MASHANTUCKET PEQUOT TRIBAL NATION *v.* FACTORY MUTUAL INSURANCE COMPANY (AC 45600)

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

Syllabus

The plaintiff, a federally recognized Indian Tribe, owns and operates, inter alia, a casino and resort complex. The defendant insurance company issued the plaintiff an all risk insurance policy, which covered the plaintiff's listed properties against all risks of physical loss or damage and for business interruptions up to $1,655,000,000 per occurrence. These coverages were triggered by physical loss or damage to covered property; that threshold language was not defined in the policy. The policy also included coverage for certain specified events, including for a response to a communicable disease and communicable disease business interruption loss. The policy contained an exclusion to covered costs for contamination due to a virus. As a result of the COVID-19 pandemic, the plaintiff claimed that it suffered, inter alia, physical loss and damage to its locations and properties in excess of $76 million. Upon the defendant's denial of the plaintiff's claim, the plaintiff sought, inter alia, a declaratory judgment that the defendant was required to provide coverage for the losses that the plaintiff sustained as a result of its suspension of business operations during the COVID-19 pandemic. The plaintiff claimed that the presence of COVID-19 fell within several of the provisions within the policy and that the policy's exclusion for contamination by a virus did not apply. The plaintiff maintained that the virus could be spread in many ways, could remain viable for many days on objects, surfaces, and materials, and that physical alterations of its property as a result of the presence of COVID-19 rendered the property nonfunctional, unsafe, and unusable. In addition, the plaintiff alleged that it suffered business interruption losses due to the presence of COVID-19, as the plaintiff's businesses were required to shut down or limit their operations pursuant to orders from tribal and state governments and to mitigate its losses. The defendant filed a motion to strike the plaintiff's operative complaint, asserting that the relief the plaintiff sought was unavailable under the clear and unambiguous language of the policy and that the exclusion for contamination by a virus barred the plaintiff's claims. The trial court granted in part the defendant's motion to strike, concluding that, although the plaintiff purchased an all risk policy, the unambiguous language of the policy provided exclusions and limits for various specified damages. The trial court determined that COVID-19 was a virus, the virus was considered contamination, and, accordingly, contamination by a virus was not covered by the

policy. The trial court found, however, that claims for costs under the provisions for communicable disease response and communicable disease business interruption losses were covered, although coverage was capped at $1 million under each of those provisions, and denied the motion to strike as to these claims. The trial court also declined to address whether alleged damage from COVID-19 constituted physical damage to, or loss of, property. On appeal to this court, the plaintiff claimed that it had sufficiently and specifically pleaded that COVID-19 physically altered its property, that the trial court improperly concluded that the exclusion for contamination by a virus applied to its claims for coverage, and that the policy expressly recognized the presence of a communicable disease as a physical loss or damage. *Held* that the trial court properly granted in part the defendant's motion to strike, that court having properly concluded that the contamination exclusion applied and defeated the plaintiff's claims for coverage under the property damage and business interruption loss provisions: the plaintiff's allegations in its operative complaint did not establish that COVID-19 caused physical loss or damage to its properties, and, therefore, the allegations were insufficient to trigger coverage under the policy for property damage or business interruption losses, as the plaintiff failed to allege facts showing the manner in which COVID-19 caused a physical, tangible alteration to or resulted in the deprivation of property that rendered it physically unusable or inaccessible, and, instead, offered conclusory allegations that COVID-19 caused a risk of physical loss or damage and that the presence of COVID-19 constituted a risk of physical loss or damage; moreover, the trial court properly concluded that the unambiguous language of the contamination exclusion specifically excluded coverage for any cost resulting from the presence of COVID-19 from the physical loss or damage and business loss interruption provisions; furthermore, the plaintiff could not prevail on its claim that the actual presence of a communicable disease such as COVID-19 constituted physical loss or damage under the policy's communicable disease response provision, as that provision did not require physical loss or damage, was triggered only if a location has the actual, not suspected, presence of a communicable disease and access was limited by an officer of the plaintiff or a government agency regulating the disease's presence, and this coverage provided only for the reasonable and necessary costs for cleanup, removal, and disposal of the disease from the property; additionally, the plaintiff could not prevail on its claim that the issue of whether COVID-19 physically altered property could not be determined at the motion to strike phase of the litigation, as our Supreme Court and other courts have already determined, even at the pleading stage, that properties were not altered as a result of the COVID-19 pandemic, and the plaintiff in the present matter pleaded only conclusory allegations that COVID-19 caused physical, tangible alteration to property, but did not provide any specifics as to how the property purportedly was altered.

