JAMES RAYNOR *v.* COMMISSIONER OF CORRECTION (AC 45675)

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

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit assault in the first degree and assault in the first degree as an accessory in connection with the shooting of the victim, sought a writ of habeas corpus, claiming that his trial counsel, C, rendered ineffective assistance. At the time of the shooting, the victim was intending to sell drugs in an area of Hartford controlled by a street gang that trafficked drugs in the area. During the underlying criminal trial, the state presented evidence regarding the petitioner's involvement with the gang, the gang's

control of the drug trade in the area, and its methods of enforcing its control over its territory. The state also introduced evidence that, eighteen hours after the victim was shot, another drug dealer, K, was shot in the same area. The state further offered an expert witness, W, who testified to his analysis of certain cell phone records and cell site location information (CSLI), which placed the petitioner and another gang affiliate in the vicinity of the shooting of K when it occurred. In his habeas petition, the petitioner claimed that C rendered ineffective assistance by failing to object to the relevancy of the state's uncharged misconduct evidence and by failing to preclude or limit the scope of the CSLI evidence by requesting a hearing pursuant to *State* v. *Porter* (241 Conn. 57), or by presenting an expert witness to challenge W's CSLI testimony. At the habeas trial, the petitioner's CSLI expert, O, testified that W mapped the cell phone information similarly to how he would have, and O agreed with W's testimony at the criminal trial that the CSLI evidence could not identify the petitioner's specific location but only the general location of the cell phone associated with the petitioner. The habeas court denied the petition, finding that C's decisions regarding the uncharged misconduct evidence were matters of sound trial strategy and not unreasonable, and that the petitioner failing to sustain his burden of proving that, had C requested a *Porter* hearing or presented a CSLI expert, there was a reasonable probability that the outcome of his criminal trial would have been different. On the granting of certification to appeal, the petitioner appealed to this court. *Held*:

1. The habeas court properly determined that C did not render ineffective assistance by failing to object to the uncharged misconduct evidence, as the petitioner did not meet his burden of proving that C's decisions were unreasonable and not a matter of sound trial strategy: with respect to the evidence concerning the petitioner's involvement with drugs and the gang, C testified at the petitioner's habeas trial that he did not object to that evidence because it was interwoven into the fabric of the case, there were witnesses who were going to testify about how they knew the petitioner, and it was clear that the drug evidence would be admitted, and the habeas court determined that C's decision regarding whether to object was guided by his experience that frequently repeated objections can cause harm to the defense, such that it was evident that C made a strategic decision not to object to the drug evidence, and his testimony provided a sufficient rationale for that decision; moreover, with respect to the evidence of the shooting of K, C did not render ineffective assistance by failing to object on relevancy grounds, as he testified that he abandoned a relevancy objection, and instead argued that the evidence was more prejudicial than probative, when he learned that the same gun was used in both shootings, because pursuing the relevancy objection likely would have damaged his own credibility with the trial court, and this testimony unequivocally demonstrated that C

made a tactical determination based on his experience with the trial court.

2. The habeas court properly determined that C did not render ineffective assistance by failing to request a *Porter* hearing or to present a CSLI expert to challenge W's testimony because, even assuming that C's performance was deficient, the petitioner failed to prove prejudice by demonstrating that, but for C's errors, there was a reasonable probability that the outcome of his criminal trial would have been different: there was abundant other evidence connecting the petitioner to the shooting of K, and the petitioner failed to present evidence that the outcome of a request for a *Porter* hearing would have been favorable to the defense and changed the outcome of his criminal trial, as C testified at the habeas trial that his overall strategy regarding the CSLI evidence was to demonstrate that the evidence did not show the specific location or user of each cell phone and that he was more concerned with the witnesses who lived in the area and saw the petitioner; moreover, the petitioner did not claim on appeal that a successful challenge to the CSLI data through a *Porter* hearing would have prevented W from testifying at all about such data, and, to the extent that he claimed that a *Porter* hearing would have led the trial court to exclude testimony from W about the petitioner's specific movements in close proximity to where K was shot, this court agreed with the habeas court that there was no reasonable probability that exclusion of such evidence would have changed the outcome of the petitioner's criminal trial, insofar as evidence unrelated to the CSLI data connected the petitioner to the shooting of K, and the CSLI data that was not challenged placed the petitioner in the vicinity of the shooting when it occurred, such that the confidence in the outcome of the criminal trial would not be undermined by the absence of the more detailed CSLI evidence the petitioner challenged; furthermore, the petitioner was not prejudiced by C's decision not to call a CSLI expert to challenge W's testimony because he failed to show that the testimony of such an expert would have been helpful in establishing his defense, as O and W both concluded that CSLI cannot identify the user or specific location of a cell phone, C testified that he did not believe O's testimony would have helped the petitioner's defense because he reached the same conclusions as W, and the evidence regarding the shooting of K was uncharged misconduct evidence and there was a plethora of other evidence, unrelated to the shooting of K, that directly connected the petitioner to the shooting of the victim.

Argued September 18—officially released December 5, 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, *M. Murphy, J.*; judgment

denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David Carlucci*, former assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, James Raynor, appeals, following the granting of certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly determined that he failed to establish that he was deprived of the effective assistance of counsel during his criminal trial. Specifically, the petitioner claims that the habeas court erroneously determined that his trial counsel did not render ineffective assistance (1) by failing to object to uncharged misconduct evidence, and (2) by failing to limit the scope of cell site location information (CSLI) evidence by either requesting a *Porter*[1] hearing or presenting a witness to challenge the state's CSLI expert. We affirm the judgment of the habeas court.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. "On the morning of July 24, 2009, Luis Torres (victim) traveled to 10 Liberty Street in Hartford to purchase heroin from an acquaintance, Alex Torres (Torres). At that time, Torres had known

[1] *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

the victim for approximately nine months. Torres testified that on several prior occasions he had sold the victim small amounts of heroin, but on this occasion, for the first time, the victim purchased a large quantity of heroin, a total of 100 bags. When the victim was making this purchase, he told Torres that he intended to sell the drugs in front of the 24 Hour Store near the intersection of Albany Avenue and Bedford Street in Hartford. Upon learning this, Torres told the victim 'to be careful because it's . . . a bad neighborhood' and that he should 'stay away from [that] area.' After the victim made his purchase, he parted company with Torres and left Liberty Street.

"Later that evening, the victim drove to New Britain and picked up his girlfriend's father, Miguel Rosado. Thereafter, in the early morning hours of July 25, 2009, the two men went to the 24 Hour Store on Albany Avenue to purchase beer and food. Upon arriving at the 24 Hour Store, Rosado and the victim spoke with two women, Adrienne Morrell and Karline DuBois, whom they believed to be prostitutes. After learning that they were not prostitutes, Rosado and the victim asked the women whether they could help them purchase 'powder,' or powder cocaine. Morrell and DuBois agreed, then got into the victim's car and directed the men to Irving Street in Hartford, where the victim purchased an unspecified quantity of cocaine. The four then returned to the 24 Hour Store in the victim's car.

"Upon returning to the 24 Hour Store, the victim displayed a bag of heroin to DuBois and asked her if she knew 'where he could get rid of it,' from which DuBois understood him to mean that '[h]e wanted to sell it.' DuBois informed the victim that she did not use heroin, and thus she did not know where the victim could sell his drugs. DuBois then stated that she was going 'back upstairs' to the apartments above the 24 Hour Store, where local people often gathered to use

drugs. The victim asked DuBois if he could join her, but DuBois warned him that he should stay downstairs because '[p]eople don't know you . . . .' Ignoring this warning, the victim stated that he was going to go upstairs with DuBois, to which she responded, 'Then you're on your own.'

"Thereafter, the victim, Rosado, Morrell, and DuBois all went upstairs to the apartments above the 24 Hour Store. DuBois recalled that when they reached the apartments, six or seven people were already there, playing cards and getting high. After they entered, Morrell, DuBois and Rosado began to smoke crack cocaine. At the same time, the victim, who was very drunk, began offering heroin to the other occupants of the apartment. As DuBois had predicted, '[n]obody [in the apartment] wanted anything to do with [the victim] because nobody knew him.' Shortly after the victim's arrival, a group of three men entered the apartment. DuBois recognized two of the three men as Altaurus Spivey, whom DuBois knew as 'S,' and Joseph Ward, whom she knew as 'Neutron.' Although DuBois did not identify the third man by name, she described him as a 'bigger black guy.'

"Upon entering the apartment, the three men approached the victim, and S asked, 'What are you doing here?' DuBois agreed with the prosecutor's statement that S spoke to the victim 'in a tough guy type of way,' which she interpreted to mean, 'you don't belong up here. . . . [Y]ou're not going to get rid of nothing. Nobody knows you. Just go.' DuBois recalled feeling a growing tension between the groups and fearing that 'there was going to be a big problem.' Thereafter, according to DuBois, S and his group left the apartment, followed a few minutes later by the victim and an unidentified female, who went downstairs together and outside through the back door of the building to the area behind the 24 Hour Store. As this was occurring,

at approximately 2 a.m., DuBois, Rosado, and Morrell remained inside the apartment.

"Several witnesses testified that the 24 Hour Store was often busy at and after 2 a.m. because it was the only store in the area that was open at that time. People would therefore go there to purchase food and drinks after the nearby bars and clubs had closed for the evening. Indeed, Officer Steven Barone of the Hartford Police Department testified that the 24 Hour Store was known by law enforcement as a 'nuisance spot,' where there was always a high volume of foot traffic and criminal activity between 2 and 4 a.m. Consistent with Barone's testimony, several witnesses stated that many people were both inside and outside of the 24 Hour Store in the early morning hours of July 25, 2009.

"One regular patron, Marc Doster, who lived on Albany Avenue in an apartment adjacent to the 24 Hour Store, was familiar with people who lived in or frequented the area around Bedford Street and Albany Avenue, including the [petitioner], who was known on the streets as 'Ape.' Doster testified that, in the early morning of July 25, 2009, as he was walking from his apartment to the 24 Hour Store, he was approached by the [petitioner] who asked him if he either knew or was affiliated with the man who was selling drugs behind the 24 Hour Store. Doster stated that he did not. The [petitioner] then told Doster, 'don't worry about it,' because he was going 'to pay [the man] a visit . . . talk to him.' Doster then recalled that, just minutes after this conversation, he saw someone with a gun in his hand running toward the back of the 24 Hour Store. Although Doster could not see the face of the man with the gun because the man was wearing black clothing and had covered his face, he observed that the man was short and heavyset, with a body size and shape that resembled the [petitioner].

"As these events were transpiring, another regular patron of the 24 Hour Store, Tyrell Mohown, who had met the victim for the first time that evening, entered the store and purchased a cigar so that he and the victim could smoke marijuana together. After making his purchase, however, when Mohown went behind the 24 Hour Store to meet the victim, he saw the victim surrounded by five men, including Neutron and John Dickerson, nicknamed 'Jerk.' Mohown testified that although he did not see the [petitioner] or S in that group, he recalled that at least two of the five men had covered their faces with bandanas. Shortly after he came upon the scene, Mohown saw Neutron strike the victim with a baseball bat several times in the upper body. The other men then began punching and kicking the victim, who collapsed on the ground. Mohown then saw Jerk take out a gun and fire one round into the victim's back before the group scattered in different directions. The victim, still conscious but unable to walk, stated that he thought he was about to die and asked Mohown to call an ambulance. Mohown returned to the 24 Hour Store and used a pay phone to report the shooting but, not wanting to get involved, did not identify the shooter.

"Another witness, Sonesta Reynolds-Campos (Campos),[2] was standing on Bedford Street near the 24 Hour Store when she heard a gunshot from the area behind the store. Upon hearing the gunshot, Campos directed her attention to that area, where she saw a group of approximately six men. Campos recalled that S, Jerk, Neutron, and the [petitioner] were all in the group, and that the [petitioner] was then wearing a hoodie and holding what appeared to be a gun.

[2] "Throughout the course of the trial, the witness was referred to as Sonesta Reynolds, Sonesta Campos, and Sonesta Reynolds-Campos. Because the witness indicated no preference to as to how she was addressed, we refer to her simply as Campos." *State* v. *Raynor*, 175 Conn. App. 409, 417 n.5, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

"At approximately 2:25 a.m., the Hartford police received reports of gunshots fired near the intersection of Bedford Street and Albany Avenue. Within minutes of receiving such reports, several Hartford police officers responded to the scene. Officer Barone, one of the first officers to respond, made efforts to secure the scene while other officers tended to the victim. At that time, officers saw multiple lacerations on the victim's face and discovered a single gunshot wound to his back. The victim was then transported to a hospital, where it was determined that the bullet had struck his spine, paralyzing him. Due to the inherent complications of removing the bullet from the victim's spine, physicians were unable to remove the bullet, and thus officers were unable to conduct forensic testing on the bullet at that time.[3]

"Several days after the shooting, Campos encountered the [petitioner] on Bedford Street. During that encounter, the [petitioner] told Campos, '[I'm] sorry you had to see it,' but '[I] had to make an example of him.' Although Campos did not ask the [petitioner] what he meant by those remarks, she interpreted them to refer to the recent shooting of the victim behind the 24 Hour Store.

"On January 7, 2014, at the conclusion of a lengthy investigation of the July 25, 2009 shooting by a state investigating grand jury,[4] the [petitioner] was arrested in connection with the shooting. Thereafter, by way of a

[3] "Prior to trial, the victim died due to an unrelated drug overdose. Following the victim's death, police were able to remove and analyze the bullet that had struck the victim's spinal cord. . . . As part of its evidentiary rulings, the court excluded any reference to the victim's death." (Citation omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 418 n.6, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

[4] "The jury did not, at any time during the [petitioner's] criminal trial, receive evidence concerning or related to the state investigating grand jury." *State* v. *Raynor*, 175 Conn. App. 409, 418 n.7, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

long form information, the state charged the [petitioner] with conspiracy to commit assault in the first degree and with being an accessory to assault in the first degree, on which he was later brought to trial before the court, *Mullarkey*, *J.*, and a jury of six. The state presented its case-in-chief on November 7, 10, and 12, 2014. On November 12, at the conclusion of the state's case-in-chief, the [petitioner] moved for a judgment of acquittal on both charges. That motion was denied by the court. On November 17, 2014, the jury returned a verdict of guilty on both charges. The following week, on November 21, 2014, the [petitioner] filed a motion to set aside the verdict on the grounds that the verdict was against the weight of the evidence and that the court abused its discretion in admitting evidence of uncharged misconduct. The [petitioner's] motion was subsequently denied by the court. On February 5, 2015, the [petitioner] was sentenced to a total effective term of thirty-seven years of incarceration to be followed by three years of special parole." (Footnotes in original.) *State* v. *Raynor*, 175 Conn. App. 409, 413–19, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

In reviewing the petitioner's sufficiency of the evidence claim on direct appeal, this court also determined that the jury reasonably could have found the following relevant facts. "In July, 2009, the area surrounding Bedford and Brook Streets was under control of Money Green Bedrock (MGB), a neighborhood street gang. MGB was known to traffic in and sell drugs, including heroin and crack cocaine, throughout the area. Members of MGB included, inter alia, S, Neutron, Jerk, and the [petitioner]. Campos testified that she routinely purchased drugs from the [petitioner] for her own use, and was often asked to 'test' the purity of the gang's heroin. As a result of these activities, Campos became acquainted with the [petitioner] and familiar with the [petitioner's] role within MGB, and gained his trust.

"According to Campos, only members of MGB were permitted to sell drugs in the area around Bedford Street, and drug dealers who did not live in the area were not allowed to do business in the area. In order to enforce their control over this territory, the members of MGB shared certain duties, including conducting drug sales, acting as lookouts, and monitoring the area to make sure no one from outside the group was 'hustling on the block . . . .' Several witnesses testified that the [petitioner] had a position of authority within MGB, and was considered an 'enforcer' for the gang. According to one witness, Ladean Daniels, the [petitioner] 'gave orders, and the people who [are] in that area abide by them.' Similarly, Doster testified that the [petitioner] would 'handle problems . . . [p]atrol the area . . . [and] [e]nforce the rules . . . .'

"As a result of the gang's assertion of control over drug selling activity in the Bedford Street area, several witnesses, who were also admitted drug dealers, testified that they either did not sell drugs in that neighborhood, because they were not from there, or that they were permitted to sell drugs on MGB's turf because they lived in the neighborhood. Drug dealers in the latter group, including Daniels,[5] operated in the area with the understanding that they would either pay MGB a portion of their profits or purchase the drugs they sold directly from the gang. According to DuBois, it was known throughout the neighborhood that drug dealers who did not abide by these rules would be 'dealt with' by MGB.

"The state introduced testimony from several witnesses to the shooting of the victim behind the 24 Hour

[5] "Daniels testified that he was allowed to sell drugs in the neighborhood because he had lived in the area of Bedford Street for approximately eleven years, he 'was cool with some of the friends of the [petitioner],' and there was an understanding that '[i]f [he] was the hustler on that block, [he] had to be buying [MGB's] drugs.' " *State* v. *Raynor*, supra, 175 Conn. App. 420 n.10.

Store on July 25, 2009. In the state's case-in-chief, Rosado testified that, when he and the victim returned to the 24 Hour Store from Irving Street, he saw the victim speak with a man known as S, whom the victim claimed to have known from the area. Although Rosado could not remember the exact words that the victim used, he recalled the victim saying that he intended either to purchase marijuana from S or to sell some marijuana to S that night. The jury also heard testimony from Mohown, who stated that he had met the victim for the first time on the evening prior to the shooting and that, prior to the shooting, he had agreed to smoke marijuana with the victim behind the 24 Hour Store.

"Doster testified, as previously noted, that 'a couple minutes before . . . the incident happened,' the [petitioner] approached him and asked him if he knew or was associated with the man who was selling drugs behind the 24 Hour Store. When Doster said that he did not know the man, the [petitioner] informed him that he was 'going to talk to [that man] and handle it.' Doster further testified that, shortly after he and the [petitioner] had that conversation, he saw someone who resembled the [petitioner] running toward the back of the 24 Hour Store holding a gun. Furthermore, Campos testified that, upon hearing gunshots, she observed the [petitioner] standing near the victim, wearing a hoodie and holding a gun. This testimony was corroborated by Daniels, who also claimed to have been near the 24 Hour Store in the early morning hours of July 25, 2009. Daniels stated that, although he did not see who shot the victim, he walked behind the store after hearing gunshots in the area and, at that time, saw the [petitioner] and another man nicknamed 'Hollywood' holding guns and standing near the victim, who was lying on the ground. Additionally, several witnesses testified that the group of men who had surrounded the victim

during the incident scattered and ran away in different directions after the victim was shot.

"Daniels further testified that, when he reencountered the [petitioner] near the 24 Hour Store minutes after the shooting and asked him what had happened, the [petitioner] stated, '[d]ude kept coming in the area trying to hustle.' Daniels also testified that, after he had returned to the 24 Hour Store and purchased a sandwich, he walked to an apartment building on Brook Street, which runs parallel to Bedford Street. As he arrived at the apartment building, Daniels came upon the group of men he had seen surrounding the victim behind the 24 Hour Store. According to Daniels, the [petitioner], Jerk, S, and another man were gathered in the yard behind the apartment building. At that time, Daniels overheard the [petitioner] tell the men 'to stay off the block and keep their eyes open because that was their work,' then warning them to be careful because 'the block was hot.' Finally, Campos testified that when she spoke with the [petitioner] several days after the shooting, he apologized to her for her having to witness the shooting, but explained to her that he 'had to make an example of him.'

"In addition to this evidence, the state introduced, as part of its case-in-chief, evidence of the [petitioner's] involvement, later on that same day, in arranging the shooting of another drug dealer who was selling drugs without permission on MGB's turf. This evidence was offered, over the [petitioner's] objection, to prove his motive and intent to participate in the earlier shooting of the victim behind the 24 Hour Store. On the basis of that evidence, the jury reasonably could have found that, on the night of July 25, 2009, approximately eighteen hours after the victim in this case was shot, another drug dealer, Kenneth Carter, was shot multiple times in the chest on Liberty Street in Hartford, approximately

one block away from Bedford Street.[6] After the police had secured the scene of the later shooting, officers recovered, from the interior of Carter's vehicle, a large clear bag filled with small, individually wrapped packages of a green, leafy substance suspected of being marijuana. The officers also found and lifted several latent fingerprints from the outside of the driver's side door of Carter's vehicle. When those fingerprints were entered into the AFIS[7] database, they were found to match known fingerprints on file for Kendel Jules, nicknamed 'Jock,' who was a known affiliate of MGB.