Argued October 10, 2023—officially released April 2, 2024

Procedural History

Action, inter alia, seeking a declaratory judgment determining the applicability of certain coverage provisions under an insurance policy issued by the defendant to the plaintiff, and for other relief, brought to the Superior Court in the judicial district of New London, where the matter was transferred to the judicial district of Hartford, Complex Litigation Docket; thereafter, the court, *Moukawsher, J.*, granted in part the defendant's motion to strike; subsequently, the parties filed a joint stipulation in which the plaintiff withdrew with prejudice its remaining claims; thereafter, the court, *Noble, J.*, granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Michael C. D'Agostino, with whom, on the brief, was *Sergio F. Oehninger*, pro hac vice, for the appellant (plaintiff).

Bryce L. Friedman, pro hac vice, with whom were *Matthew C. Penny*, pro hac vice, and *Andraya Pulaski Brunau*, for the appellee (defendant).

Opinion

PELLEGRINO, J. The issue at the core of this appeal is, in the context of a dispute regarding insurance coverage for business losses suffered as a result of the COVID-19 pandemic, whether the operative complaint contained sufficient allegations to withstand a motion to strike pursuant to Practice Book § 10-39. The plaintiff, Mashantucket Pequot Tribal Nation, appeals from the judgment rendered in favor of the defendant, Factory Mutual Insurance Company, following the partial granting of its motion to strike and the subsequent withdrawal of the remaining claims set forth in the plaintiff's operative complaint. On appeal, the plaintiff claims that (1) the court improperly concluded that a policy exclusion for contamination caused by a virus

applied to the majority of its claims for coverage and (2) our Supreme Court's decisions in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, 346 Conn. 33, 288 A.3d 187 (2023) (*CT Dermatology*), and *Hartford Fire Ins. Co.* v. *Moda, LLC*, 346 Conn. 64, 288 A.3d 206 (2023) (*Moda*), both of which were released subsequent to the trial court's decision in the present case, do not provide an alternative basis to affirm the trial court's granting of the motion to strike. We disagree with both of the plaintiff's claims and, accordingly, affirm the judgment of the court.

The following facts, as alleged in the first amended complaint (operative complaint), and procedural history are relevant to our resolution of this appeal. The plaintiff, a federally recognized Indian Tribe headquartered at a reservation located within the geographic boundaries of Connecticut, operates and has an interest in a number of businesses, including the Mashantucket Pequot Gaming Enterprise, doing business as Foxwoods Resort Casino, a resort and casino complex that includes multiple casinos, hotels, theaters and restaurants. The defendant, a Rhode Island insurance company licensed to write commercial property insurance in Connecticut, sold an "all risk" insurance policy (policy) to the plaintiff, which covers "[the plaintiff] and any subsidiary, and [the plaintiff's] interest in any partnership or joint venture in which [the plaintiff] has management control or ownership as now constituted or hereafter is acquired . . . ."[1] The term of this policy is from July 1, 2019, through July 1, 2020, and covers the plaintiff's listed property against all risks of (1) physical loss or damage and (2) business interruptions (time element loss)[2] up to $1,655,000,000 per occur-

[1] The policy states that it is governed by the laws of Connecticut.

[2] The policy states that it insures against time element loss directly resulting from physical loss or damage of the type insured "1) to property described elsewhere in this [p]olicy and not otherwise excluded by this [p]olicy or otherwise limited in the TIME ELEMENT COVERAGES below; 2) used by the [plaintiff], or for which the [plaintiff] has contracted use; 3)

rence. These primary coverages were triggered by physical loss or damage to covered property;[3] that threshold language, however, was not defined in the policy. The plaintiff paid millions of dollars in premiums to the defendant for this insurance policy.