"Thereafter, Sergeant Andrew Weaver of the Hartford Police Department testified to his analysis of the cell phone records associated with the cell phones of Carter, the [petitioner], and Jock.[8] Weaver testified that the cell phone records revealed that the [petitioner] had initiated contact with Carter at 10:10 p.m. that evening and had called him several times over the next thirty minutes, including one call at 10:39 p.m., approximately ten minutes before Carter was shot. Weaver also testified that a call had been placed from the [petitioner's] cell phone to Jock's cell phone approximately seven minutes before Carter was shot. On the basis of his analysis of such call records and the associated cell phone tower, Weaver testified that, at the time of the [petitioner's] final call to Jock before the Carter shooting, Jock's cell phone was in the area of Liberty Street,

[6] "Although Carter died as a result of his wounds, the court excluded from the trial any reference to Carter's death, and the state was prohibited from referring to the shooting as a murder or homicide." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.12.

[7] "AFIS stands for automated fingerprint identification system." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.13.

[8] "On direct examination, Weaver testified that between 2004 and 2014, he had received extensive forensics training in '[analyzing] cellular phones, cellular mapping . . . [and] computer forensics.' The [petitioner] did not object either to Weaver's credentials or the substance of his testimony." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.14.

moving in the general direction of the location of Carter's vehicle.

"Thereafter, the state presented additional testimony from Daniels, who claimed that he had been present for a conversation between the [petitioner], Jerk, and Jock in the days following the Carter shooting. Daniels testified that on that occasion, he had gone to the [petitioner's] apartment on Bedford Street to purchase drugs. He further testified that, within three or four minutes of his arrival, the [petitioner] and Jerk began 'mocking [Jock about] how he was nervous and afraid when he was supposed to shoot the dude.' Although Daniels did not know who the group was referring to, the [petitioner] indicated that the person who was shot '[kept] coming down [here] hustling and he was meeting people in that back street.' Daniels also testified that the three men described how they had split up and deployed themselves before the Carter shooting. According to Daniels, the [petitioner] patrolled the area of Garden Street to make sure the coast was clear, while Jock walked to Liberty Street and Jerk positioned himself on Brook Street. The [petitioner] also said that the shooting was '[Jock's] initiation into the block' and that 'if Jock [couldn't] get the job done, Jerk was [there] to help . . . .' " (Footnotes in original; footnote omitted.) Id., 419–24.

The following procedural history is also relevant to our resolution of this appeal. On August 26, 2020, the petitioner filed his third amended petition for a writ of habeas corpus, claiming in relevant part that his criminal trial counsel, Attorney Glen Conway, had provided ineffective assistance during the petitioner's criminal trial. The petitioner claimed, inter alia, that Conway was ineffective because he failed to object to the relevancy of the state's uncharged misconduct evidence regarding both the petitioner's involvement in the MGB neighborhood street gang and the Carter shooting,

failed to request a *Porter* hearing to preclude Weaver's CSLI testimony and failed to present an expert witness to challenge Weaver's testimony.

The habeas court, *M. Murphy, J.*, conducted a trial on October 19 and 20, 2021, at which the petitioner presented the testimony of several witnesses, including CSLI expert James Oulundsen and Conway. Moreover, the petitioner proffered and the court admitted several exhibits, including transcripts from the underlying criminal proceeding and maps pertaining to CSLI data. On June 8, 2022, the court issued a memorandum of decision denying the petition. As to the petitioner's claim that Conway was deficient in failing to object to the uncharged misconduct evidence, the habeas court determined that Conway's decisions regarding the uncharged misconduct evidence were matters of sound trial strategy and that the petitioner failed to prove that Conway acted unreasonably. The habeas court also rejected the petitioner's claims that Conway was ineffective by failing to request a *Porter* hearing or to present a CSLI expert to challenge Weaver's testimony because the petitioner had not sustained his burden of proving that, had Conway requested a *Porter* hearing or presented a CSLI expert, there was a reasonable probability that the outcome of his criminal trial would have been different. On June 14, 2022, the petitioner filed a petition for certification to appeal the habeas court's denial of his writ of habeas corpus, which the habeas court granted. This appeal followed.

While this appeal was pending, the petitioner filed a motion for articulation, requesting that the habeas court address whether Conway was deficient in failing to move to preclude the CSLI evidence and in failing to present an expert to counter the state's CSLI evidence. In its order granting the motion for articulation, the habeas court stated: "(1) The petitioner . . . did not substantiate by a preponderance of the evidence that

the CSLI evidence was unreliable and/or irrelevant. Oulundsen validated and replicated Weaver's analysis; thus, their analyses were the same. Oulundsen viewed Weaver's maps as only potentially misleading because Oulundsen considered some representations on the maps to be general instead of specific. The general representations included where individuals could have been without pinpoint precision, which both Weaver and Oulundsen acknowledged was not possible. The CSLI evidence was relevant and [the petitioner] did not demonstrate such evidence would have been excluded had Conway sought to exclude it. Had Conway utilized an expert such as Oulundsen, he would not have undermined the relevance and probity of the CSLI evidence. Therefore, Conway did not perform deficiently by failing to move to preclude the CSLI evidence as unreliable and/or irrelevant, and by failing to present a defense expert to counter Weaver's testimony as to the relevance and probity of the CSLI evidence. (2) Even if [the petitioner] had shown deficient performance, which he has not, he has not demonstrated that he was prejudiced. Oulundsen's testimony in the habeas trial did not undermine this court's confidence in the outcome of the jury trial."

The standard of review and law governing ineffective assistance of counsel claims is well settled. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied. . . . Consequently, [i]t is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Hazel* v. *Commissioner of Correction*, 179 Conn. App. 534, 542–43, 179 A.3d 813, cert. denied, 328 Conn. 918, 180 A.3d 963 (2018).

I

We begin with the petitioner's claim that Conway provided ineffective assistance by failing to object to the uncharged misconduct evidence, which consists of the drug evidence[9] and the Carter shooting evidence,

[9] The petitioner refers to this evidence as "general gang evidence." Because the respondent, habeas court, and this court in the petitioner's direct appeal, all refer to it as "drug evidence," we similarly use that term.

as irrelevant. The respondent, the Commissioner of Correction, maintains that the habeas court properly determined that Conway's decision to forgo objecting to the uncharged misconduct evidence on relevancy grounds was a matter of sound trial strategy. We agree with the respondent.

The following additional procedural history, as set forth by this court in the petitioner's direct appeal, is relevant. "On November 5, 2014, two days before trial, the court held a hearing on the state's motion to admit other crimes evidence. At the hearing, the state indicated that it intended to offer evidence as to 'the [petitioner's] drug trafficking in the area in question . . . his control of the area . . . his association with a gang known as [MGB] . . . and the enforcement of that area from individuals who would encroach on that drug trafficking turf.' The state further indicated at that time that it intended to offer the Carter evidence during its case-in-chief.

"In support of its motion, the state made the following offer of proof: as a matter of logistics, the state intended to devote the first two days of trial to presenting evidence of the shooting of the victim in this case. Thereafter, on the third day of evidence, it would present the Carter evidence. Such evidence would include testimony from Officer Michael Creter, the first Hartford police officer to respond to the scene of the Carter shooting, and Detective Claudette Kosinski, who, while processing the vehicle in which Carter was shot, recovered latent fingerprints that ultimately were linked to MGB member Jock. The state also stated that it intended to present testimony from Vachon Young, who had spoken to Carter minutes before the shooting. The state claimed that Young would testify that Carter had told him that he 'was going to the area of Liberty Street to sell the [petitioner] some drugs.' The state then indicated that it would call Daniels to testify about the

conversation he overheard while inside the [petitioner's] apartment several days after the Carter shooting in which the [petitioner] acknowledged his planning of the Carter shooting, which he described as Jock's initiation into the gang. In addition, the state indicated that it would call Rosado to testify that just before the victim was shot, 'an identified associate or coconspirator, [S], asked [the victim] to go to the back of the 24 Hour Store so that he could buy [drugs] from [the victim].' The state thus argued that the setup of the victim's shooting, inducing the victim, through S, to go behind the 24 Hour Store either to sell or buy drugs, was 'strikingly similar' to the [petitioner's] conduct before the Carter shooting, whereby the [petitioner] '[summoned Carter] to the Liberty Street area so that he could buy drugs from him.'

"The state next indicated that it would call James Stephenson, a former supervisor in the state forensics laboratory, who would testify that he compared the bullets used in the Carter shooting with the bullet recovered from the victim, and concluded by forensic analysis that the same firearm had been used in both shootings. Last, the state indicated that it would present the testimony of Weaver, who would discuss the cell phone records of the participants in the Carter shooting and the associated cell tower logs.

"In response to this offer of proof, [Conway] informed the court that, although he had received the police reports submitted by the state months before the trial, the state's written notice of intent to admit such evidence was vague because it failed to specify what subsection of the Connecticut Code of Evidence the state was relying upon to establish its admissibility. Without a more definite statement from the prosecutor as to the applicable subsection of the Connecticut Code of Evidence, [Conway] claimed that 'it [was] a little hard to fashion an objection.' [Conway] then commented

that 'notwithstanding the fact that bullets were fired from the same gun . . . eighteen or nineteen hours apart, I don't see the relevance . . . [t]he description of the person . . . doesn't fit my client . . . [and] there was a claim that what happened to . . . Carter was a result [of] a dispute over a woman. So, I, you know . . . relevance, common scheme, whatever the claim . . . I don't think it crosses the relevance threshold, number one. Number two . . . if it is able to crawl over the relevance threshold, barely, I see a tremendous prejudicial effect that far outweighs whatever minute probative value . . . is there. And that's a concern of mine. But I need specificity, and that's the whole point of me filing the motion for . . . notice of the uncharged misconduct . . . .'

"Thereafter, by agreement of the parties, the court withheld its ruling on the admissibility of the proffered misconduct evidence to afford the state two more days to identify which exception to the Connecticut Code of Evidence on which it would rely in offering the evidence detailed in its offer of proof. Noting his agreement with the court's suggestion, [Conway] stated, '[my] preference . . . would be to wait . . . and the rationale is just because of the additional names that were disclosed, the cases that [the state] is relying on, it would afford me an opportunity to see what I can do about it . . . .'

"Two days later, in accordance with the court's instructions, the state filed an amended notice of intent to offer other crimes evidence. In that filing, the state expressly stated that the Carter evidence would be offered as evidence of the [petitioner's] intent and motive to conspire to participate and to aid the principal in shooting the victim in this case. The [petitioner] did not file a motion in limine seeking the exclusion of such evidence.

"On the second day of its case-in-chief . . . the state, outside the presence of the jury, reasserted its intention to introduce the drug evidence and the Carter evidence. Specifically, the state asserted that this evidence was relevant to the [petitioner's] motive for being involved in shooting the victim, as well as to his control of the Bedford Street area. In addition, the state indicated its intention to offer evidence of a third instance of uncharged misconduct, which involved the [petitioner's] separate alleged assault of a man named Nigel, because he had been selling drugs in the area controlled by MGB without the gang's permission.

"In response to the state's amended notice of intent, [Conway] remarked: 'I did have a chance to read [case law] over the weekend and I appreciate the opportunity to better get a handle on . . . the law surrounding the misconduct. I do understand the claim of relevancy by the state's attorney. However, I . . . do not believe, in particular, with regard to the alleged bad act involving . . . Nigel, as well as the . . . involvement by my client in the [Carter] shooting, that . . . whatever probative value is achieved through the introduction of that evidence, it's far outweighed by the prejudicial impact. It's . . . overwhelming, in my opinion. . . . And although I do maintain my objection, and I'd ask the court to rule in my favor, I would ask the court, if the court intends to allow this testimony and this evidence in, to give the appropriate . . . limiting instructions throughout the introduction of this evidence as to what it's offered for and to the extent possible, obviously, to minimize the prejudicial aspects of . . . the evidence, in particular, the . . . [Carter] . . . evidence because it is . . . shocking and . . . my concern is . . . that the jury will take that evidence, disregard the actual evidence from this case and convict my client for his conduct or alleged conduct in that case.'

"The court subsequently ruled that it would allow limited uncharged misconduct evidence regarding the [petitioner's] membership in MGB and its control of the drug trade in the Bedford Street area. The court further stated: '[A]s far as the shooting on Liberty Street is concerned, I have been weighing those factors for quite some time since I got this case, I guess, because there's so much material here provided through the grand jury investigation. And the fact that each of the charges in this information against [the petitioner] are specific intent crimes, as opposed to general intent, makes the evidence, particularly the ballistics evidence, very relevant, highly probative. And, properly sanitized, I'm going to allow in evidence on the Liberty Street shooting that occurred eighteen hours after the incident that we're trying. As far as exactly what we need to sanitize, I want to go through that with you gentlemen in some detail. Of course, the fact that someone was killed at that scene is out.' Last, the court excluded evidence of the alleged assault on Nigel on grounds of its prejudicial effect on the [petitioner] and lack of notice.

"Shortly thereafter, in the presence of the jury, the prosecutor asked Campos whether there was 'a certain . . . group' that hung out on Bedford Street and if it was known by a particular name. [Conway] objected and asked to be heard outside the presence of the jury. [Conway] then requested clarification as to whether the court's decision to admit the drug evidence included a ruling that the name of the gang was also admissible. The court clarified that, on the basis of its earlier ruling, the name of the gang was admissible. The [petitioner] raised no further objections to the admission of such evidence.

"That afternoon, after the testimony of Campos and Doster, both of whom testified without further objection as to the drug evidence . . . the court, sua sponte, instructed the jury that '[w]hen the state offers evidence

of . . . misconduct, it's not being admitted to prove the bad character, propensity or criminal tendencies of the [petitioner]. It's being admitted solely to show intent and motive. You may not consider such evidence as establishing a predisposition on the part of the [petitioner] to commit any of the crimes charged or demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues of motive and intent, and each of those legal concepts you will get an instruction on.

" 'On the other hand, if you don't believe the evidence or even if you do, you find [it does] not logically, rationally and conclusively support . . . the issues of motive and intent, you may not consider that testimony for any other purpose. You may not consider evidence of other misconduct of the [petitioner] for any purpose, other than the ones I just told you about because it could predispose you to critically believe the [petitioner] may be guilty of the offenses charged here merely because of the other alleged misconduct. So, you may consider that evidence, if you credit it, only on the issues of intent and motive.'

"On the third day of trial . . . the state concluded its presentation of the evidence regarding the shooting of the victim. Thereafter, the court informed the jurors that the state was 'going to shift gears in this case' and asked the jury to take a short recess. Outside the presence of the jury, the court inquired as to the order of the state's witnesses and stressed that the state should take great care not to reveal that Carter had died on the night of the shooting. By agreement of the parties, the state informed the court that it would ask leading questions to its witnesses and instruct them that they were not to reveal that Carter had been killed, but only that he had been shot.

"The court then summoned the jury back to the courtroom, after which it stated that '[t]he reason I said we're switching gears, ladies and gentlemen, is, most of the evidence that's remaining in the state's case-in-chief, as far as I know, concerns a different incident, and I didn't want you to be confused. And the state will be offering this evidence, and I will be giving you a specific instruction about it. . . . [T]here will be some evidence in this case of other acts of misconduct. It's not being admitted to prove bad character, propensity of criminal tendencies of the [petitioner]. It's being entered simply to show intent and motive related to the crimes that are being tried in this case, and you may not consider such evidence as establishing a predisposition on the part of the [petitioner] to commit any of the crimes charged in our information, nor to demonstrate a criminal propensity.

" 'You may consider such evidence if you believe it and further find it logically, rationally and conclusively supports the issues for which it is being offered by the state. But it bears only on the issues of intent and motive concerning the charges that arise from the Bedford Street incident. And you may not consider evidence of other misconduct of the [petitioner] for any purpose other than the ones I just told you because if you do, it may predispose your mind to . . . uncritically believe the [petitioner] may be guilty of the offense here charged, merely because of other misconduct. For this reason, you consider it only on the issues of intent and motive.'

"Thereafter, in accordance with its offer of proof, the state presented, inter alia, the testimony of Creter, Kosinski, Weaver, Stephenson, and Daniels . . . . Only Young, of the witnesses mentioned in the state's offer of proof, did not testify. At the conclusion of the state's case-in-chief that afternoon, the court reinstructed the jury that evidence regarding uncharged

misconduct of the [petitioner] was 'admitted . . . only to establish . . . his intent, motive in the matter involving [the victim]. You may not consider such other evidence as establishing a predisposition on the part of the [petitioner] to commit any crimes charged or to demonstrate a criminal propensity. . . . If you don't believe the evidence or even if you do, and you find that it does not logically, rationally, and conclusively support on the issues of motive, intent in the [present] matter . . . then you may not consider it for any purpose.' " (Citation omitted; footnotes omitted.) *State* v. *Raynor*, supra, 175 Conn. App. 440–47.

The following legal principles guide our resolution of the petitioner's claims that trial counsel rendered deficient performance under *Strickland*. "In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . 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, e.g., ABA Standard for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . 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*. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [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 . . . ." (Emphasis in original; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 305–306, 298 A.3d 636, cert. denied, 348 Conn. 915, A.3d (2023).

We first address the petitioner's argument that Conway provided ineffective assistance by not objecting to the admission of the drug evidence. The petitioner claims that, although Conway knew the prejudicial effect of the drug evidence, he did not object to its

admission because it was "so interwoven into the fabric of the case . . . ."[10] We are not persuaded.

We agree with the habeas court's conclusion that Conway did not render deficient performance in deciding not to object to the admission of the drug evidence. At the petitioner's habeas trial, Conway testified that he did not object to the drug evidence because "it was so interwoven into the fabric of the case, there were witnesses that were going to testify about how they knew [the petitioner] and these other individuals associated with [him]. . . . [A]fter looking at the grand jury testimony, it was so crystal clear that [it] was coming in . . . ." In its memorandum of decision, the habeas court determined that "Conway anticipated that the state would show that the petitioner was a member of the MGB organization, that the [victim's shooting was] connected to the area MGB controlled, and that the organization used enforcement methods against individuals who infringed on their territory. . . . [Conway's] decision whether to object or not [was] guided by his experience that frequently repeated objections can cause harm to the defense." As this court repeatedly has noted, "[t]he decision of a trial lawyer not to make

[10] The petitioner further claims that Conway was ineffective by not objecting to the drug evidence because the evidence the state proffered to suggest its relevancy never materialized. The petitioner argues that "neither Campos nor Doster or Daniels testified that the petitioner occupied such a position of authority in the gang that the assault of [the victim] could not have happened without his knowledge or approval" and that "the promised testimony establishing [the victim] was lured to the rear of the 24 Hour Store as part of an orchestrated gang retaliation never materialized." As set forth previously in this opinion, however, all three witnesses identified the petitioner as having a position of authority in, and being an enforcer of, MGB. Moreover, all three witnesses testified about their separate conversations with the petitioner, wherein the petitioner stated that he was going to "make an example of" and "handle" the person selling drugs behind the 24 Hour Store. Accordingly, we are not persuaded by the petitioner's claim that the evidence the state proffered to prove the relevancy of the drug evidence never materialized.

an objection is a matter of trial tactics, not evidence of incompetency . . . . [T]here is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment. . . . It is well established that [a] reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance and that a tactic that appears ineffective in hindsight may have been sound trial strategy at the time." (Citation omitted; internal quotation marks omitted.) *Boyd* v. *Commissioner of Correction*, 130 Conn. App. 291, 298, 21 A.3d 969, cert. denied, 302 Conn. 926, 28 A.3d 337 (2011). It is evident, based on his testimony at the habeas trial, that Conway made a strategic decision not to object to the drug evidence. Furthermore, his testimony provided a sufficient rationale for that decision. Thus, we agree with the habeas court that the petitioner has not overcome the strong presumption that Conway's decision not to object to the drug evidence was anything other than a reasonable exercise of his professional judgment.

In connection with his argument that Conway was ineffective by failing to object to the drug evidence, the petitioner further claims that Conway rendered ineffective assistance by failing to object to the Carter shooting evidence on the basis of relevancy. We are not persuaded.

At the habeas trial, Conway testified that he initially objected to the Carter shooting evidence on relevancy grounds. Conway explained, however, that when he learned that the same gun was used in both the shooting of the victim and the Carter shooting, "the relevance [objection] was not going to fly, and so it had to be because of the overwhelming amount of uncharged misconduct. It was . . . in my view really more prejudicial

than probative." Conway further testified that his relevancy objection was a "loser," and pursuing it likely would have damaged his own credibility with the trial court and "haunt[ed]" the petitioner.

In its memorandum of decision, the habeas court found that Conway rendered effective assistance and that the petitioner failed to overcome the presumption that Conway's decision to forgo objecting to the Carter shooting evidence on relevancy grounds was reasonable. The habeas court stated that "Conway assesses each case based on its unique circumstances, and his decision whether to object or not is guided by his experience that frequently repeated objections can cause harm to the defense. . . . Conway's strategy in this case was determined by the dynamics of the case itself and the trial judge, who had overruled his initial relevance objection. Conway, who knows the exceptions by which uncharged misconduct can be used to prove intent, abandoned the relevance objection and subsequently argued that such evidence was more prejudicial than probative.

"Although the petitioner argues that the Carter shooting misconduct evidence was irrelevant, does not prove that the [victim's] shooting was intentional, and is merely 'bad act' evidence, the record and the Appellate Court's summary starkly contradict the petitioner's contentions. The court concludes that Conway's performance was reasonably competent and that the petitioner has not rebutted the presumption that the trial strategy was reasonable. Additionally, the petitioner has not shown that he was prejudiced by undermining this court's confidence in the outcome of the criminal trial on this ground." (Citation omitted.)

We conclude that Conway did not render deficient performance by objecting to the Carter shooting evidence on grounds of its prejudicial effect, instead of

its relevancy. "In reaching our conclusion, we emphasize that a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 313. Conway's testimony at the petitioner's habeas trial, specifically regarding his desire to maintain his own credibility with the trial court, unequivocally demonstrates that he made a tactical determination to pursue an objection that the Carter shooting evidence was prejudicial in lieu of a potentially damaging and less viable relevancy objection. See *Reynolds* v. *Commissioner of Correction*, 321 Conn. 750, 762–63, 140 A.3d 894 (2016) ("[i]t is hardly unreasonable for counsel to choose to preserve credibility with the finder of fact by declining to pursue an argument that is supported by nothing more than conjecture"), cert. denied sub nom. *Reynolds* v. *Semple*, 581 U.S. 997, 137 S. Ct. 2170, 198 L. Ed. 2d 241 (2017). Thus, we agree with the habeas court that Conway's decision to refrain from making a relevancy objection that he knew, based on his experience with the trial court, could harm his credibility and defense, was one of reasonable trial strategy.

We agree with the habeas court's determination that the petitioner did not meet his burden of proving that Conway's decisions regarding the drug evidence and the Carter shooting evidence were unreasonable. Conway's decisions were tactical determinations that "fall into the category of trial strategy or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 314. Thus, we conclude that Conway's performance was not deficient.[11]

[11] Accordingly, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Conway's decision not to object to the relevancy of the drug evidence and the Carter shooting

II

We now turn to the remaining aspect of the petitioner's claim, which is that Conway provided ineffective assistance by failing to object to, or otherwise challenge, the introduction of the CSLI evidence. Specifically, the petitioner asserts that Conway was ineffective by failing to request a *Porter* hearing with respect to the CSLI evidence and by failing to present the testimony of an expert witness to counter Weaver's testimony. The respondent maintains that the habeas court correctly determined that the petitioner failed to prove that he was prejudiced by Conway's failure to request a *Porter* hearing or to present a CSLI expert to challenge Weaver's testimony because the petitioner failed to prove that, but for Conway's errors, there was a reasonable probability that the outcome of his criminal trial would have been different. We agree with the respondent.

The following additional procedural history is relevant to our resolution of this claim. At the petitioner's criminal trial, "[o]n direct examination, Weaver testified that between 2004 and 2014, he had received extensive forensics training in '[analyzing] cellular phones, cellular mapping . . . [and] computer forensics.' The [petitioner] did not object either to Weaver's credentials or the substance of his testimony." *State* v. *Raynor*, supra, 175 Conn. App. 423 n.14. Moreover, "Weaver testified that the cell phone records revealed that the [petitioner] had initiated contact with Carter at 10:10 p.m. that evening and had called him several times over the next thirty minutes, including one call at 10:39 p.m., approximately ten minutes before Carter was shot. Weaver also testified that a call had been placed from the [petitioner's] cell phone to Jock's cell phone approximately

evidence. See, e.g., *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637–38, 212 A.3d 678 (2019) (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently).

seven minutes before Carter was shot. On the basis of his analysis of such call records and the associated cell phone tower, Weaver testified that, at the time of the [petitioner's] final call to Jock before the Carter shooting, Jock's cell phone was in the area of Liberty Street, moving in the general direction of the location of Carter's vehicle." Id., 423–24.

The following legal principles pertaining to the prejudice component of the *Strickland* test are relevant to our resolution of this claim. At the outset, "[a] court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 562–63, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018). Thus, when a habeas court "determine[s] that the petitioner ha[s] not proven that he was prejudiced by the performance of his trial counsel, our focus on review is whether the [habeas] court correctly determined the absence of prejudice. . . . With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [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. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.) Id., 565.

We begin with the petitioner's first claim that Conway provided ineffective assistance by failing to request a hearing to either exclude or limit the scope of the CSLI evidence pursuant to *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).[12] Our Supreme Court, in *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), first determined that CSLI is of a scientific nature; id., 132; and held in that case that the trial court erred by not conducting a *Porter* hearing to ensure that the evidence was based on reliable scientific methodology. Id.,133. In *State* v. *Turner*, 334 Conn. 660, 224 A.3d 129 (2020), however, our Supreme Court clarified that, "[e]ven though . . . the rule in *Edwards* applies retroactively, we did not hold in *Edwards* that trial courts were bound to have, sua sponte, held *Porter* hearings in every case involving expert testimony on cell phone data in the absence of an objection or request to do so. Rather, a court is obligated to conduct a *Porter* hearing

[12] "In *Porter*, [our Supreme Court] . . . held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. A nonexhaustive list of factors for the court to consider include: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] substantive judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Citation omitted; internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124, 156 A.3d 506 (2017).

only when a party requests one." (Footnote omitted.) Id., 677–78. In the present case, Conway did not request a *Porter* hearing. In order to succeed on his claim, the petitioner must prove *both* that Conway's decision to forgo a *Porter* hearing constituted deficient performance *and* that he was prejudiced by that performance.

On the basis of our review of the record, we conclude that, even assuming arguendo that Conway's performance was deficient, the petitioner cannot demonstrate prejudice because he has not shown that there is a reasonable probability that the outcome of his criminal trial would have been different had Conway requested a *Porter* hearing. See *Martin* v. *Commissioner of Correction*, 179 Conn. App. 647, 664, 180 A.3d 1003 ("reasonable probability is a probability sufficient to undermine the confidence in the outcome" (internal quotation marks omitted)), cert. denied, 328 Conn. 926, 182 A.3d 84 (2018). First, the petitioner has not demonstrated that there is a reasonable probability that the outcome of his criminal trial would have been different because there was abundant other evidence connecting the petitioner to the Carter shooting. At the petitioner's criminal trial, Weaver testified that he had reviewed the cell phone records of the petitioner, Jules, and Carter, and found that the cell phone associated with the petitioner made several phone calls to cell phones associated with both Jules and Carter in the thirty minutes before the Carter shooting.[13] Moreover, the state presented testimony from Daniels indicating that the petitioner discussed how he patrolled Garden Street before the Carter shooting, and how, according to the petitioner, the

[13] At the petitioner's criminal trial, Weaver generally testified that, when reviewing cell phone records, he does not say for certain who the person was that was making or receiving the phone call. Instead, he "specifically state[s] that a phone number that is related to [Person A] . . . made a call to another phone number." Weaver then testified that the following phone calls were made the evening of July 25, 2009: (1) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 9:09 p.m.; (2) a phone call from a cell phone related to the petitioner to a cell phone

person shot "[kept] coming down [here] hustling." *State* v. *Raynor*, supra, 175 Conn. App. 424.

Second, we agree with the habeas court that the petitioner has failed to present evidence that the outcome of a request for a *Porter* hearing would have been favorable to the defense and changed the outcome of his criminal trial. At the petitioner's habeas trial, Conway testified that his overall strategy regarding the CSLI evidence was to demonstrate that the evidence neither showed the specific location of the cell phones nor established the user of each cell phone. When asked whether excluding the CSLI evidence would have helped his defense, Conway testified: "I can't say it would have been helpful or harmful quite frankly because there was a benefit, in my view, based on . . . sort of how this stuff was presented by the state and how flat it fell. Sometimes . . . that's okay to have [an expert] come up there and put this big show on, and [the] ultimate conclusion is zero. It shows how thin [the state's] case is. So, I can't tell you for me to say it would be helpful or harmful . . . you are asking me to speculate . . . ."

In its memorandum of decision, the habeas court set forth a detailed analysis regarding Conway's failure to

related to Carter at 10:10 p.m.; (3) a two second call from a cell phone related to Jules to a cell phone related to the petitioner at 10:10 p.m.; (4) two phone calls from a cell phone related to Young to a cell phone related to the petitioner at approximately 10:12 p.m.; (5) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 10:15 p.m.; (6) a phone call from a cell phone related to Young to a cell phone related to the petitioner at 10:24 p.m.; (7) a phone call from a cell phone related to Young to a cell phone related to Carter at approximately 10:32 p.m.; (8) a phone call from a cell phone related to the petitioner to a cell phone related to Carter at 10:39 p.m.; (9) a phone call from a cell phone related to the petitioner to a cell phone related to Jules at 10:42 p.m.; and (10) a phone call from a cell phone related to Carter to a cell phone related to the petitioner at 10:42 p.m. Finally, Weaver testified that, on July 26, 2009, beginning at 6:58 a.m., a cell phone related to the petitioner exchanged "[q]uite a few phone calls" with a cell phone related to Jules.

request a *Porter* hearing. The habeas court stated that "[a] *Porter* hearing is warranted prior to testimony such as Weaver's about cell site location information. It is incumbent on counsel to request a *Porter* hearing. Conway did not request a *Porter* hearing. Conway testified that he was not overly concerned about the cell phone evidence because it could not pinpoint anyone, it was unknown precisely where on the map a caller was located, and it was unknown who was using any of the cell phones. Conway described his strategy as highlighting that it was unknowable with any certainty where a caller was located and who was using the cell phone. Thus, Conway did not think the maps mattered much and was more concerned with the witnesses who lived in the area and saw the petitioner. Conway acknowledged that he could have requested a *Porter* hearing, but it never occurred to him in this case because he considered cell site information to be generally accepted."

The habeas court found "that the petitioner has not proven that Conway was ineffective for failing to request a *Porter* hearing. The petitioner has not demonstrated that, had Conway requested a *Porter* hearing, the trial court would have conducted such a hearing and that the outcome would have been favorable to the defense or changed the outcome of the criminal trial. . . . Even if this court were to assume that Conway performed deficiently, the petitioner has failed to prove the necessary prejudice." (Citation omitted.) We agree.

The petitioner does not claim on appeal that a successful challenge to the CSLI data through a *Porter* hearing would have prevented Weaver from testifying at all about such data. In fact, the petitioner concedes in his principal brief: "If the extent of Weaver's testimony had been that the CSLI data showed that cell phones associated with [the petitioner] and Jules were in the vicinity of the Carter shooting at the time it

occurred, that would have been generally accepted usage of CSLI, and Conway might have correctly assumed a request for a *Porter* hearing would be denied." This statement was confirmed by the testimony at the habeas trial of the petitioner's CSLI expert, Oulundsen. As more fully set forth in this opinion, Oulundsen agreed generally with Weaver's mapping of the cell site information and his placement of the petitioner in the general vicinity of the Carter shooting at the times the petitioner's phone was sending and receiving calls to and from Jules.

The petitioner's challenge to Weaver's testimony is limited to arguing that a *Porter* hearing would have led the court to exclude testimony from Weaver about the specific movements of Jules and the petitioner in "close proximity" to where Carter was shot. Assuming the petitioner is correct, we agree with the habeas court that there is no reasonable probability that exclusion of such evidence would have changed the outcome of the petitioner's criminal trial. As noted previously, evidence unrelated to the CSLI data connected the petitioner to the Carter shooting, and the CSLI data that is not challenged placed the petitioner and Jules in the vicinity of the shooting when it occurred. Furthermore, Weaver testified at the petitioner's criminal trial that the CSLI data could not pinpoint the location of a cell phone and could only provide a general idea of its location. Given this evidence, our confidence in the outcome of the trial would not be undermined by the absence of the more detailed CSLI evidence the petitioner challenges.

For the same reason, we reject the petitioner's claim that Conway provided ineffective assistance by failing to present a CSLI expert to challenge Weaver's testimony. Oulundsen testified at the habeas trial that, after reviewing Weaver's work, he determined that Weaver mapped the cell phone information similarly to how he

would have. Oulundsen stated, however, that Weaver chose to omit icons representing the petitioner's residence and towers that provided overlapping coverage, both of which were in the vicinity of the cell towers on which Weaver relied. Additionally, Oulundsen testified that he found Weaver's maps "suggestive" because he placed icons representing the cell phones associated with the petitioner and Jules next to each other. When asked whether he disagreed with the steps Weaver took to reach his conclusions, however, Oulundsen responded, "Not so much of the steps, *because I would have kind of plotted these things the same way* . . . ." (Emphasis added.) Finally, Oulundsen agreed with Weaver's testimony at the criminal trial that CSLI evidence could not identify the petitioner's specific location but, rather, CSLI evidence could identify the general location of the cell phone associated with the petitioner.

Next, the petitioner's counsel questioned Conway regarding his decision not to present a CSLI expert to challenge Weaver's testimony. Conway testified that he did not believe Oulundsen's testimony would have helped the petitioner's defense, nor persuaded a jury, because he and Weaver ultimately reached the same conclusions. Further, Conway testified that his strategy regarding the CSLI evidence was to show that Weaver could neither say who was using the cell phones, nor identify the specific locations of the cell phones. In its memorandum of decision, the habeas court determined that "Oulundsen agreed with Weaver's trial testimony that he did not know exactly where the petitioner and Jules were, and that only a general area of their locations could be determined."

We agree with the habeas court that the petitioner was not prejudiced by Conway's decision not to call a CSLI expert to challenge Weaver's testimony. "[T]here is no per se rule that requires a trial attorney to seek out an expert witness." (Internal quotation marks omitted.)

Antonio A. v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600, cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). In fact, "[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Servello* v. *Commissioner of Correction*, 95 Conn. App. 753, 763–64, 899 A.2d 636, cert. denied, 280 Conn. 904, 907 A.2d 91 (2006). Here, Oulundsen and Weaver both concluded that CSLI cannot identify the user of the cell phones or the specific locations of the cell phones. Thus, the petitioner has not shown that the presentation of a CSLI expert to challenge Weaver's testimony would have assisted his defense. Finally, it bears remembering that the evidence regarding the Carter shooting was uncharged misconduct evidence. As discussed previously in this opinion, there was a plethora of other evidence, unrelated to the Carter shooting, that directly connected the petitioner to the shooting of the victim, the crime of which the petitioner was convicted and which he has challenged in his habeas petition.

Therefore, we agree with the habeas court's conclusion that the petitioner has not satisfied the prejudice prong of *Strickland* because he has not demonstrated a reasonable probability that, had Conway requested a *Porter* hearing to challenge or limit the scope of the CSLI evidence or presented a CSLI expert to challenge Weaver's testimony, the outcome of his criminal trial would have been different. Consequently, the habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

The judgment is affirmed.

In this opinion the other judges concurred.

SHERI SPEER *v.* DANJON CAPITAL, INC.
(AC 45774)

Bright, C. J., and Cradle and Sheldon, Js.

Syllabus

The plaintiff sought to extinguish a mortgage on and to quiet title to certain real property located in Norwich, alleging that the defendant had acquired a lien on the property in bad faith. The plaintiff filed a notice of service of discovery, certifying that she had served the defendant, via first-class mail, with a discovery package that included interrogatories, requests for production, and requests for admissions. Subsequently, the plaintiff filed a motion for order requesting that all facts as to which she had served the defendant with requests for admissions be deemed admitted because the defendant had not timely responded to the requests. On the same day, she filed a motion for summary judgment on the basis of the facts she claimed that the defendant had admitted. The defendant filed an objection to the motion for order, representing through counsel that, although the plaintiff had served it with interrogatories and requests for production, she had not served any requests for admissions. The trial court denied the motion for order, finding that the plaintiff had not served the defendant with requests for admissions and that she had misled the court and the defendant by certifying that she had done so. In its sanctions order, the court concluded that the plaintiff's misleading filings constituted an abuse of discovery and that it would require the plaintiff to reimburse the defendant for all costs and attorney's fees it had incurred to defend itself against the plaintiff's claims. The defendant filed an affidavit in support of attorney's fees from its counsel, and the plaintiff filed a motion to reconsider the court's sanctions order and an objection to attorney's fees, alleging that the order had been issued in reliance on a mistake because the plaintiff had served the defendant with requests for admissions, although she had done so via email, rather than by first-class mail, as she had initially certified in her notice of service of discovery. The plaintiff suggested that the court's finding to the contrary resulted from the failure of the defendant's counsel to diligently check his email for the requests and from an unspecified error by the clerk's office in the filing of the requests, which she claimed to have filed as an attachment to her motion for order. The court thereafter denied the plaintiff's motions for reassignment and to reconsider. The court also dismissed the plaintiff's action as a sanction for her discovery abuse, which it found that she had engaged in by insisting repeatedly that she had served the defendant with requests for admissions to which the defendant had failed to respond, although the court file and her own records contradicted her claim. *Held*:

1. The trial court abused its discretion by dismissing the plaintiff's action as a sanction for her alleged abuse of discovery:

   a. The plaintiff could not prevail on her claim that the trial court erred in finding that she had failed to serve the defendant with requests for admissions; there was ample evidence in the record, despite the plaintiff's insistence to the contrary, to support that finding, including the defendant's denial, through its counsel, that it had been served with such requests by first-class mail or by email, and no requests for admissions were included in the document that the plaintiff filed contemporaneously with her motion for order, which she represented was a true copy of the entire discovery package that she had served on the defendant.

   b. The trial court's dismissal of the plaintiff's action was disproportionate to any violation by the plaintiff of its discovery rules and orders: although the plaintiff persisted in claiming that she had included requests for admission in the discovery package that she had served on the defendant, a claim that the court found to be factually inaccurate, the plaintiff was not disrespectful to the court, was not dismissive of its prior findings or orders, or otherwise contumacious, rather, the plaintiff attempted to explain why the court file did not contain the requests for admissions and why the claimed failure of the defendant's counsel to receive them by email was inaccurate; moreover, dismissal was not the only remedy available to the court to protect the defendant's interests, as the court's order requiring the self-represented plaintiff to reimburse the defendant for the costs it incurred to defend itself was a more than adequate sanction.

2. The trial court improperly denied the plaintiff's motion for reassignment of all matters concerning the amount of attorney's fees to which the defendant was entitled, that court having failed to decide that matter within 120 days of the parties' final court-ordered submissions thereon: because the court's sanctions order set specific deadlines for the parties to submit materials in response to the order and did not contemplate any further submissions on the issue, the court was required to timely decide what sum of attorney's fees should be paid by the plaintiff to the defendant to compensate it for the expenses it incurred to defend itself against the plaintiff's unfounded motion for order; accordingly, on remand to the trial court, the issue can be finally adjudicated by another judicial authority on the basis of the parties' prior submissions.

3. This court declined to review the plaintiff's claim that the trial court erred in denying her motion for summary judgment: this court concluded that it lacked jurisdiction to decide the plaintiff's claim because the plaintiff's motion for summary judgment was not, in fact, denied, or otherwise finally adjudicated; moreover, the denial of a motion for summary judgment, except under limited circumstances that did not exist in the present case, was not an appealable final judgment over which this court would have jurisdiction.

Argued October 12—officially released December 5, 2023

Procedural History

Action, inter alia, seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *O'Hanlan*, *J.*, denied the plaintiff's motion for reassignment; thereafter, the court, *O'Hanlan*, *J.*, rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *reversed in part*; *further proceedings*.