The plaintiff claimed that it suffered direct physical loss and damage to locations and properties insured under the policy, as well as time element loss, and other types of covered losses in excess of $76 million as a result of the "deadly and highly contagious" COVID-19 disease, which the World Health Organization declared to be a pandemic on March 11, 2020.[4] The plaintiff contended that "COVID-19 causes a physical, tangible alteration to property, and the presence of COVID-19 amounts

while located as described in the INSURANCE PROVIDED provision or within 1,000 feet/300 metres thereof, or as described in the TEMPORARY REMOVAL OF PROPERTY provision; or 4) while in transit as provided by this [p]olicy, and 5) during the [p]eriods of [l]iability described in this section, provided such loss or damage is not at a contingent time element location." (Emphasis omitted.)

We note that the Supreme Court of Maryland, in interpreting a nearly identical insurance policy issued by the defendant to a different insured, explained that "time element coverage is sometimes referred to as business interruption or business loss coverage." *Tapestry, Inc.* v. *Factory Mutual Ins. Co.*, 482 Md. 223, 233 n.6, 286 A.3d 1044 (2022); see also *Schleicher & Stebbins Hotels, LLC* v. *Starr Surplus Lines Ins. Co.*, 175 N.H. 744, 750–51, 302 A.3d 67 (2023) (time element coverage protects against consequences of loss, not damage to property itself).

[3] See, e.g., *Yale University* v. *Cigna Ins. Co.*, 224 F. Supp. 2d 402, 412 (D. Conn. 2002) (property insurance coverage is triggered by threshold concept of injury to insured property, frequently physical loss or damage); see also *Procaccianti Cos.* v. *Zurich American Ins. Co.*, Docket No. C.A. 20-512 (WES), 2023 WL 3536233, *2 (D. R.I. May 18, 2023) (to obtain coverage, plaintiffs required to demonstrate they suffered direct physical loss or damage to property).

[4] A recent Superior Court decision noted: "COVID-19 (coronavirus disease 2019) is a disease caused by a virus named SARS-CoV-2. It can be very contagious and spreads quickly. Over one million people have died from COVID-19 in the United States. COVID-19 most often causes respiratory symptoms that can feel much like a cold, the flu, or pneumonia. COVID-19 may attack more than your lungs and respiratory system. Other parts of your body may also be affected by the disease. Centers for Disease Control and Prevention, About Covid-19, (last modified July 10, 2023), available

to physical loss and damage to property." Specifically, the plaintiff maintained that COVID-19 can be spread in several ways, including from person-to-person via respiratory droplets, through airborne transmission, and by contact with objects or surfaces. The plaintiff also asserted that COVID-19 can remain viable for many days on objects, surfaces, or materials, including those used in the ordinary course of business by the plaintiff. The plaintiff claimed that physical alterations of its property as a result of the presence of COVID-19 rendered it nonfunctional, unsafe, or unusable.[5] Additionally, the

online at https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html (last visited July 25, 2023)." (Internal quotation marks omitted.) *American Rag Cie, LLC* v. *Hartford Fire Ins. Co.*, Superior Court, judicial district of Hartford, Complex Litigation Docket No. X07-CV-22-6153983-S (August 1, 2023); see also *Manginelli* v. *Regency House of Wallingford, Inc.*, 347 Conn. 581, 594 n.7, 298 A.3d 263 (2023) (summarizing events at beginning of COVID-19 pandemic).

[5] Specifically, the plaintiff alleged the following: "The physical alteration, damage, and impairment described herein includes, but is not limited to, damage to:

"a. In the restaurants: cooking equipment and appliances, storage equipment, signs, menus, ovens, microwaves, refrigerators, freezers, ice machines, napkins, utensils, measuring cups and spoons, utensils, plates, cups, saucers, scales, thermometers, timers, aprons, soda dispensers, bar, glasses, bottles of alcohol, and containers, among other items.

"b. In the retail outlets: retail merchandise, signs, shelves, displays, counters, clothes hangers, boxes, packaging, and bags, among other items.

"c. In the casinos: tables, chairs, lights, displays, cards, chips, dice, cards, cups, containers, slot machines, games, screens, handles, and money, among other items.

"d. In the spas: tables, chairs, bottles, packaging, curtains, showers, tubs, cushions, blankets, pillows, towels, linens, cups, glasses, coolers, pitchers, and trays, among other items.