Sheri Speer, self-represented, the appellant (plaintiff).

Opinion

PER CURIAM. The self-represented plaintiff, Sheri Speer, appeals from the judgment of the trial court dismissing her present action against the defendant, Danjon Capital, Inc., as a sanction for abuse of discovery. On appeal, she claims that the court (1) abused its discretion by dismissing this action as a sanction for her alleged discovery abuse, which it found that she had engaged in by insisting repeatedly that she had served the defendant with requests for admissions to which the defendant had failed to respond although the court file and her own records contradicted her claim that requests for admissions had been served; (2) improperly denied her timely motion for reassignment of all matters concerning the amount of attorney's fees she should be ordered to pay the defendant as a sanction for her discovery abuse after the court failed to decide that matter within 120 days of the parties' final court-ordered submission thereon; and (3) erred in denying her motion for summary judgment. We agree with the plaintiff that the court improperly dismissed this action as a sanction for her alleged abuse of discovery and that it improperly denied her motion for reassignment of the pending matter concerning the amount of attorney's

fees that should be awarded to the defendant as a sanction for her discovery abuse, which the court failed to decide within 120 days of the last court-ordered submission on that matter. We dismiss that portion of the plaintiff's appeal challenging the purported denial of her motion for summary judgment.

The case arises against the following factual and procedural background. In February, 2021, the plaintiff, representing herself, commenced this action against the defendant to extinguish a mortgage on and quiet title to a parcel of real property in Norwich, alleging that the defendant had acquired a lien on the property in bad faith as a result of usurious practices. The plaintiff thereafter filed a notice of service of discovery, in which she certified that, on or before November 17, 2021, she had served the defendant, via first-class mail, with a discovery package that included interrogatories, requests for production, and requests for admissions.[1] On December 23, 2021, the plaintiff filed a motion for order requesting that all facts as to which she had served the defendant with requests for admissions be deemed admitted because the defendant had not answered or objected to such requests, as required by law, within thirty days after the filing of her notice of service of discovery.[2] On that same date, she also filed a motion for summary judgment and a memorandum in support of that motion on the basis of the facts she claimed to have been admitted by the defendant due to its alleged failure to respond to her requests for admissions.

The defendant filed an objection to the plaintiff's motion for order, representing through counsel that,

[1] See Practice Book § 13-22 (b).

[2] See Practice Book § 13-23 (a) ("[e]ach matter of which an admission is requested is admitted unless, within thirty days after the filing of the notice required by Section 13-22 (b) . . . the party to whom the request is directed files and serves upon the party requesting the admission a written answer or objection").

although the plaintiff had served it with interrogatories and requests for production in the present case, she had not served it with any requests for admissions. The defendant further stated in its objection, without requesting that sanctions of any kind be imposed on the plaintiff for her unfounded claim, that, when the plaintiff did ultimately serve it with requests for admissions, it "[would] promptly respond to the same."

On March 3, 2022, the court heard oral argument on the motion for order, which the plaintiff had further supported before the hearing with a notice of supplemental authority. In the course of that hearing, the court reviewed with the plaintiff an electronic copy of a document in the court file, which the plaintiff had described as a copy of the entire discovery package, including requests for admissions, that she had served on the defendant in this case. This review revealed that the document in question contained no requests for admissions.

Four days after the hearing, on March 7, 2022, the court denied the motion for order by issuing a written order (March 7 sanctions order), in which it not only found that the plaintiff had not served the defendant with any requests for admissions in the present case but that she had misled the court and the defendant by certifying that she had done so. Noting that the plaintiff had continued to maintain her position on the motion for order even after the incorrectness of her position had been clearly demonstrated at the hearing, the court ruled that the plaintiff's "inaccurate/misleading filings" constituted an abuse of discovery that it would redress by requiring the plaintiff to reimburse the defendant for all costs and attorney's fees it had incurred to defend itself against the plaintiff's claims. Finally, after setting a schedule for the parties to file written submissions concerning the amount of money the plaintiff should pay to the defendant to reimburse it for the expenses

it had incurred to defend itself against the plaintiff's discovery abuse, the court declared that it reserved the right to impose additional sanctions on the plaintiff, including dismissal of the present action, if the plaintiff failed to obey its orders or engaged in "further deceptive or misleading conduct . . . ."

In the month following the issuance of the March 7 sanctions order, the parties filed several additional submissions concerning whether and how that order should be implemented. Initially, on March 15, 2022, the defendant filed an affidavit in support of attorney's fees from its counsel, detailing the time he had spent in opposing the plaintiff's motion for order. On the basis of that affidavit, the defendant requested that the plaintiff be ordered to reimburse it in the amount of $660 for the attorney's fees that it had incurred to defend itself against the motion for order. The plaintiff responded to counsel's affidavit by filing both a motion to reconsider the March 7 sanctions order, dated March 17, 2022, and an objection to paying any attorney's fees pursuant to that order, dated March 23, 2022. The basis for those pleadings was the plaintiff's modified claim that the March 7 sanctions order had been issued in reliance on a mistake because she had, in fact, served the defendant with requests for admissions, although she had done so via email, rather than by first-class mail, as she had initially certified in her notice of service of discovery. The plaintiff suggested that the court's initial finding to the contrary had resulted both from the failure of the defendant's counsel to diligently check his email for the requests for admissions that she had sent him by that means and from an apparent, but unspecified, "coding/scanning/filing error" by the clerk's office in filing her motion for order, from which it unaccountably omitted the requests for admissions that she had attached to the motion. The plaintiff further claims that the requests for admissions were also

attached to the memorandum of law that she filed in support of her motion for summary judgment. The defendant filed an objection to the plaintiff's motion to reconsider on March 18, 2022, in which the defendant's counsel once again denied that the plaintiff had ever served him with any requests for admissions in this case, either by first-class mail, as she initially certified, or by email, as she later claimed.

The court did not hear argument on or adjudicate any of the parties' motions, submissions or requests concerning the amount of money awardable to the defendant under the March 7 sanctions order before July 25, 2022, when the plaintiff called the continuing pendency of that matter to its attention by filing a motion for reassignment pursuant to Practice Book § 11-19. The plaintiff pleaded in her motion for reassignment that the motion was being filed in a timely fashion, less than fourteen days after the expiration of the 120 day time period after March 23, 2022, when her most recent submission on that matter was filed, as ordered by the court in the March 7 sanctions order.

One month later, on August 23, 2022, without scheduling either matter for oral argument, the court issued written orders denying both the plaintiff's motion to reconsider and her motion for reassignment. It denied the motion to reconsider on the basis of the repeated representation by the defendant's counsel that the plaintiff had not served him with any requests for admissions in the present case, at any time or by any means. It denied the motion for reassignment on the ground that the plaintiff had never marked her motion to reconsider ready for argument or otherwise sought to have it adjudicated within the 120 day time period after it was filed. On August 24, 2022, moreover, also without scheduling the matter for argument or otherwise notifying the parties of its intent to do so, the court issued two new orders sanctioning the plaintiff for abuse of discovery.

First, it ordered the plaintiff to reimburse the defendant in the amount of $660 for all attorney's fees it had incurred to defend itself against her motion for order. Second, it ordered the dismissal of the present action. As the basis for issuing its order of dismissal, the court declared that, after reviewing the plaintiff's motions, including her motion to reconsider, it had concluded that her persistence in making inaccurate statements regarding discovery demonstrated a "disturbing lack of candor" that constituted a further abuse of the discovery process under Practice Book § 13-14.[3] This appeal followed.[4]

I

The plaintiff first claims that the court (a) erred in finding that she failed to serve the defendant with any requests for admissions and (b) abused its discretion by dismissing the case as a sanction for her alleged abuse of discovery in pressing her claim, despite evidence to the contrary, that the defendant had failed to respond to requests for admissions that she repeatedly claimed to have served on it in this case. We disagree with the plaintiff's first argument, but we agree with the second.

The following relevant legal principles guide our analysis of these claims. "[A] court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of [Practice Book] § 13-14, impose sanctions, including the sanction of dismissal.

[3] Practice Book § 13-14 provides in relevant part: "(a) If any party has failed . . . substantially to comply with any . . . discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order proportional to the noncompliance as the ends of justice require.

"(b) Such orders may include the following . . . (5) An order of dismissal, nonsuit or default. . . ."

[4] The defendant did not file a brief in the present appeal.

* * *

"In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear. . . . This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 14–18, 776 A.2d 1115 (2001) (*Millbrook*).

A

As to the plaintiff's first argument, which challenges the court's central factual finding that she did not, in fact, serve the defendant with requests for admissions in this case, the plaintiff bears the burden of establishing that that finding is clearly erroneous, in the sense that "there is no evidence in the record to support it . . . or . . . 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.) *Gervais* v. *Gervais*, 91 Conn. App. 840, 844, 882 A.2d 731, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005). The plaintiff cannot prevail on this argument because there is ample evidence of record that, despite the plaintiff's insistence and alleged efforts to the contrary, she did not, in fact, succeed in serving the defendant with requests for admissions in this case. The defendant, through its counsel, initially denied that it was served

with such requests for admissions by United States mail, as the plaintiff had certified in her notice of service of discovery. Moreover, as the court expressly noted in its March 7, 2022 sanctions order, no requests for admissions were included in the document she had filed contemporaneously with her motion for order, representing it to be a true copy of the entire discovery package she had served on the defendant in this case. Such evidence gave the court a substantial basis for the finding underlying its dismissal order that the plaintiff had not, in fact, served the defendant with requests for admissions in this case. That finding was therefore not clearly erroneous.

B

Turning next to the plaintiff's argument that the court's imposition of the sanction of dismissal upon her was disproportionate to any proven violation by her of the court's rules and orders regarding discovery, we must begin by reiterating that our standard of review on this issue is whether the trial court abused its discretion. In addressing *Millbrook*'s proportionality factor, we are mindful that "[t]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the [plaintiff] for [her] allegedly improper conduct." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, 267 Conn. 73, 85, 836 A.2d 1167 (2003). Additionally, we must remember that a "[trial] court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant [her] day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate,

contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17. "[I]n assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 76, 176 A.3d 1167 (2018).

The court dismissed the plaintiff's action on the ground that she had persisted, at and after the hearing on her motion for order, in making what the court found to be the factually inaccurate claim that she had included requests for admissions in the discovery package she had served on the defendant, "despite statements and clear evidence to the contrary from her adversary and from the clerk at the hearing, using documents the plaintiff herself had filed with the clerk's office and which have been in the court file since, as noted in the court's initial order . . . ."[5] The court initially concluded in the March 7 sanctions order that such conduct constituted an abuse of discovery because the plaintiff knew or should have known, based on an examination of her own files and the court file, that

[5] The court noted in its order denying the plaintiff's motion for order that the defendant had stated in its objection that the discovery request attached as exhibit B to the motion for order, which did not contain any requests for admissions, was the same discovery request that it had received from the plaintiff. The court further stated that, "[a]t the hearing, the plaintiff refused to concede this point, at least until the clerk put the court's copy of the plaintiff's motion [for order] on the screen, and the plaintiff was required to review all fifty-five pages before conceding that there were no requests for admissions in her requests."

this claim was incorrect. The court also faulted the plaintiff in its ultimate dismissal order for her conduct following the issuance of the March 7 sanctions order, specifically, for continuing to claim that she had served the defendant with requests for admissions before filing her motion for order, even though she claimed that she had done so by email instead of by United States mail, and then offering possible explanations for the inconsistency between that claim and both the contents of the court file, which, before she filed the motion for order, had contained no such requests, and the statement of the defendant's counsel that he never received them. As for the court file, the plaintiff asserted in her motion to reconsider that the fact that the requests for admissions were not attached to her motion for order must have resulted from an unspecified clerical error in the filing or coding of her motion for order. As for the denial by the defendant's counsel that the plaintiff had sent him her requests for admissions by email, she suggested that the defendant's counsel had performed an inadequate search of his own email records for the missing requests for admissions.

Although the plaintiff's proposed explanations for the inconsistencies between her claim that she had served her requests for admissions on the defendant and the lack of such requests for admissions in the contents of the court file and the denial by the defendant's counsel that he had received such requests for admissions by any means were not supported by independent evidence, the offering of such explanations was not disrespectful to the court, dismissive of its prior findings or orders, or otherwise contumacious. Rather than ignoring the court's initial findings and sanctions order or the contents of the court file that had led the court to issue that order, the plaintiff attempted to explain why the court file did not contain the requests for admissions and why the claimed failure of the defendant's counsel

to receive them by email was inaccurate. A party so claiming should not be punished by the court with dismissal of her action simply for making such claims.

Dismissal, moreover, is a sanction of last resort, which was not the only remedy available to the court to protect the defendant's interests in the circumstances at issue in the present case. Requiring the self-represented plaintiff to reimburse the defendant for all expenses it had incurred to defend itself against her erroneous claim that several facts should be deemed admitted because the defendant had not answered requests for admissions as to those facts was not only an available sanction for such conduct but also was a more than adequate sanction to satisfy the defendant's interests in defending this case. The plaintiff's erroneous claim surely caused the defendant to incur expenses to defend itself against it, particularly attorney's fees to have its counsel review all relevant records concerning discovery in the case and prepare submissions to file with the court in order to set the record straight. Although such expenses were directly traceable to the plaintiff's careless pleading, service, and recordkeeping practices, the defendant made no initial request for sanctions despite the cost and inconvenience it experienced as a result of such conduct. Later, moreover, the defendant showed apparent satisfaction with the court's proposed sanction of reimbursement by supplying the court with all the information that was necessary to fashion a proper reimbursement order. Logically and reasonably, the defendant requested no additional sanctions of any kind because the sanction of reimbursement was sufficient to make it whole.

For the foregoing reasons, we conclude that the sanction of dismissal was disproportionate to the conduct at issue. That order must therefore be reversed, and this case must be remanded for further proceedings consistent with this opinion.

II

The plaintiff's next claim on appeal is that the trial court erred in denying her motion for reassignment of the motions, requests, and submissions she had filed after the issuance of the March 7 sanctions order, concerning whether and how that order should be implemented, because the court did not rule on those matters within 120 days of the last court-ordered submission on that issue. As presented, the motion for reassignment concerned only the sanction of attorney's fees that the court had declared it would impose pursuant to the March 7 sanctions order to reimburse the defendant for attorney's fees it had incurred before the issuance of that order to defend itself against the plaintiff's unfounded claim that several facts should be deemed admitted because it had not responded to her requests for admissions as to those facts. It did not, however, concern either the plaintiff's motion to reconsider the March 7 sanctions order, which was not filed in response to any court order, or the court's later sua sponte order dismissing this action for abuse of discovery on the basis of similar but separate findings of fact concerning continuing discovery abuse by the plaintiff.

We agree with the plaintiff that, because the court's March 7 sanctions order set specific deadlines for the parties to submit materials in response to the order and did not contemplate or suggest that the court anticipated any further submissions or oral argument on the sanctions issue, in the absence of waiver by the parties, the court was required by our rules of practice to decide timely what sum of attorney's fees should be paid by the plaintiff to the defendant as a sanction to compensate it for the expenses it incurred prior to March 7 to defend itself against the plaintiff's unfounded motion for order, which the court had found to be an abuse of discovery. Upon remand of this case to the trial court, that issue can be finally adjudicated by another judicial authority

based on the prior submissions of the parties on the issue.

III

As for the plaintiff's third claim, alleging error in the denial of her motion for summary judgment, we lack jurisdiction to decide that claim because the plaintiff's motion was not, in fact, denied, or otherwise finally adjudicated. In addition, we note that the denial of a motion for summary judgment, except in limited circumstances that do not exist here, is not an appealable final judgment over which we would have jurisdiction. See, e.g., *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 346–47, 272 A.3d 677 (2022).

The judgment of dismissal, the order requiring the plaintiff to pay attorney's fees to the defendant, and the denial of the plaintiff's motion for reassignment are reversed, and the case is remanded for further proceedings consistent with this opinion; the portion of the appeal pertaining to the purported denial of the plaintiff's motion for summary judgment is dismissed.

SHERI SPEER *v.* BROWN JACOBSON P.C. ET AL. (AC 45662)

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

Syllabus

The self-represented plaintiff appealed to this court from the judgment of the trial court dismissing her quo warranto action challenging the qualifications of the defendant law firm, B Co., and the defendant attorney, W, to serve as corporation counsel and assistant corporation counsel for the defendant city of Norwich. The plaintiff had claimed in several prior cases, either offensively or as a special defense, that B Co. and W were not eligible to serve as the city's counsel. After the plaintiff filed the present action, alleging that B Co. and W did not meet the qualifications for the offices of corporation counsel or assistant corporation counsel for the city because neither was an elector in accordance with the city charter and the city's code of ordinances and seeking to

eject B Co. and W from those offices, the defendants filed a motion to dismiss, arguing that the plaintiff's action was barred by the doctrine of res judicata because the issue of whether B Co. and W properly represented the city as its attorneys had been the subject of prior litigation on numerous occasions that resulted in a final judgment on the merits in favor of the defendants. The trial court granted the defendants' motion to dismiss, relying on two prior cases in finding that the plaintiff's action was barred by res judicata and collateral estoppel. In the first prior case, the plaintiff and three other individuals had filed a quo warranto action alleging that W, B Co. and another attorney had not been appointed to the office of corporation counsel in accordance with the city charter and, therefore, were not authorized to act as corporation counsel for the city, but they neglected to sign the complaint. The plaintiff filed an amended complaint on behalf of herself and the three other individuals, and the court subsequently ordered them to appear at a hearing and show cause why their complaint should not be dismissed for lack of subject matter jurisdiction because the complaint was not signed in accordance with the rules of practice and because the plaintiff, by filing the amended complaint on behalf of other individuals, engaged in the unauthorized practice of law. Following that hearing, the court dismissed the case without explanation. In the second case, a foreclosure action, the city sought to foreclose certain municipal tax liens on property owned by the plaintiff, and she asserted as a special defense that B Co. lacked agency to represent the city or enforce the alleged liens because the firm, as a professional corporation, could not be an elector as required to qualify as corporation counsel under the city charter. The court granted the city's motion for summary judgment as to liability only, finding that the plaintiff lacked standing to challenge the authority of the city's attorney to institute the foreclosure action. *Held*:

1. The trial court improperly concluded that the doctrine of res judicata barred the plaintiff's action: neither disposition of the two cases relied on by the trial court was a judgment on the merits, that is, one that is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form, as the foreclosure action was dismissed because the plaintiff lacked standing and the first quo warranto action was dismissed after the court determined that the plaintiff had engaged in the unauthorized practice of law and that the court lacked subject matter jurisdiction because the complaint was not properly signed; accordingly, the doctrine of res judicata did not bar the present action.
2. The trial court improperly concluded that the doctrine of collateral estoppel precluded the plaintiff's action, this court having found that the issues raised in the present action were not decided in either of the two cases on which the trial court relied: although the trial court's precise reasoning in the dismissal of the first quo warranto action was unclear, that court's show cause order stated that the court was considering dismissing the case only because the plaintiff had engaged in the

unauthorized practice of law by signing the complaint on behalf of other unrepresented parties and because it lacked subject matter jurisdiction due to the improper signing of the complaint, and the court never addressed the merits of the first quo warranto action, in particular, whether B Co. and W were qualified to hold the offices of corporation counsel and assistant corporation counsel; moreover, as to the foreclosure action, the court addressed whether the plaintiff had standing to raise, as a special defense, the propriety of the city's counsel's representation in that case but never addressed the merits of the plaintiff's claims and, although the issue of whether the plaintiff had standing to defensively challenge the authority of the city's counsel to represent the city in a foreclosure proceeding was necessarily determined and essential to the judgment in the foreclosure action and would have preclusive effect if the plaintiff sought to assert that same defense in a subsequent foreclosure action, the court did not decide whether the plaintiff had standing to initiate a quo warranto action, which depended solely on her status as a taxpayer.

Argued September 14—officially released December 5, 2023

Procedural History

Action for, inter alia, a writ of quo warranto challenging the appointment of the named defendant to the office of corporation counsel of the city of Norwich, brought to the Superior Court in the judicial district of New London, where the court, *O'Hanlan, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Sheri Speer, self-represented, the appellant (plaintiff).

Opinion

BRIGHT, C. J. The self-represented plaintiff, Sheri Speer, appeals from the judgment of the trial court dismissing, on the grounds of res judicata and collateral estoppel, her quo warranto action challenging the qualifications of the defendants Brown Jacobson P.C. (Brown Jacobson) and one of its attorneys, Aimee Wickless, to serve as corporation counsel for the defendant

city of Norwich (city).[1] On appeal, the plaintiff claims, inter alia, that the court improperly concluded that her claims are barred by the doctrines of res judicata and collateral estoppel. We agree and, therefore, reverse the judgment of the trial court.[2]

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Brown Jacobson and Wickless have acted as corporation counsel and assistant corporation counsel for the city in legal proceedings, including some involving the plaintiff. The plaintiff filed the present quo warranto action on August 4, 2021, alleging that Brown Jacobson and Wickless "do

[1] On April 14, 2023, the defendants filed a notice of intent not to file a brief and waived oral argument in this appeal. As such, we consider this appeal on the basis of the plaintiff's brief and the record, as defined by Practice Book § 60-4, only. In the defendants' notice, they also requested that this court "consider whether or not the prior . . . court rulings prohibiting [the plaintiff from] filing until sanctions were paid precludes even accepting this appeal." We decline this request for two reasons. First, any concern about the propriety of the plaintiff filing the underlying action in the Superior Court in light of sanctions issued against her is not properly raised for the first time on appeal; instead, that issue should have been raised with the trial court in the first instance. See *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 643, 224 A.3d 147 (2020) ("[i]t is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial, and [o]nly in [the] most exceptional circumstances can and will [an appellate] court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court" (internal quotation marks omitted)). Second, any argument that the defendants wanted this court to consider should have been raised in a brief filed with this court. See *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444, 35 A.3d 188 (2012) ("[i]t is well established that [w]e are not obligated to consider issues that are not adequately briefed" (internal quotation marks omitted)).

[2] The plaintiff also claims that the court improperly (1) denied her motion to reconsider, (2) denied her discovery requests in connection with the motion to dismiss, (3) refused to take judicial notice of alleged facts regarding the prior litigation, and (4) disregarded the law of quo warranto in granting the defendants' motion to dismiss. Because we agree with the plaintiff's primary claim that the court improperly granted the defendants' motion to dismiss, we do not consider her additional claims challenging that judgment.

not presently meet the qualifications for the offices of corporation counsel or assistant corporation counsel" for the city because neither is an elector in accordance with the city charter and code of ordinances.[3] As a "resident and taxpayer" of the city, the plaintiff sought "temporary and permanent writs of quo warranto ejecting" Brown Jacobson and Wickless from those offices.

The defendants filed a motion to dismiss, arguing that the plaintiff's action "is barred by the doctrine of res judicata" because "[t]he issue of [Brown Jacobson and Wickless] representing the [city] as its [attorneys] has been the subject of prior litigation on numerous occasions that resulted in a final judgment on the merits in favor of the defendants."[4] In their motion to dismiss, the defendants cited four different cases in which the plaintiff claimed, either offensively or as a special defense, that Brown Jacobson and Wickless were not eligible to serve as the city's corporation counsel. The defendants discussed three of those cases in their memorandum of law in support of that motion, and the court relied on only two of them in its order granting the defendants' motion.[5]

[3] Chapter XVI, § 1, of the Norwich City Charter provides in relevant part: "There shall be a corporation counsel who shall be appointed by the city council . . . . He shall be an elector of the [city] . . . ." Similarly, the city's code of ordinances provides in relevant part that "[t]he assistant corporation counsels shall be electors of the city . . . ." Norwich Code of Ordinances, c. 2, art. I, § 2-16.

[4] The defendants also moved for sanctions against the plaintiff for "vexatious litigation," which the court did not address in its order.

[5] The two cases that the court did not address in its order were (1) a quo warranto action that the plaintiff and other individuals filed on June 15, 2012, against Brown Jacobson, Wickless and others (second quo warranto action); see *Speer* v. *Wickless*, Superior Court, judicial district of New London, Docket No. CV-12-5014421-S; and (2) an action that the plaintiff filed on August 15, 2012, alleging that a tax collector for the city had improperly engaged the legal services of Brown Jacobson and Wickless, who were not corporation counsel at that time; see *Speer* v. *Daily*, Superior Court, judicial district of New London, Docket No. CV-12-5014452-S. In their memorandum of law in support of their motion to dismiss, however, the defendants failed

The procedural histories of the two cases relied on by the trial court in granting the defendants' motion to dismiss are as follows. First, on February 24, 2012, the plaintiff and three other individuals filed a quo warranto action alleging that Wickless, Brown Jacobson, and Attorney John Wirzbicki had not been appointed to the office of corporation counsel in accordance with the city charter and, therefore, were not authorized to act as corporation counsel for the city (first quo warranto action).[6] See *Speer* v. *Wickless*, Superior Court, judicial district of New London, Docket No. CV-12-5014370-S. The complaint, which was not signed, contained forty-six counts, several of which directly challenged Wickless' prosecution of foreclosure actions against the plaintiff in 2009 and 2010. The plaintiff, on behalf of

to explain how either case satisfies the criteria necessary for the application of res judicata or collateral estoppel. As to the case against the tax collector, the defendants entirely omitted that case from their memorandum of law. Although the defendants argued in their memorandum that the second quo warranto action precluded the present action under the doctrine of res judicata, they failed to address the judgment rendered in that case and, moreover, failed to cite the correct trial court docket number. Given the defendants' failure to adequately discuss those cases in their memorandum of law, the court was not required to address them in its order granting the defendants' motion to dismiss. See *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 856, 171 A.3d 525 (2017) ("Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . These same principles apply to claims raised in the trial court." (Emphasis omitted; internal quotation marks omitted.)). Furthermore, because the defendants elected not to file a brief in this appeal, they have presented us with no argument as to how the resolution of either of those cases acts as a bar to the present action. See *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 337, 50 A.3d 841 (2012) ("this court will not make arguments on behalf of parties that have declined to make any"), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013). Accordingly, we limit our discussion to the two cases that the court relied on in its order.

[6] In that action, the plaintiffs also alleged that Brown Jacobson was not an elector and, therefore, was not qualified to hold the office of corporation counsel.

herself and the three other individuals, filed an amended complaint in the first quo warranto action on April 24, 2012. After the plaintiff filed the amended complaint, the court, *Hon. Thomas F. Parker*, judge trial referee, ordered the plaintiff and the three other individuals to appear at a May 30, 2012 hearing and show cause why their complaint should not be dismissed for lack of subject matter jurisdiction because the complaint was not signed in accordance with Practice Book § 4-2 (a)[7] and because the plaintiff, by filing the amended complaint on behalf of other individuals, engaged in the unauthorized practice of law. In response to that order, the plaintiff and the other individuals filed prehearing briefs on May 25, 2012. During oral argument before this court, the plaintiff indicated that she believes that she attended the show cause hearing. Following that hearing, the court dismissed the case without explanation on May 31, 2012.

In the second case, the city, represented by Wickless and Attorney Michael E. Driscoll, filed a complaint on September 20, 2012, seeking to foreclose certain municipal tax liens on property owned by the plaintiff (foreclosure action). See *Norwich* v. *Speer*, Superior Court, judicial district of New London, Docket No. CV-12-6014928-S. In her answer, the plaintiff asserted as a special defense that Wickless' firm, Brown Jacobson, "lack[ed] agency to represent the [city] or enforce the liens alleged" because the firm, which is a professional corporation, cannot be an elector as is required to qualify as corporation counsel under the city charter. In its memorandum of law in support of its motion for summary judgment as to liability, the city asserted that the plaintiff lacked standing to assert that special defense because the city's "representation by counsel

[7] Practice Book § 4-2 (a) provides in relevant part: "A party who is not represented by an attorney shall sign his or her pleadings and other papers. . . ."

is an entitlement belonging to the [city], not [to] the [plaintiff]," and, regardless, such a special defense is not among the "limited defenses to a foreclosure action." In an effort to disprove the plaintiff's allegation, the city attached to its motion a city council resolution dated December 19, 2011, indicating that Wickless had been reappointed as assistant corporation counsel. In response, the plaintiff filed a motion for summary judgment as to her special defense. The court, *Cosgrove*, *J.*, denied the plaintiff's motion and granted the city's motion for summary judgment as to liability only on January 23, 2014. In its memorandum of decision, the court agreed with the city that the plaintiff lacked standing to challenge "the authority of the [city's] attorney to institute [the foreclosure] action. . . . The city is entitled to retain the lawyers of its choice. It has passed corporate resolutions and it has cooperated with the prosecution of this action. This defense is without merit and is asserted solely for the purposes of delay."

On the basis of the resolution of those actions, the defendants in the present case argued that "the allegations raised by the plaintiff . . . are identical to those raised . . . in the aforementioned [cases]. The plaintiff has sued the defendants on two occasions, each time claiming that [Brown Jacobson and Wickless] are not eligible to represent the [city] as its corporation counsel and/or [assistant] corporation counsel. In addition, the plaintiff has raised this same issue several times as [a] special defense, [and] each time said special defense was either stricken or summary judgment was rendered." The plaintiff filed a memorandum of law in opposition to the defendants' motion to dismiss on October 25, 2021, arguing that the defendants misconstrued the facts, that their motion to dismiss was frivolous and intended to stall the proceedings, and that the doctrine of res judicata is inapplicable to this case.

After hearing argument on the defendants' motion on January 24, 2022,[8] the court granted the motion to dismiss on May 18, 2022, concluding, on the basis of the foreclosure action and the first quo warranto action, that the present action was barred by the doctrines of res judicata and collateral estoppel.[9] In its two paragraph order, the court stated: "The court grants the motion to dismiss for the reasons set forth in the [defendants'] motion to dismiss and in this order. . . . The plaintiff has raised these same claims at least twice earlier, in each case directly challenging the attorneys chosen by the [city] to represent its interests against her. Her claims each time were rejected by the Superior Court. The first was in the memorandum of decision granting summary judgment . . . in favor of the city on [the plaintiff's] special defense in [the foreclosure action]. The second was in the court's judgment of dismissal . . . of [the first quo warranto] action . . . [in which the plaintiff challenged] the [city's] selection of counsel, for [the plaintiff's] failure to respond to the court's order to show cause . . . . Under principles of res judicata and collateral estoppel, the plaintiff is precluded from pursuing the same claims that she raised in those cases again in this action, seeking a writ of quo warranto on the same issue. . . . The fact that the plaintiff raises these issue[s] in a different procedural posture, by quo warranto, rather than in a special defense or a declaratory action, does not change the fact that it is the same claim, seeking the same result. What matters is that the court in those cases took up the issue presented by the plaintiff and either refuted it on its merits or dismissed it by reason of the plaintiff's own misconduct.

[8] Pursuant to Practice Book § 63-4 (3), the plaintiff certified that no transcripts are required for this appeal. Accordingly, the transcript from the hearing was not considered in our resolution of this appeal.

[9] In the defendants' motion to dismiss, they argued only that res judicata—not collateral estoppel—precluded the plaintiff's claims.

"It is worth noting that the plaintiff's opposition . . . does not refute the res judicata/collateral estoppel grounds raised by the defendant[s], but simply recites the procedural nature of a quo warranto action. The sound policy of these doctrines is amply demonstrated in the subject matter of these cases, in that the plaintiff should not be allowed, once the issue has been decided, to collaterally attack the propriety of the city's choice of counsel each time the city and she are involved in litigation. The waste of time and resources, the distraction from the real issues in each case, in addition to the danger of inconsistency, that are threatened each time the plaintiff yet again raises the issue are all factors for which the doctrines of res judicata and collateral estoppel were developed to avoid." (Citations omitted.)

The plaintiff filed a motion to reconsider the court's decision on May 31, 2022, which the court denied on July 12, 2022. This appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that her quo warranto action is precluded by the doctrines of collateral estoppel and res judicata.[10] We agree.

[10] We note that both our Supreme Court and this court generally have held that neither res judicata nor collateral estoppel "is . . . a proper basis on which to predicate a motion to dismiss for lack of subject matter jurisdiction. Those doctrines properly are raised by motion for summary judgment." *Geremia* v. *Geremia*, 159 Conn. App. 751, 771 n.15, 125 A.3d 549 (2015); see also *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 222, 982 A.2d 1053 (2009) ("[c]ollateral estoppel, like res judicata, must be specifically pleaded by a defendant as an affirmative defense" (internal quotation marks omitted)); *State* v. *T.D.*, 286 Conn. 353, 360 n.6, 944 A.2d 288 (2008) ("the doctrine of collateral estoppel does not implicate a court's subject matter jurisdiction . . . [and] [e]ven when applicable . . . does not mandate dismissal of a case" (citations omitted)); *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 687, 490 A.2d 509 (1985) ("Res judicata is not included among the permissible grounds on which to base a motion to dismiss. Res judicata with respect to a jurisdictional issue does not itself raise a jurisdictional question. It merely alleges that the court has previously decided a jurisdictional question and therefore must be asserted as a special defense. . . . It may not be raised by a motion to dismiss." (Citation omitted.)). Because we conclude on the merits that the court improperly relied on res judicata

We begin by setting forth the applicable standard of review. "The issue of whether the doctrines of res judicata and collateral estoppel apply to the facts of this case presents a question of law. Our review, therefore, is plenary." (Internal quotation marks omitted.) *Wells Fargo Bank, National Assn.* v. *Doreus*, 218 Conn. App. 77, 83, 290 A.3d 921, cert. denied, 347 Conn. 904, 297 A.3d 198 (2023).

"The doctrines of collateral estoppel and res judicata, also known as issue preclusion and claim preclusion, respectively, have been described as related ideas on a continuum. . . . Both doctrines share common purposes, namely, to protect the finality of judicial determinations, [to] conserve the time of the court, and [to] prevent wasteful litigation . . . . Despite their conceptual closeness . . . the two doctrines are regarded as distinct." (Citations omitted; internal quotation marks omitted.) *Solon* v. *Slater*, 345 Conn. 794, 810, 287 A.3d 574 (2023). For this reason, we address each doctrine separately.

I

The plaintiff first argues that the doctrine of res judicata is inapplicable to the present case because (1) "the dismissal of an earlier action for lack of standing is not a judgment on the merits and does not have a res judicata effect," and (2) the first quo warranto action was dismissed only because the complaint was unsigned. We conclude that neither of the two judgments on which the court relied were decided on the merits for the purposes of res judicata.

The following legal principles are relevant to our analysis. "[T]he doctrine of res judicata . . . [provides that] a former judgment on a claim, if rendered on

and collateral estoppel when dismissing the plaintiff's claims, we need not address whether the motion to dismiss was the correct procedural vehicle for raising those issues in this case.

the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019). "[A] judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form. . . . A decision with respect to the rights and liabilities of the parties is on the merits where it is based on the ultimate fact or state of facts disclosed by the pleadings or evidence, or both, and on which the right of recovery depends." (Internal quotation marks omitted.) *Hall* v. *Gulaid*, 165 Conn. App. 857, 864, 140 A.3d 396 (2016).

"Res judicata, as a judicial doctrine . . . should be applied as necessary to promote its underlying purposes. . . . But by the same token, the internal needs of the judicial system do not outweigh its essential function in providing litigants a legal forum to redress their grievances. Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. The doctrines of preclusion, however, should be flexible and must give way when their

mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies. . . .

"We review the doctrine of res judicata to emphasize that its purposes must inform the decision to foreclose future litigation. The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily. We further emphasize that where a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding. But the scope of matters precluded necessarily depends on what has occurred in the former adjudication." (Internal quotation marks omitted.) *Bruno* v. *Geller*, 136 Conn. App. 707, 722–23, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

In the foreclosure action, the court rejected the plaintiff's special defense because she lacked standing to challenge "the authority of the [city's] attorney to institute [the] action." In the first quo warranto action, the court dismissed the case after it determined that the plaintiff had engaged in the unauthorized practice of law and that the court lacked subject matter jurisdiction because the complaint was not properly signed.[11] Neither disposition is a judgment on the merits, and, therefore, the doctrine of res judicata does not apply. See

[11] The record is unclear as to the court's reason for dismissing the first quo warranto action. The court's order of dismissal, which was issued the day after the show cause hearing, states simply that "[t]his case is dismissed." In granting the defendants' motion to dismiss, the court in the present action concluded that the first quo warranto action was dismissed "for [the plaintiff's] failure to respond to the court's order to show cause . . . ." Our review of the record indicates that the plaintiff did, in fact, respond to the court's order. The plaintiff filed a prehearing brief on May 25, 2012, and, during oral argument before this court, the plaintiff indicated that she believes that she attended the show cause hearing. Regardless of the reason for the dismissal, however, it is clear that the court never reached the merits of the first quo warranto action.

Wells Fargo Bank, National Assn. v. *Doreus*, supra, 218 Conn. App. 84 ("[j]udgments based on the following reasons are not rendered on the merits: *want of jurisdiction*; pre-maturity; failure to prosecute; unavailable or inappropriate relief or remedy; *lack of standing*" (emphasis altered; internal quotation marks omitted)). Accordingly, the court improperly concluded that the doctrine of res judicata bars the present quo warranto action.

II

As to the application of collateral estoppel, the plaintiff argues that the present case involves a different issue than the prior two cases because, at the time of the first quo warranto action and the foreclosure action, Wickless was an elector and, therefore, was validly appointed. We agree that collateral estoppel does not apply, but for different reasons.

The following legal principles guide our review. "Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit. . . . Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment." (Internal quotation marks omitted.) Id. "For collateral estoppel to apply, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of

the issue, the judgment could not have been validly rendered." (Citations omitted; internal quotation marks omitted.) *State* v. *Joyner*, 255 Conn. 477, 490, 774 A.2d 927 (2001). The burden is on the party asserting collateral estoppel to "[show] that the issue [the] relitigation [of which they seek] to foreclose was actually decided in the first proceeding." (Internal quotation marks omitted.) *Solon* v. *Slater*, supra, 345 Conn. 812.

Neither the court nor the defendants identified any particular issues raised in the current action that were decided in a prior case. Instead, in its order granting the defendants' motion to dismiss, the court merely stated in general terms that the plaintiff "should not be allowed, once the issue has been decided, to collaterally attack the propriety of the city's choice of counsel each time the city and she are involved in litigation."[12]

To decide whether collateral estoppel applies to bar the plaintiff's claim, we must first determine what issues actually were litigated and resolved in the prior actions and then compare those issues to the issues raised in the present action. See *Solon* v. *Slater*, supra, 345 Conn. 811 ("[t]o establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding" (internal quotation marks omitted)). We address each case in turn.

In the first quo warranto action, the court's show cause order stated that the court was considering dis-

[12] As previously noted, the defendants did not argue in their motion to dismiss that the doctrine of collateral estoppel bars the present action; instead, the court raised that issue sua sponte. The plaintiff does not argue on appeal that we should not reach the issue of collateral estoppel because it was not a basis of the defendants' motion to dismiss or because it was raised sua sponte by the court. She has instead addressed the merits of the issue on appeal. In light of that, and given that our standard of review is plenary, we address the merits of the court's reliance on collateral estoppel in dismissing the plaintiff's complaint.

missing the case only because (1) it lacked subject matter jurisdiction due to the improper signing of the complaint, and (2) the plaintiff had engaged in the unauthorized practice of law by signing the complaint on behalf of other unrepresented parties. The court thereafter dismissed the case without any explanation. Although the court's precise reasoning for the dismissal is not clear, what is clear is that the court never addressed the merits of the first quo warranto action, in particular whether Brown Jacobson and Wickless are qualified to hold the offices of corporation counsel and assistant corporation counsel.[13] Consequently, contrary to the court's statement in the present case, the court in the first quo warranto action never addressed the propriety of the city's choice of counsel, and, therefore, the first quo warranto action does not preclude the present action under the doctrine of collateral estoppel.

As to the foreclosure action, the court addressed whether the plaintiff had standing to raise, as a special defense, the propriety of the city's choice of representation in that case. The court never addressed the merits of the plaintiff's claims.[14] Furthermore, the standing

[13] See footnote 11 of this opinion.

[14] We note that, after the court in the foreclosure action concluded that the plaintiff did not have standing to raise the special defense attacking the city's choice of counsel, the court went on to say that the plaintiff's defense was "without merit" and that the city had "passed corporate resolutions," presumably referring to the city council's reappointment of Wickless as assistant corporation counsel in 2011. Because the court made those statements after concluding that the plaintiff lacked standing, which is an issue of subject matter jurisdiction; see *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 448, 165 A.3d 1137 (2017) (" '[t]he issue of standing implicates subject matter jurisdiction' "); that further discussion of the plaintiff's special defense was nonessential to the court's judgment and constitutes "pure dicta" that does not have preclusive effect. See *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 246, 558 A.2d 986 (1989) ("[o]nce it becomes clear that the trial court lacked subject matter jurisdiction . . . any further discussion of the merits is pure dicta" (internal quotation marks omitted)); see also *Healey* v. *Mantell*, 216 Conn. App. 514, 526, 285 A.3d 823 (2022) ("If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. . . .

issue that the court decided in that action is distinct from the standing issue raised in the present quo warranto action. As the city argued in its memorandum of law in support of its motion for summary judgment in the foreclosure action, the plaintiff lacked standing to assert a defense other than one "that relates to the making, validity or enforcement of the lien"[15] and to challenge the city's choice of counsel, "an entitlement belonging to the [city]." Accordingly, the issue of whether the plaintiff had standing to defensively challenge the authority of the city's counsel to represent the city in a foreclosure proceeding was necessarily

Thus, statements by a court regarding a nonessential issue are treated as merely dicta." (Emphasis omitted; internal quotation marks omitted.)).

Regardless, even if the foreclosure court's additional discussion of that special defense did not constitute dicta, whether Wickless was reappointed as assistant corporation counsel in 2011 does not resolve the issue in the present action, that is, whether Brown Jacobson and Wickless are currently qualified to hold the offices of corporation counsel and assistant corporation counsel. Resolution of that question requires the court to interpret provisions of the city charter and code of ordinances, which it did not do in the foreclosure action, in light of the present circumstances of the defendants. See *DeMayo* v. *Quinn*, 315 Conn. 37, 40–41, 105 A.3d 141 (2014) (whether "the defendant's appointment to the office of corporation counsel violated the charter presents a question of law . . . [that] requires us to construe provisions of [a municipal] charter" (citations omitted; internal quotation marks omitted)).

[15] See *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 665–67, 212 A.3d 226 (2019) ("[T]he 'making, validity, or enforcement test' is a legal creation of uncertain origin, but it has taken root as the accepted general rule in the Superior and Appellate Courts over the past two decades. Its scope, however, has been the subject of some debate in those courts. This court has never expressly endorsed this test. . . . In reaching our decision, we presume that the Appellate Court did not intend for the making, validity, or enforcement test to require mortgagors to meet a more stringent test than that required for special defenses and counterclaims in nonforeclosure actions. We therefore interpret the test as nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions. See *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 605, 92 A.3d 278 ('a counterclaim must simply have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test as set forth in Practice Book § 10-10 and the policy considerations it reflects'), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014)." (Citations omitted; footnotes omitted.)).

determined and essential to the judgment in the foreclosure action and, therefore, would have preclusive effect if the plaintiff sought to assert that same defense in a subsequent *foreclosure* action. The court did not decide, however, whether the plaintiff has standing to initiate a quo warranto action, which depends solely on her status as a taxpayer.

General Statutes § 52-491 provides: "When any person or corporation usurps the exercise of any office, franchise or jurisdiction, the Superior Court may proceed, on a complaint in the nature of a quo warranto, to punish such person or corporation for such usurpation, according to the course of the common law and may proceed therein and render judgment according to the course of the common law." "Since [our Supreme Court] decided *State ex rel. Waterbury* v. *Martin*, [46 Conn. 479 (1878)], [it has] relied implicitly on the rule established therein that a plaintiff's status as a taxpayer is sufficient to establish standing to pursue a quo warranto action [under § 52-491]. See, e.g., *Cheshire* v. *McKenney*, 182 Conn. 253, 254–55, 438 A.2d 88 (1980) (quo warranto action filed, in part, by plaintiffs as councilmen, residents and taxpayers); *State ex rel. Barnard* v. *Ambrogio*, 162 Conn. 491, 493, 294 A.2d 529 (1972) (quo warranto action brought by plaintiff as finance director and taxpayer); *State ex rel. Sloane* v. *Reidy*, 152 Conn. 419, 420, 209 A.2d 674 (1965) (quo warranto action brought by plaintiffs as residents and taxpayers); *Civil Service Commission* v. *Pekrul*, 41 Conn. Sup[p]. 302, 303, 308, 571 A.2d 715 [(1989)] (concluding that plaintiff as city resident and taxpayer had standing to bring quo warranto action), aff'd, 221 Conn. 12, 14, 601 A.2d 538 (1992) (affirming trial court decision 'in all of its procedural and substantive ramifications' . . .). Even though standing was not an issue expressly before [the court] in these cases, in reaching the substantive issue on appeal, [the] court necessarily presumed that

the plaintiffs, as taxpayers, had alleged sufficient grounds for standing, as standing implicates the trial court's subject matter jurisdiction." (Emphasis omitted.) *Bateson* v. *Weddle*, 306 Conn. 1, 8, 48 A.3d 652 (2012).

Here, the plaintiff alleged in her complaint in the present action that she is a "resident and taxpayer" of the city.[16] The issue of whether the plaintiff is in fact a taxpayer of the city was not decided in the foreclosure action. Even if it had been, the fact that the plaintiff was not a taxpayer in 2012 would not collaterally estop her from claiming that she was a taxpayer in 2021, when she brought the present action. Consequently, the foreclosure action does not bar the plaintiff from litigating her standing to pursue, or the merits of, the present quo warranto action.

Therefore, because the issues raised in the present action were not decided in either of the two cases on which the court relied, the court improperly concluded that the doctrine of collateral estoppel precludes the plaintiff's quo warranto action.

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

In this opinion the other judges concurred.

LIBERTY INSURANCE CORPORATION ET AL. *v.* THEODORE JOHNSON ET AL. (AC 45933)

Suarez, Seeley and Norcott, Js.

Syllabus

The defendant policyholders, T and K, appealed to this court from the judgment rendered by the trial court, following its granting of a motion

[16] During oral argument before this court, the plaintiff confirmed that she based her claim of standing on her status as a taxpayer in the city.

for summary judgment filed by the plaintiff insurance companies, L Co., M Co. and S Co., declaring that the plaintiffs did not have a duty to defend or indemnify the defendants in a separate tort action. According to the allegations of the complaint in the tort action, the defendants' son, A, a minor, consumed alcohol at a bar, after which he went to the defendants' house, where he was visibly intoxicated and consumed more alcohol. At some point, A left the defendants' house and operated a motor vehicle owned by T and in which another individual, J, was a passenger. A lost control of the motor vehicle and struck a telephone pole, causing J to sustain personal injuries in the accident. J subsequently commenced the tort action against the bar and its backer, as well as T, K and A. J alleged claims against T and K for, inter alia, negligence. The defendants sought coverage for J's claims from the plaintiffs under a homeowners insurance policy issued by L Co., an automobile insurance policy issued by S Co., and an umbrella insurance policy issued by M Co. Thereafter, the plaintiffs commenced the present declaratory judgment action. The plaintiffs subsequently filed a motion for summary judgment, claiming that no reasonable fact finder could conclude that they had a duty to defend or indemnify the defendants in the tort action because J did not seek damages covered by any of the insurance policies issued to the defendants by the plaintiffs. Specifically, they argued that a motor vehicle exclusion in the homeowners policy that excluded coverage for bodily injury or property damage arising out of, inter alia, the ownership, maintenance or use of a motor vehicle owned or operated by or rented or loaned to an insured barred coverage under the homeowners policy because J's claims against the defendants arose out of T's ownership of the vehicle and A's negligent operation of that vehicle; that the coverage for bodily injury under the automobile policy had been cancelled prior to the date of the accident; and that J's claims were not covered under the umbrella policy because it did not afford coverage against liability for bodily injury arising out of the use of a motor vehicle owned by any insured unless the liability was covered by an underlying policy and, because there was no underlying coverage under the homeowners or automobile policies, there could be no coverage under the umbrella policy. In response, the defendants asserted that, because some of the claims against the defendants in the tort action alleged negligence separate and apart from the motor vehicle accident, including that T and K were negligent by permitting A to consume alcohol at their home and permitting him to leave the home and operate a motor vehicle despite A's intoxication, their alleged negligence did not fall within the scope of the motor vehicle exclusion relied on by the plaintiffs and, thus, there were claims against the defendants in the tort action that fell within the language providing coverage pursuant to the homeowners and umbrella policies. The defendants argued further that, because there were one or more covered claims, they were entitled to a defense in the tort action and questions of fact remained

as to whether they were entitled to indemnity under the applicable policies. The defendants made no argument that coverage existed under the automobile policy. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the trial court improperly granted the plaintiffs' motion for summary judgment on the basis of its determination that the motor vehicle exclusion in the homeowners policy applied and, thus, that the plaintiffs had no duty to defend the defendants in the tort action:

a. The trial court properly examined the allegations of the complaint in the tort action to determine whether any one of the specifications of negligence against T and K could support a claim that falls within coverage under the homeowners policy and, contrary to the defendants' argument that several of the allegations or specifications of negligence in the tort action did not fall within the scope of the motor vehicle exclusion because they involved either negligent supervision or the provision of alcohol by the defendants while in their house and that there was no close link in time, causation or geography between those specifications and the use of a motor vehicle, guiding precedent, namely, *Hogle* v. *Hogle* (167 Conn. 572) and *United Services Automobile Assn.* v. *Kaschel* (84 Conn. App. 139), established that whether the motor vehicle exclusion applied depended on whether there was a sufficient causal link between the bodily injuries claimed in the tort action and the use of a motor vehicle, rather than the negligence alleged and the use of a motor vehicle; moreover, this was not a case in which the allegations in the underlying complaint revealed that the injuries sustained by J could have resulted only from the alleged negligent acts of the defendants while in their home, as the only reasonable interpretation of the complaint in the tort action revealed that the motor vehicle accident was the operative event that gave rise to J's injuries, and, as such, the inescapable conclusion was that those injuries were connected with, had their origins in, grew out of, flowed from, or were incident to the use of an automobile, triggering the motor vehicle exclusion.

b. Although the defendants attempted to distinguish *Hogle* and *Kaschel*, claiming that the trial court should not have relied on those cases in granting the plaintiffs' motion for summary judgment because both of those cases involved insureds whose alleged negligence was not separable from their use of a motor vehicle, the defendant insured in each case was the operator of the motor vehicle, and the alleged negligence in those cases was virtually contemporaneous with the operation of the motor vehicle and occurred at or near where the motor vehicle accident took place, the factors on which the defendants relied to distinguish *Hogle* and *Kaschel* were not the same factors on which those decisions were based, as this court and the Supreme Court did not base those decisions on temporal or geographical factors but focused, instead, on the language of the exclusion in the insurance policy and whether the use of a motor vehicle was connected with the accident that caused the

injuries; moreover, the defendants' attempt to distinguish *Hogle* and *Kaschel* on the ground that those cases involved a defendant insured who operated the motor vehicle was undermined by the Supreme Court's statement in *Hogle* that its decision did not depend on whether it was the driver's negligent operation of the motor vehicle or the activities of his dog inside the motor vehicle that constituted the proximate cause of the accident but, rather, depended on whether the use of the motor vehicle was connected with the accident or the creation of a condition that caused the accident; furthermore, *New London County Mutual Ins. Co.* v. *Nantes* (303 Conn. 737) and *New London County Mutual Ins. Co.* v. *Bialobrodec* (137 Conn. App. 474) provided further support for this court's determination that the appropriate inquiry for determining the applicability of the motor vehicle exclusion in the homeowners policy was whether there was a sufficient causal link between the injuries claimed and the use of a motor vehicle, and, accordingly, the defendants' attempt to distinguish *Kaschel* and *Hogle* as a basis for asserting that the motor vehicle exclusion did not apply was unavailing.

2. The defendants could not prevail on their argument that the court improperly failed to construe the homeowners policy from the standpoint of a reasonable layperson, as, aside from citing certain basic principles of insurance law, the defendants made the same arguments about the specifications of negligence concerning their alleged negligent conduct at their home and the lack of a temporal, causal or geographical nexus to the use of a motor vehicle, which this court had already addressed and rejected.

3. The defendants could not prevail on their argument that case law supported the conclusion that a duty to defend existed in the present case: although the defendants pointed to case law involving concurring causes or a predominating efficient cause of a loss in maintaining that the motor vehicle exclusion should not be construed to bar a duty to defend covered, prior alleged causes of the loss, such as the negligence of the defendants, the cases on which the defendants relied were inapposite to the present case and did not involve the question of whether an insurer had a duty to defend in such situations; moreover, to the extent that the defendants repeated their arguments regarding the lack of a causal connection between the specific allegations of their alleged negligence that occurred at their home and a motor vehicle, prior case law provided that an insurer has a duty to defend only if the underlying complaint reasonably alleges an injury that is covered by the policy, not whether the allegations of negligence are so covered; furthermore, although the defendants relied on case law from other jurisdictions in arguing that courts in such cases have concluded that a motor vehicle exclusion does not apply under circumstances analogous to the present case, in light of this court's determination that the decision in the present case was controlled by *Hogle* and *Kaschel*, as well as other applicable

Connecticut precedent, this court did not need to look outside of Connecticut case law for guidance on this issue.

4. Contrary to the defendants' claim that M Co. had a duty to defend and/or indemnify them under the umbrella policy with respect to the underlying tort action, the clear language of that policy barred coverage for personal injury or property damage arising out of, inter alia, the use of a motor vehicle owned by any insured, unless the liability was covered by an underlying policy or by other valid and collectible insurance, and, because it was undisputed that coverage for bodily injury and property damage under the automobile policy had been deleted prior to the date of the accident that caused J's injuries and this court concluded that the trial court correctly determined that the motor vehicle exclusion in the homeowners policy precluded coverage under that policy, there was no coverage pursuant to an underlying policy.

Argued October 5—officially released December 5, 2023

Procedural History

Action for a declaratory judgment to determine whether the plaintiffs had a duty to defend and indemnify the defendants under certain insurance policies in an action seeking to recover damages for injuries sustained in a motor vehicle accident, brought to the Superior Court in the judicial district of Hartford, where the court, *Reed*, *J.*, granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the defendants appealed to this court. *Affirmed.*

Joseph M. Busher, *Jr.*, for the appellants (defendants).

Kerry R. Callahan, with whom was *Andrew W. O'Sullivan*, for the appellees (plaintiffs).

Opinion

SEELEY, J. The defendants, Theodore Johnson (Theodore) and Kim Johnson (Kim),[1] appeal from the judgment rendered by the trial court following its granting of a motion for summary judgment filed by the plaintiffs,

[1] In this opinion, we refer to the defendants individually by name when necessary and collectively as the defendants.

Liberty Insurance Corporation (Liberty Insurance), Liberty Mutual Insurance Company (Liberty Mutual) and Safeco Insurance Company of Illinois (Safeco).[2] The primary issue in this appeal concerns whether the trial court properly determined that there was no genuine issue of material fact that the plaintiffs do not have a duty to defend the defendants from claims asserted against them in a separate action that stemmed from a motor vehicle accident in which the defendants' son, Aaron Johnson (Aaron), was driving a motor vehicle owned by Theodore when he lost control of the vehicle and struck a telephone pole, causing serious injuries to a passenger in the vehicle, Jordan Torres. We affirm the judgment of the court.

The record reveals the following undisputed facts and procedural history. At some point prior to 1:33 a.m. on December 26, 2019, Aaron left the defendants' house and operated a 1997 Audi A4 2.8 Quattro (Audi) owned by Theodore. Torres was a passenger in the Audi at the time. As Aaron attempted to navigate a curve, he lost control of the Audi, crossed into the westbound lane of traffic, and left the roadway, striking a telephone pole.

Torres, who sustained personal injuries in the accident, subsequently commenced an action (Torres action) against a bar in Newington and its backer, as well as Theodore, Kim and Aaron. In the Torres action, Torres alleged that, on December 25, 2019, Aaron, a minor, consumed alcohol at the bar, after which he went to the defendants' house in Glastonbury, where he was visibly intoxicated and consumed more alcohol. Torres alleged claims against Theodore for negligence and vicarious liability[3] related to the negligence of

[2] In this opinion, we refer to Liberty Insurance, Liberty Mutual and Safeco by name when necessary and collectively as the plaintiffs.

[3] Specifically, count eight of the complaint in the Torres action alleged a claim for vicarious liability against Theodore, asserting that Theodore, as the owner of the Audi, was vicariously liable for the negligence of Aaron. Pursuant to the homeowners insurance policy issued to the defendants by Liberty Insurance, personal liability coverage does not apply to bodily injury

Aaron. The negligence claim against Theodore alleges that the accident and Torres' resulting "injuries, damages, and losses . . . were caused by the negligence of [Theodore] in one or more of the following ways: (a) In that [Theodore] allowed and/or permitted [Aaron] to consume alcohol and/or liquor at his home despite [Aaron] being a minor; (b) in that [Theodore] allowed access to and/or furnished alcohol to a minor, [Aaron]; (c) in that [Theodore] allowed [Aaron] to leave his home despite his intoxication; (d) in that [Theodore] allowed [Aaron] to operate a motor vehicle he owned despite his intoxication; (e) in that [Theodore] allowed [Aaron] to operate his vehicle despite his intoxication; (f) in that [Theodore] allowed [Aaron] to operate his vehicle despite lacking competence on proper and safe operation of said vehicle; (g) in that [Theodore] allowed [Aaron] to operate his vehicle in such a way as to endanger the well-being of [Torres] as his passenger; (h) in that [Theodore] permitted [Aaron], a minor, to possess alcohol and/or liquor in his home and failed to take reasonable efforts to halt such possession and/or consumption in violation of [General Statutes] § 30-89a; [and] (i) in that [Theodore] failed to supervise [Aaron] and his guests while in his home." Torres also asserted a claim of negligence against Kim, which is nearly identical to the one against Theodore except that it excludes any allegation that she owned the vehicle driven by Aaron.

Following the commencement of the Torres action, the defendants sought coverage from the plaintiffs for Torres' claims under three policies of insurance: (1) a homeowners insurance policy issued to the defendants

or property damage arising out of "[v]icarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above," namely, a motor vehicle. The trial court concluded that the exclusion for claims of vicarious liability barred coverage for the vicarious liability claim against Theodore for his son's actions. The defendants have not challenged this holding on appeal.

by Liberty Insurance (homeowners policy); (2) an automobile insurance policy issued to the defendants by Safeco (automobile policy); and (3) an umbrella insurance policy issued to the defendants by Liberty Mutual (umbrella policy). Thereafter, the plaintiffs commenced the present action seeking a judgment declaring that the plaintiffs are not obligated to defend or indemnify the defendants with respect to the Torres action.

The plaintiffs subsequently filed a motion for summary judgment. In support thereof, the plaintiffs argued that no reasonable fact finder could conclude that they have a duty to defend or indemnify the defendants in the Torres action because, in that action, Torres did not seek damages covered by any of the policies of insurance issued to the defendants by the plaintiffs. Specifically, they based that argument on an exclusion in the homeowners policy that excludes coverage for " 'bodily injury' or 'property damage' . . . arising out of (1) [t]he ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an 'insured' [motor vehicle exclusion] . . . ." Thus, according to the plaintiffs, because the claims asserted against the defendants in the Torres action arose out of Theodore's ownership of the Audi, as well as Aaron's negligent operation of that vehicle, the motor vehicle exclusion barred coverage under the homeowners policy.

With respect to the automobile policy, the plaintiffs asserted that the policy's coverage for bodily injury for the Audi had been cancelled prior to the date of the accident, at the request of the defendants. The plaintiffs provided documentation demonstrating that coverage for bodily injury and property damage had been deleted from the automobile policy, effective December 12, 2019, including a letter from Safeco to the defendants confirming their change in coverage and an affidavit

attesting to the accuracy of the letter and its contents. Finally, as to the umbrella policy, the plaintiffs argued that it "does not afford coverage against liability for bodily injury arising out of the use of a motor vehicle owned by any insured unless the liability is covered by an underlying policy." That is, because there is no underlying coverage under the homeowners or automobile policies, there can be no coverage under the umbrella policy.

The defendants filed a memorandum of law in opposition to the motion for summary judgment, arguing that, because some of the claims against the defendants in the Torres action allege negligence separate and apart from the motor vehicle accident, their alleged negligence does not fall within the scope of the motor vehicle exclusion relied on by the plaintiffs and, thus, there are claims against the defendants in the Torres action that fall within the language providing coverage pursuant to the homeowners and umbrella policies. Therefore, "a reasonable policyholder could and would likely reasonably believe that the conduct [that] they were alleged to have engaged in would be covered under the language of the homeowners [policy] and thus the umbrella policy." The defendants argued further that, because "there are one or more covered claims, the [defendants] are entitled to a defense in the [Torres action] . . . [and questions of fact remain] as to whether they are entitled to indemnity under the applicable policies."

In an order dated October 3, 2022, the court granted the plaintiffs' motion for summary judgment. In its decision, the court first addressed the motor vehicle exclusion in the homeowners policy, concluding that, because "the claims for bodily injury [in the Torres action] arise from the ownership and use of [Theodore's] vehicle . . . the motor vehicle exclusion under the homeowners policy applies. Accordingly, coverage

for the bodily injury claims brought by Torres against Theodore and Kim . . . arising from their son's negligent operation of a motor vehicle is barred under this exclusion in their homeowners policy. Similarly, the defendants' homeowners policy . . . contains an exclusion for claims for vicarious liability, which the court concludes bars coverage for vicarious liability claims against [Theodore] for his son's actions." The court next addressed the automobile policy, which it found had been cancelled, at the defendants' request, as of December 11, 2019, prior to the date of the accident. In light of its conclusion that the motor vehicle exclusion in the homeowners policy barred coverage and its finding that the automobile policy had been cancelled prior to the date of the accident, the court concluded that "there was no underlying policy to support coverage under the defendants' umbrella policy, which excludes coverage for bodily injury claims involving the ownership or use of a vehicle owned by the insured which is not 'covered by an underlying policy or by other valid and collectible insurance.' "[4] From the judgment rendered in favor of the plaintiffs, the defendants appealed to this court. Additional facts and procedural history will be set forth as necessary.

Before we address the merits of the appeal, we set forth our standard of review and well settled principles governing the interpretation of insurance contracts.

[4] In their memorandum in opposition to the motion for summary judgment and before the trial court, the defendants made no argument that coverage exists under the automobile policy, nor have they made any such argument in this appeal. As we stated, the court concluded that the automobile policy had been cancelled, at the defendants' request, prior to the date of the accident and that, as a result, there was no coverage under that policy in effect when the accident occurred on December 26, 2019. In this appeal, the defendants have not challenged the court's finding that the automobile policy had been cancelled prior to the date of the accident. Accordingly, we confine our analysis to the homeowners and umbrella policies.

"The standard of review of a trial court's decision granting [a motion for] summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Dusto* v. *Rogers Corp.*, 222 Conn. App. 71, 87, A.3d (2023).

"Our standard of review for interpreting insurance policies is [also] well settled. The construction of an insurance policy presents a question of law that we review de novo. . . . When construing an insurance policy, we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . . Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent

of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . .

"The question of whether an insurer has a duty to defend its insured is purely a question of law . . . . An insurer's duty to defend is determined by reference to the allegations contained in the [underlying] complaint. . . . The duty to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage. . . . If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured. . . . That being said, an insurer has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy. . . . [W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable. . . . There is also no duty to defend if the complaint alleges a liability which the policy does not cover . . . . Because the duty to defend is broader in scope than the duty to indemnify, an insurer that does not have a

duty to defend likewise will not have a duty to indemnify. . . .

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

"An insured, in turn, may rebut an insurer's claim that it has no duty to defend him in the light of an applicable policy exclusion by showing that at least one of his allegations, as pleaded states a claim that falls even possibly outside the scope of the exclusion or within an exception to that exclusion. Unless the allegations of any such underlying claim fall so clearly and unambiguously within a policy exclusion as to eliminate any possible coverage, the insurer must provide a defense to its insured." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 239–41, 291 A.3d 1051 (2023); see also *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 156, 61 A.3d 485 (2013) (despite breadth of rule that duty to defend is triggered whenever complaint alleges facts that potentially could fall within scope of coverage, our Supreme Court has "recognized the necessary limits of [that] rule" and "will not predicate

the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable" (internal quotation marks omitted)).

With these principles in mind, we turn to the defendants' claim on appeal. The defendants' principal claim on appeal is that the court improperly granted the plaintiffs' motion for summary judgment on the basis of its determination that the motor vehicle exclusion in the homeowners policy applies and, thus, that the plaintiffs have no duty to defend the defendants in the Torres action. In support of that claim, the defendants raise a number of arguments, namely, (1) the court "erred because it did not view the allegations of negligence against the defendants to determine whether any one of the specifications could support a claim within the coverage," (2) the court improperly relied on case law involving alleged negligence of motor vehicle operators, which is distinguishable from the circumstances in the present case, (3) the court improperly failed "to construe the homeowners policy from the standpoint of a reasonable layperson," (4) case law supports the conclusion that a duty to defend exists in the present case, and (5) "[d]uties to defend and/or indemnify exist under the umbrella policy."

I

We address the defendants' first two arguments together. The defendants' first argument is that the court improperly failed to examine the allegations of the complaint in the Torres action to determine whether any one of the specifications of negligence against Theodore and Kim could support a claim that falls within coverage under the homeowners policy.[5] This argument

[5] Although the defendants argue that the court failed to examine the allegations of the complaint in the Torres action to determine whether any one of the specifications of negligence against them could support a claim that falls within coverage under the homeowners policy, any alleged failure of the court to do so is of no consequence given our plenary review over this matter and the fact that we conduct such an examination in this appeal.

is premised on the long-standing principle that "[a]n insurer's duty to defend is triggered if at least one allegation of the complaint falls even *possibly* within the coverage." (Emphasis in original; internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 805, 67 A.3d 961 (2013); see id., 806 ("the duty to defend is triggered whenever a complaint alleges facts that *potentially* could fall within the scope of coverage" (emphasis in original; internal quotation marks omitted)). In their second argument, the defendants attempt to distinguish case law on which the trial court relied in making its decision.

With respect to the defendants' first argument, count nine of the complaint in the Torres action alleges nine specifications of negligence against Theodore, and count ten alleges eight specifications of negligence against Kim, in that each count alleges that either Theodore or Kim was negligent "in one or more of the following ways . . . ." The defendants argue that a number of those allegations or specifications of negligence do not fall within the scope of the motor vehicle exclusion because they involve either negligent supervision or the provision of alcohol by the defendants while in their house and are disconnected from the use of a motor vehicle. The specific allegations of negligence on which the defendants rely include the following, as set forth in count nine: "(a) [i]n that [Theodore] allowed and/or permitted [Aaron] to consume alcohol and/or liquor at his home despite [Aaron] being a minor; (b) in that

Nevertheless, it appears from the court's decision that it acknowledged the allegations of negligence relating to the defendants' conduct at their home in serving alcohol to their son but rejected their argument that "there [was] no nexus between their alleged negligence [at their home] and the operation of a motor vehicle." Instead, the court concluded that "[t]he claims by Torres clearly arise from [Aaron's] alleged negligent operation of [Theodore's] car, including driving under the influence. '[T]he motor vehicle accident was the operative agent giving rise to the injuries alleged . . . .' "

[Theodore] allowed access to and/or furnished alcohol to a minor, [Aaron]; (c) in that [Theodore] allowed [Aaron] to leave his home despite his intoxication . . . (h) in that [Theodore] permitted [Aaron], a minor, to possess alcohol and/or liquor in his home and failed to take reasonable efforts to halt such possession and/or consumption in violation of . . . § 30-89a; [and] (i) in that [Theodore] failed to supervise [Aaron] and his guests while in his home." Identical allegations of negligence were made against Kim in count ten, although the numbering differs slightly. According to the defendants, "there is no close temporal link, no necessary causal link, and no geographic link between the identified specifications of negligence and the use or ownership of a [motor] vehicle."[6] The defendants therefore argue that, "because any one of the five identified specifications of negligence as to Theodore . . . and . . . [Kim] is sufficient to establish a duty to defend, the court erred in granting [the motion for] summary judgment." We do not agree.

Our decision is guided by *Hogle* v. *Hogle*, 167 Conn. 572, 356 A.2d 172 (1975), and *United Services Automobile Assn.* v. *Kaschel*, 84 Conn. App. 139, 851 A.2d 1257, cert. denied, 271 Conn. 917, 859 A.2d 575 (2004), which

[6] Specifically, the defendants argue that it is "unclear when during the subsequent six hours Aaron arrived at [the defendants'] house in Glastonbury and when the [defendants'] allegedly negligent acts or omissions occurred. It is equally uncertain as to the duration of time elapsed between the allegedly negligent acts or omissions identified above and the injuries. There is thus a significant temporal disconnect between the [defendants'] alleged negligence and the alleged injuries." Because the complaint in the Torres action does not allege ownership, operation or use of a motor vehicle by Kim, the defendants further argue that "[t]here is no necessary causal link between [Kim's] alleged negligence and the operation, use or ownership of an automobile." With respect to their argument about the lack of a geographic connection between the defendants and an automobile, the defendants point out that all of the allegations of negligence concerning them involve conduct that occurred in their home and that there are no allegations of negligence by them for any conduct occurring outside of their home.

we first briefly discuss. In *Hogle*, the plaintiff wife brought an action against her husband seeking to recover damages for personal injuries she sustained when the automobile in which she was a passenger and which was being driven by her husband was involved in a collision. *Hogle* v. *Hogle*, supra, 574. The husband filed a third-party complaint against his insurance company, claiming that the accident was caused by his dog, which had jumped from the rear seat to the front seat, striking him while he was driving, and that his homeowners insurance policy extended coverage to him for any injuries or damage caused by the activities of his dog. Id., 574–75. The insurer claimed, as a defense to the third-party action, that coverage was specifically excluded by the terms of the homeowners policy, which provided that coverage "shall not apply to the ownership, maintenance, operation, use, loading or unloading of (1) automobiles . . . while away from the premises . . . ." (Internal quotation marks omitted.) Id., 575. Specifically, the insurer asserted that the sums the husband became liable to pay after he settled the underlying action with his wife were excluded from coverage because they arose from his operation or use of his car away from the covered premises. Id., 575–76. The trial court granted the insurer's motion for summary judgment as to the third-party complaint, and the husband appealed. Id., 576.

On appeal, our Supreme Court concluded that the trial court properly granted the insurer's motion for summary judgment. In doing so, the court addressed the meaning of the language "arise out of" the "use" of an automobile, explaining: "[I]t is generally understood that for liability for an accident or an injury to be said to 'arise out of' the 'use' of an automobile for the purpose of determining coverage under the appropriate provisions of a liability insurance policy, it is sufficient to show only that the accident or injury 'was connected

with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile." Id., 577. The court further stated: "[The insurer's] obligation to pay the judgment rendered in favor of [the wife] does not depend on whether it was [the husband's] negligent operation of the car, or the activities of his dog inside the car, which constituted the proximate cause of the accident, and, consequently, of [the wife's] injuries, as [the husband] contends. Such obligation, rather, depends in this case on another fact, namely, whether [the husband's] use of his car was connected with the accident or the creation of a condition that caused the accident. . . . Our review of the pleadings, affidavits, and other proofs submitted discloses no genuine issue between [the husband] and [the insurer] on the fact that his use of the automobile was in some way connected with the accident which resulted in the injuries complained of by [his wife]. His liability to pay the damages assessed against him in the judgment rendered in favor of [the wife], then, can be said to have arisen from his use of the automobile while away from the insured premises, so that coverage under the homeowner's policy was expressly excluded." (Citations omitted; internal quotation marks omitted.) Id., 578–79.

In *Kaschel*, like in the present case, the plaintiff insurer brought a declaratory judgment action seeking a determination of whether it was obligated, pursuant to a homeowners insurance policy it had issued to its insured, John T. Kelly, who died prior to the commencement of the declaratory judgment action, to defend and to indemnify the defendant Brian Kaschel, the administrator of the insured's estate, in an underlying tort action. *United Services Automobile Assn.* v. *Kaschel*, supra, 84 Conn. App. 140–41. The underlying tort action

concerned an incident in which Robert Choquette was injured when his motorcycle was struck by an automobile operated by Kelly, who allegedly was intoxicated at the time. Id., 141. After the collision, Kelly allegedly exited his vehicle to check Choquette's condition but then left the scene without calling for help or rendering assistance. Id. Choquette subsequently commenced a tort action against Kelly alleging that Kelly was negligent and reckless in the operation of his vehicle and that Kelly's negligent failure to render aid and assistance to Choquette exacerbated his injuries. Id., 141–42. In the declaratory judgment action, the trial court granted the plaintiff insurer's motion for summary judgment as to the counts alleging Kelly's negligent and reckless operation of his vehicle, as those counts were excluded from coverage under a provision in the policy excluding coverage for claims of bodily injury or property damage " 'arising out of . . . the . . . use . . . of motor vehicles . . . owned or operated by . . . an insured,' " which is virtually identical to the language of the motor vehicle exclusion in the present case. Id., 142, 145. The trial court, however, denied the motion for summary judgment as to the count concerning Kelly's actions in leaving the scene without rendering assistance, as the court found that those actions "were independent of the events leading to the accident and Kelly's use of his vehicle." Id., 142.

The primary issue before this court on appeal was "whether the injuries that [Choquette] allegedly sustained as a result of Kelly's failure to render aid to him arose out of Kelly's use of his motor vehicle for purposes of exclusion from coverage under the homeowner's insurance policy." Id., 144. In concluding that the trial court "incorrectly determined that those injuries did not arise out of Kelly's use of his motor vehicle"; id.; this court, relying on *Hogle*, stated: "In the present case, it is clear that, pursuant to *Hogle*, any injuries that

[Choquette] allegedly sustained as a result of Kelly's failure to render aid to him arose out of Kelly's use of his motor vehicle. The motor vehicle accident was the operative event giving rise to the injuries alleged in . . . the amended complaint and, therefore, those injuries were connected with, had [their] origins in, grew out of, flowed from, or were incident to . . . the use of the vehicle. This is not a case in which the allegations in the underlying complaint reveal that the injuries could have resulted only from the wholly independent act of failing to render aid." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 146.

Guided by this precedent, we now turn to the present case. Whether the plaintiffs have a duty to defend depends on whether the complaint in the Torres action states facts that bring Torres' claim for damages within coverage of the homeowners policy.[7] See *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 869, 261 A.3d 825 (2021) (resolution of issue of whether insurer had duty to defend required court to examine allegations of operative complaint in personal injury action and language of insurance policy); *Edelman* v. *Pacific Employers Ins. Co.*, 53 Conn. App. 54, 59, 728 A.2d 531 ("[a]n insurer's duty to defend . . . is determined by reference to the allegations contained in the [injured party's] complaint" (internal quotation marks omitted)), cert. denied, 249 Conn. 918, 733 A.2d 229 (1999); *Schwartz* v. *Stevenson*, 37 Conn. App. 581, 584, 657 A.2d 244 (1995) ("[a] duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage" (internal quotation marks omitted)). We, thus, must examine the allegations of the complaint in the Torres action in light of the language of the homeowners policy

[7] "[T]he interpretation of pleadings is always a question of law for the court." (Internal quotation marks omitted.) *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 871, 261 A.3d 825 (2021).

and the motor vehicle exclusion contained therein. Although some of the allegations in the negligence counts against the defendants in the Torres action concern conduct by the defendants that occurred at their home in Glastonbury, those counts clearly and unambiguously state that the injuries and damages complained of were sustained "[a]s a result of the collision . . . ." In other words, the operative event that gave rise to the injuries and damages sustained by Torres, as alleged in the complaint, was the motor vehicle accident; therefore, like in *Kaschel*, "those injuries were connected with, had [their] origins in, grew out of, flowed from, or were incident to . . . the use of the vehicle." (Citation omitted; internal quotation marks omitted.) *United Services Automobile Assn.* v. *Kaschel*, supra, 84 Conn. App. 146.

Moreover, *Hogle* specifically provides guidance on how the language in the motor vehicle exclusion in the present case is to be construed and directs that, for there to be a causal relationship between the accident and the use of an automobile, "it is sufficient to show only that the *accident* or *injury* 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile . . . ." (Emphasis added.) *Hogle* v. *Hogle*, supra, 167 Conn. 577. Additionally, "our courts have given an expansive meaning to the phrase '*arising out of*' when used in an insurance policy." (Emphasis in original.) *Lift-Up, Inc.* v. *Colony Ins. Co.*, supra, 206 Conn. App. 873; see also *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 43, 801 A.2d 752 (2002) ("the term 'use' with reference to motor vehicles is to be interpreted broadly"). There is no dispute in the present case that there is a sufficient causal relationship between the injuries sustained by Torres in the motor vehicle accident, as alleged in the complaint, and Aaron's use of the Audi.

In relying on the five specifications of negligence that relate to their alleged negligence while in their home in support of their claim that at least one allegation of the complaint in the Torres action falls possibly within coverage, the defendants assert that because there is no close link in time, causation or geography between those identified specifications and the use of a vehicle, those allegations give rise to a duty to defend on the part of the plaintiffs. The defendants, however, have misconstrued the language of the motor vehicle exclusion. That provision excludes coverage for *bodily injury arising out of* the use of a motor vehicle; it does not exclude coverage for *negligence* arising out of the use of a motor vehicle. The appropriate inquiry for determining whether the motor vehicle exclusion applies, therefore, is whether there is a sufficient causal link between the *bodily injuries* claimed in the Torres action and the use of a motor vehicle, and that is consistent with both *Hogle* and *Kaschel*. See also *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 754–55, 36 A.3d 224 (2012) (in construing nearly identical motor vehicle exclusion in insurance policy, our Supreme Court stated that issue "is whether [the] *injuries* were connected with, had their origins in, grew out of, flowed from, or were incident to the employment of the automobile" (emphasis added)). Moreover, this is not a case in which the allegations in the underlying complaint reveal that the injuries sustained by Torres could have resulted only from the alleged negligent acts of the defendants while in their home. As we stated, the only reasonable interpretation of the complaint in the Torres action reveals that the motor vehicle accident was the operative event that gave rise to Torres' injuries, and, as such, the inescapable conclusion is that those injuries were connected with, had their origins in, grew out of, flowed from, or were incident to the use of an automobile. See *Hogle* v. *Hogle*, supra, 167 Conn. 577.

The defendants attempt to distinguish *Hogle* and *Kaschel*, claiming that the trial court should not have relied on those cases in granting the plaintiffs' motion for summary judgment. Specifically, they base that argument on the facts that both of those cases "involved insureds whose alleged negligence was not separable from their use of a motor vehicle," the defendant insured in each case was the operator of the motor vehicle, and the alleged negligence in those cases was "virtually contemporaneous with the operation of the motor vehicle" and occurred at or near where the motor vehicle accident took place. We are not persuaded.

The factors on which the defendants rely to distinguish *Hogle* and *Kaschel*, which concern the time and location of the alleged negligence in relation to the motor vehicle accident, as well as the negligent actor, are not the same factors on which those decisions were based. In neither case did this court or our Supreme Court rest its decision on the timing of the alleged negligence in relation to the operation of the motor vehicle or whether it occurred at or near the scene of the accident. Rather, the issues on appeal in *Hogle* and *Kaschel*, which are nearly identical to the issue in the present appeal, concerned whether the insurer had a duty to defend and/or indemnify an insured when the homeowners insurance policies at issue excluded coverage for bodily injury or property damage related to the use of an automobile or arising out of the use of motor vehicles owned or operated by an insured. Indeed, the language of the motor vehicle exclusion in *Kaschel* is virtually identical to the one at issue in the present case. Although the language of the exclusion in *Hogle* differs slightly from the one in the present case, significantly, it excludes coverage for the "use" of a motor vehicle away from the insured premises, and the court's analysis of language in insurance policies concerning liability for an accident or injury "arising

out of" the "use" of a motor vehicle is instrumental to our determination of the issue in the present appeal.

In deciding whether the insurer had a duty to defend in each appeal in *Hogle* and *Kaschel*, this court and our Supreme Court did not base those decisions on temporal or geographical factors but focused, instead, on the language of the exclusion in the insurance policy and whether the use of a motor vehicle was connected with the accident that caused the injuries. See *Hogle* v. *Hogle*, supra, 167 Conn. 578; *United Services Automobile Assn.* v. *Kaschel*, supra, 84 Conn. App. 146. Additionally, the defendants' attempt to distinguish *Hogle* and *Kaschel* on the ground that those cases involved a defendant insured who operated the motor vehicle is undermined by our Supreme Court's statement in *Hogle* that its decision did "not depend on whether it was [the husband's] negligent operation of the car, or the activities of his dog inside the car, which constituted the proximate cause of the accident . . . ." *Hogle* v. *Hogle*, supra, 578. Instead, in *Hogle*, the court's determination of whether the insurer had a duty to defend or indemnify depended on whether the "use of [the] car was connected with the accident or the creation of a condition that caused the accident." Id. We agree with the plaintiffs that "*Kaschel* and *Hogle* are controlling and determinative as to what constitutes the 'use' of a motor vehicle as applied to an automobile exclusion in a homeowners insurance policy."

In addition to *Hogle* and *Kaschel*, we also find *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 737, and *New London County Mutual Ins. Co.* v. *Bialobrodec*, 137 Conn. App. 474, 48 A.3d 742 (2012), instructive to our resolution of this appeal. In *Nantes*, two houseguests of the insured homeowner were seriously injured when the homeowner left her car running overnight in an attached garage, which caused the house to fill with carbon monoxide. *New London*

County Mutual Ins. Co. v. *Nantes*, supra, 739. The houseguests suffered serious neurological injuries as a result of carbon monoxide poisoning, and they sustained additional injuries when they were dragged from the house, unconscious, by the homeowner. Id., 741. After the houseguests brought an action against the homeowner, the homeowner's insurer commenced a declaratory judgment action, seeking a declaration that the injuries sustained by the houseguests were not covered by a homeowners insurance policy issued by the insurer; id., 742; which excluded coverage for injuries " '[a]rising out of . . . [t]he . . . use' of a motor vehicle." Id., 740. The trial court rendered judgment in favor of the insurer, finding that there was no coverage under the homeowners insurance policy because the injuries sustained by the houseguests fell within the motor vehicle exclusion of the policy. Id., 744. On appeal, our Supreme Court applied the definition of "arising out of" articulated in *Hogle*; id., 753–54; and concluded that the houseguests' injuries arose out of the use of a motor vehicle. Id., 758. Specifically, the court stated: "Consistent with our reasoning in *Hogle*, the fact that [the homeowner's] use of her motor vehicle was connected to or created a condition that caused [the houseguests'] injuries is enough to bring them within the motor vehicle exclusion. . . . Contrary to the defendants' claim . . . [the] dragging injuries [sustained by the houseguests] arose out of the use of a motor vehicle because [the homeowner's] negligent act of leaving her car running in the garage was the proximate cause of those injuries." Id., 758–59. *Nantes*, therefore, provides further support for our determination that the appropriate inquiry for determining the applicability of the motor vehicle exclusion, which excludes coverage for bodily injury arising out of the use of a motor vehicle, is whether there is a sufficient causal link between the injuries claimed and the use of a motor vehicle.

Bialobrodec involved circumstances and claims very similar to those in the present case. *Bialobrodec* was a declaratory judgment action brought by an insurer in which the trial court granted the insured's motion for summary judgment and rendered judgment in its favor, determining that the insurer had no duty to defend its insureds. *New London County Mutual Ins. Co.* v. *Bialobrodec*, supra, 137 Conn. App. 477. The defendant administrator of the estate of the decedent previously had brought an action against the insured parents for their allegedly negligent supervision of their son, claiming that they had allowed their son "to purchase and, thereafter, to give the decedent access to and use of a motorcycle, a motor vehicle, which the decedent operated and crashed, resulting in his death." Id., 476. The trial court determined that a "motor vehicle exclusion provision[8] and [a] negligent entrustment of a motor vehicle exclusion provision, both contained in a homeowner's insurance policy issued by the [insurer], exclude[d] coverage for the defendant's negligent supervision cause of action." (Footnote added.) Id.

On appeal in *Bialobrodec*, the defendant argued that "the court misconstrued his claim as arising out of the use of the motorcycle, when, in fact, his negligent supervision cause of action arises out of the parents' failure to supervise their son." Id., 477. This court rejected that claim, stating: "In his appellate brief, the defendant argues that the decedent's death was caused by the parents' negligent supervision of [their son], not by the decedent's use of the motorcycle. . . . The defendant attempts to separate his negligent supervision legal theory from the factual allegations of his complaint against the parents pertaining to the decedent's accident and injuries arising from his use of the motorcycle. The

[8] The language of the motor vehicle exclusion in *Bialobrodec* is identical to the one at issue in the present case. See *New London County Mutual Ins. Co.* v. *Bialobrodec*, supra, 137 Conn. App. 479.

facts alleged by the defendant in his complaint against the parents, however, underlie and undercut his claim that his negligent supervision cause of action stands alone and is separate from any claims arising from the motorcycle accident because they leave no doubt that the injuries for which he seeks to recover arose out of the decedent's use of the motorcycle owned by an insured under the policy issued by the [insurer]. The policy explicitly and unambiguously provides that bodily injury arising out of the use of motor vehicles owned by an insured shall be excluded from policy coverage. Although the alleged facts may support a negligent supervision cause of action against the parents, that does not change the parameters of our review of this appeal. We review the court's determination that the motor vehicle exclusion provisions of the policy applied to the allegations in the first count of the defendant's complaint against the parents, not whether a negligent supervision cause of action might lie against them for their actions or inaction in the supervision of their son.

" 'It is well settled that, [f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case.' . . . *Luster* v. *Luster*, 128 Conn. App. 259, 262 n.6, 17 A.3d 1068, cert. granted on other grounds, 302 Conn. 904, 23 A.3d 1243 (2011). In his complaint against the parents, the defendant thus makes judicial admissions, including that [their son] owned the motorcycle, that the decedent drove the motorcycle and, thus, engaged in the use of the motorcycle, that, while driving the motorcycle, the decedent crashed and that the crash gave rise to the decedent's fatal injuries and, ultimately, to his death. If the decedent had not used and operated the motorcycle, crashed and suffered injuries, any alleged failure of the parents to supervise their son with respect to the motorcycle

could not be the basis of a cause of action against them by the defendant. Thus, the defendant seeks compensatory damages against the parents based on his factual allegations that the decedent's fatal injuries arose out of the decedent's use or operation of a motorcycle owned by [the son], an insured under the policy, pursuant to a legal theory that the parents negligently failed to supervise their son. Therefore, we conclude that the court properly determined as a matter of law that the [insurer] does not have a duty to defend the parents against the defendant's negligent supervision cause of action because the terms of the motor vehicle exclusion provision exclude coverage for that negligent supervision cause of action that arose from the decedent's use of a motor vehicle owned by an insured under the policy." (Footnote omitted.) *New London County Mutual Ins. Co.* v. *Bialobrodec*, supra, 137 Conn. App. 481–82.

This court's analysis in *Bialobrodec* squarely governs the issue before us in the present case. Like the defendant in *Bialobrodec*, the defendants in the present case attempt to separate the allegations of negligence in the Torres action pertaining to their actions in allegedly providing their son with alcohol, failing to supervise their son, and allowing him to leave the premises driving a vehicle while he was intoxicated from the allegations pertaining to the use of a motor vehicle. Those allegations, however, do not stand alone because the allegations of the complaint leave no doubt that the injuries for which Torres sought to recover arose out of Aaron's use of a motor vehicle owned by an insured. See also *Kling* v. *Hartford Casualty Ins. Co.*, 211 Conn. App. 708, 720, 273 A.3d 717 ("[A]lthough negligence unrelated to the use of an auto *may* have contributed to the plaintiff's injuries, those injuries nonetheless arose out of the use of an auto because, again, the plaintiff would not have been injured without [the tortfeasor's] use of

two autos: his truck and trailer. Consequently, the role that those autos played in injuring the plaintiff is enough to exclude those injuries from coverage under the policy, regardless of any other nonauto related acts of negligence that may have also contributed to the plaintiff's injuries." (Emphasis in original.)), cert. denied, 343 Conn. 926, 275 A.3d 627 (2022).

Because *Nantes* and *Bialobrodec* provide further support for our resolution of this appeal, the defendants' attempt to distinguish *Kaschel* and *Hogle* as a basis for asserting that the motor vehicle exclusion does not apply is unavailing.

On the basis of our plenary review of the record in this case, including our comparison of the allegations of the complaint in the Torres action with the language of the homeowners policy and the motor vehicle exclusion contained therein, we conclude, as a matter of law, that the plaintiffs have no duty to defend the defendants in the Torres action.

II

The defendants' next claim is that the court improperly failed "to construe the homeowners policy from the standpoint of a reasonable layperson." In support of this claim, they rely on the "basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters . . . . [T]he policyholder's expectations should be protected as long as they are objectively reasonable . . . ." *Cody* v. *Remington Electric Shavers*, 179 Conn. 494, 497, 427 A.2d 810 (1980). Aside from quoting that general principle, the defendants make the same arguments about the specifications of negligence concerning their alleged negligent conduct at their home and the lack of a temporal, causal or geographical nexus to the use of a motor vehicle, which we already have addressed and rejected.

For example, they assert that "a reasonable insured could expect that the identified allegations would not be excluded by an automobile exclusion, as the allegations are based upon conduct of a different character, separate in time, location, and completed before the automobile collision. This is especially true where the insured was not involved with the use of an automobile and was not an operator of the vehicle." For the reasons already discussed in part I of this opinion, we reject this claim.[9]

III

The defendants next argue that case law supports the conclusion that a duty to defend exists in the present

[9] The defendants also assert that the language of the exclusion is not clear as to whose ownership of the vehicle it references and that, because Kim is not the alleged owner of the vehicle, the exclusion does not apply to her. To the extent that the defendants argue that the motor vehicle exclusion is ambiguous, we disagree. In *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 737, our Supreme Court was "called on to ascertain the meaning of the phrase, '[a]rising out of' the 'use' of 'motor vehicles,' " and found the phrase to be "clear and unambiguous because our case law explicitly defines it." Id., 753. As the court explained: "Our case law also imparts a single meaning to the phrase use of an automobile: [u]se is to be given its ordinary meaning. It denotes the employment of the automobile for some purpose of the user. . . . Because our case law gives each relevant term a single meaning—albeit an expansive one—there is no ambiguity in a policy exclusion that provides that [c]overage [for] [p]ersonal [l]iability and . . . [m]edical [p]ayments to [o]thers do[es] not apply to bodily injury . . . [a]rising out of . . . [t]he . . . use . . . of motor vehicles . . . ." (Citations omitted; internal quotation marks omitted.) Id., 754. Because that provision was unambiguous, the court in *Nantes* "construe[d] it according to its natural and ordinary meaning . . . ." Id.

Moreover, we note that the motor vehicle exclusion in the present case excludes coverage arising out of the use of motor vehicles "owned or operated by or rented or loaned to *an* 'insured.' " (Emphasis added.) The policy defines an insured as "you and residents of your household who are: (a) Your relatives . . . ." The complaint in the Torres action alleges that Theodore, Kim's husband and a resident in her household who is a relative, is the owner of the Audi. Notably, the policy language applies to a motor vehicle owned by "an" insured, not "the" insured, and, because the negligence claim against Kim is premised on the use of a motor vehicle that is owned by an insured, namely, her husband, the defendants' claim that the motor vehicle

case. They make this argument in two parts: first, they assert that "Connecticut case law recognizes that where there are covered and noncovered causes for an accident, the covered and noncovered causes must be analyzed separately," and second, "case law from other jurisdiction[s] holds that automobile exclusions do not bar coverage for similar allegations." For the reasons that follow, we disagree with both parts of their argument.

With respect to the first part, the defendants rely on case law involving concurring causes or a predominating efficient cause of a loss. See *Frontis* v. *Milwaukee Ins. Co.*, 156 Conn. 492, 242 A.2d 749 (1968); *Edgerton & Sons, Inc.* v. *Minneapolis Fire & Marine Ins. Co.*, 142 Conn. 669, 116 A.2d 514 (1955). Specifically, they point out that "the language contained within the exclusions involved in *Frontis* (building ordinance) and *Edgerton* (load collision) only required an 'indirect' relationship to the loss in order to apply. This is significant since it demonstrates that even when a subsequent event occurs that is within the scope of an exclusion it does not remove an otherwise covered claim from coverage. . . . '[T]he noninsuring clause does not remove the coverage afforded by the general insuring clause.' [*Edgerton & Sons, Inc.* v. *Minneapolis Fire & Marine Ins. Co.*, supra], 674. Accordingly, the motor vehicle exclusion here should not be construed to bar a duty to defend covered, prior alleged causes of the loss, such as the alleged negligence of Kim and Theodore . . . that are temporally, geographically, and causally distinct from the motor vehicle."

The cases on which the defendants rely, however, are inapposite to the present case, which, instead, involves the question of whether an insurer has a duty

exclusion does not apply to count ten because Kim is not the alleged owner of the vehicle is unavailing.

to defend. It bears repeating that, in cases involving the issue of whether an insurer has a duty to defend, "[a]n insurer's duty to defend is determined by reference to the allegations contained in the [underlying] complaint"; (internal quotation marks omitted) *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 218 Conn. App. 240; and the policy language. See *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 714 (determination of whether duty to defend existed required review of policy language and plaintiff's complaint). After comparing the allegations of the complaint with the language of the motor vehicle exclusion in the present case, we agree with the trial court's determination, as a matter of law, that no duty to defend exists. Additionally, to the extent that the defendants repeat their arguments regarding the lack of a causal connection between the specific allegations of their alleged *negligence* that occurred at their home and a motor vehicle, this court has stated previously that "an insurer has a duty to defend only if the underlying complaint reasonably alleges an *injury* that is covered by the policy"; (emphasis altered; internal quotation marks omitted) *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 240; not whether the allegations of negligence are so covered.

In the second part of their argument, the defendants rely on case law from other jurisdictions, arguing that courts in such cases "have concluded that a motor vehicle exclusion does not apply under circumstances analogous to [the present] case . . . ." In light of our determination that our decision is controlled by *Hogle* and *Kaschel*, as well as other applicable Connecticut precedent, we need not look outside our jurisdiction for guidance on this issue. See *Cohen* v. *Dept. of Energy & Environmental Protection*, 215 Conn. App. 767, 796, 285 A.3d 760 ("[i]n the *absence* of controlling or persuasive

Connecticut authority, we look to the law of other jurisdictions" (emphasis added; internal quotation marks omitted)), cert. denied, 345 Conn. 968, 285 A.3d 1126 (2022), and cert. denied, 345 Conn. 969, 285 A.3d 737 (2022).

IV

The defendants' final argument is that "[d]uties to defend and/or indemnify exist under the umbrella policy." This claim requires little discussion. The clear language of the umbrella policy bars coverage for personal injury or property damage "arising out of the ownership, maintenance, use, loading, or unloading of a motor vehicle or watercraft owned, hired or rented by any insured, *unless the liability is covered by an underlying policy* or by other valid and collectible insurance." (Emphasis added.) With respect to the automobile policy, it is undisputed that coverage for bodily injury and property damage had been deleted from that policy, effective December 12, 2019, prior to the date of the accident that caused Torres' injuries. Thus, there was no underlying coverage under that policy at the time of the accident. We also have concluded that the trial court correctly determined that the motor vehicle exclusion in the homeowners policy precludes coverage under that policy. Accordingly, because there is no coverage pursuant to an underlying policy, Liberty Mutual has no duty under the umbrella policy to defend or indemnify the defendants with respect to the Torres action.

Therefore, the trial court properly granted the plaintiffs' motion for summary judgment and determined, as a matter of law, that the plaintiffs have no duty to defend the defendants in the Torres action.

The judgment is affirmed.

In this opinion the other judges concurred.

ERICK BENNETT *v.* COMMISSIONER OF CORRECTION (AC 46491)

Moll, Clark and Seeley, Js.

Syllabus

The petitioner sought a writ of habeas corpus, alleging, inter alia, that he had been denied certain of his constitutional rights at his underlying criminal trial. The habeas court, following a trial, rendered judgment denying his petition for a writ of habeas corpus and the petitioner, on the granting of certification, appealed to this court. During the pendency of his appeal, the petitioner filed a motion to open or vacate the judgment, which the habeas court denied. The habeas court thereafter denied the petitioner's petition for certification to appeal. On the petitioner's appeal to this court, *held* that the petitioner was not entitled to appellate review of his claim that the habeas court improperly denied his motion to open or vacate the judgment denying his habeas petition, as he failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal.

Argued November 16—officially released December 5, 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 the petition; thereafter, the court, *Newson*, *J.*, denied the petitioner's motion to open or vacate the judgment; subsequently, the court, *Newson*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Erick Bennett, self-represented, the appellant (petitioner).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, *Craig P. Nowak*, supervisory assistant state's attorney, and *Adrienne Russo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The self-represented petitioner, Erick Bennett, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his motion to open and/or vacate the judgment denying his third amended petition for a writ of habeas corpus (motion to open). Although the petitioner challenges the merits of the habeas court's denial of his motion to open, he has failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal. Accordingly, we dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. On September 28, 2018, the self-represented petitioner, a sentenced prisoner, filed his third amended petition for a writ of habeas corpus in which he asserted approximately eleven claims, including but not limited to: (1) ineffective assistance of trial and appellate counsel; (2) violations of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (3) judicial bias; (4) due process violations; and (5) actual innocence. On June 15, 2021, following a trial and the submission of posttrial briefs, the habeas court, *Bhatt*, *J.*, denied the petition. Upon the habeas court's grant of certification to appeal from the denial of his habeas petition, the petitioner filed an appeal on October 7, 2021 (prior habeas appeal). In a decision released on February 7, 2023, this court affirmed the judgment of the habeas court. See *Bennett* v. *Commissioner of Correction*, 217 Conn. App. 901, 287 A.3d 1157, cert. denied, 346 Conn. 1019, 292 A.3d 1255 (2023).

Meanwhile, during the pendency of the prior habeas appeal, on November 23, 2022, the petitioner filed his motion to open, which, after a hearing, the court, *Newson*, *J.*, denied on January 20, 2023. On March 30, 2023,

the petitioner filed a petition for certification to appeal from the denial of the motion to open. The court ultimately denied the petition as untimely, and this appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review . . . only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Citation omitted; internal quotation marks omitted.) *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 750–51, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011).

In his briefing to this court, the petitioner has failed to "expressly allege and explain in his brief how the habeas court abused its discretion in denying certification." *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 512–13, 267 A.3d 831 (2021). Under these circumstances, this court repeatedly has concluded, and our Supreme Court has agreed, that a petitioner who has failed to brief this threshold issue is not entitled

to appellate review. See *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 505, 225 A.3d 977 (2020), aff'd, 341 Conn. 508, 267 A.3d 831 (2021); see also *Stanley* v. *Commissioner of Correction*, 217 Conn. App. 805, 808, 290 A.3d 437, cert. denied, 346 Conn. 919, 291 A.3d 607 (2023); *Simonoff* v. *Commissioner of Correction*, 216 Conn. App. 824, 826–27, 286 A.3d 500 (2022); *Cordero* v. *Commissioner of Correction*, 193 Conn. App. 902, 902–903, 215 A.3d 1282, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019); *Thorpe* v. *Commissioner of Correction*, 165 Conn. App. 731, 733, 140 A.3d 319, cert. denied, 323 Conn. 903, 150 A.3d 681 (2016); *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 8, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002); *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477, 722 A.2d 286 (1999). Although we acknowledge that self-represented litigants like the petitioner are afforded some latitude with respect to a court's construction of their pleadings, such accommodation is not permitted where a fundamental issue is neither raised nor briefed, as is the case here. See, e.g., *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005) ("[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law" (internal quotation marks omitted)). As stated by our Supreme Court, "there is no exception to the requirement that a habeas petitioner must expressly allege that the habeas court abused its discretion in denying the petition for certification to appeal when the petitioner is self-represented." *Goguen* v. *Commissioner of Correction*, supra, 341 Conn. 524.

Because the petitioner has failed to meet the first prong of *Simms* v. *Warden*, supra, 230 Conn. 612, by

demonstrating that the denial of his petition for certification to appeal constituted an abuse of discretion, we decline to review his claims on appeal.

The appeal is dismissed.