"e. In the hotels: beds, linens, key cards, remotes, handles, tables, desks, chairs, lamps, switches, curtains, blinds, cords, luggage racks, irons, ironing boards, shelves, toilet paper, paper towels, cups, soap boxes, shampoo bottles, conditioner bottles, lotion bottles, bells, desks, signs, pillows, pens, paper, cleaning supplies, elevators, bell carts, housekeeping carts, housekeeping supplies, mops, brooms, bottles, rags, and clothes, among other items.

"f. At all locations: lighting fixtures, cash registers, computers, tables, chairs, couches, stools, curtains, blinds, doors, door handles, carts, countertops, display cases, shelving, uniforms, floors, windows, fans, mirrors, decorative items, pictures, frames, sinks, faucets, faucet handles, soap dis-

plaintiff alleged that the presence of COVID-19 in the air rendered the property unusable, uninhabitable, and unfit for normal occupancy or use. As a result of the presence of COVID-19, the plaintiff's businesses shut down or limited their operations pursuant to orders from tribal and state governments and to mitigate its losses, and, therefore, the plaintiff sustained time element losses.

The all risk insurance policy that the plaintiff purchased from the defendant provided various types of coverages, including for the aforementioned physical loss or damage and time element loss, as well as additional coverages for certain specified events, such as the response to a communicable disease such as COVID-19. In other words, the policy included numerous coverage provisions, the majority of which are not mutually exclusive. The plaintiff alleged that the presence of COVID-19 fell within several of the coverages contained in the policy. The plaintiff also claimed that the policy's exclusion for contamination due to a virus did not apply. The plaintiff submitted a claim under the policy, which the defendant denied.[6]

In its operative complaint, the plaintiff sought a declaratory judgment[7] and also alleged claims for breach

pensers, papers towels, paper towel holders, toilets, urinals, and trash cans, among other items."

[6] The plaintiff alleged that the defendant "denied or effectively denied coverage for that claim and did so in bad faith based on apparent systematic company practices designed to avoid or minimize payments for covered COVID-19 claims."

[7] Specifically, the plaintiff requested "a declaration from the court that: (a) the various coverage provisions identified herein are triggered by the [plaintiff's] claims; (b) the policy covers the [plaintiff's] claims; (c) the [plaintiff] sustained direct physical loss or damage from a covered cause of loss under this policy; (d) [the defendant] waived or is estopped from asserting its positions, as described above, to bar or limit coverage for the [plaintiff's] claims; (e) no exclusion applies to bar or limit coverage for the [plaintiff's] claims; and (f) granting any other declaratory relief useful to resolving the dispute between the parties."

of contract,[8] common-law bad faith,[9] and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[10] In its prayer for relief, the plaintiff sought declaratory relief, monetary damages, interest, attorney's fees, and other relief the court deemed just and proper. The plaintiff attached a copy of the insurance policy to the complaint.[11]

On May 4, 2021, the defendant filed a motion to strike the operative complaint pursuant to Practice Book § 10-39, claiming that "the relief [the plaintiff] seeks is unavailable under the clear and unambiguous terms of the parties' insurance contract . . . ." In the memorandum of law in support of its motion to strike, the defendant noted that the policy covered the property against all risks of physical loss or damage, subject to certain exclusions,[12] which, in turn, were subject to certain

[8] The plaintiff alleged that it had "complied with all applicable policy provisions and any other requirements; or, [the defendant] waived those provisions or any such requirements or is estopped from asserting any purported noncompliance with those provisions or any such requirements. . . . [The defendant] breached the policy by improperly denying coverage to the [plaintiff] or otherwise repudiating [the defendant's] obligation to cover the [plaintiff's] losses and expenses as expressly required under the policy."

[9] The plaintiff alleged that the defendant acted in bad faith in its refusal to provide coverage and in its handling of the plaintiff's claims. Additionally, it asserted that the defendant "had a dishonest purpose, sinister motive, or malicious intent."

[10] The plaintiff alleged, inter alia, that the defendant had engaged in unfair or deceptive acts by engaging in unfair practices pursuant to the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-816 et seq.

[11] "A complaint includes all exhibits attached thereto. *Streicher* v. *Resch*, 20 Conn. App. 714, 716, 570 A.2d 230 (1990); Practice Book § 10-29." *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 258 n.3, 907 A.2d 1269, cert. denied, 280 Conn. 951, 912 A.2d 483 (2006).

[12] "Provisions in insurance policies excepting particular losses from the coverage thereof are ordinarily valid, for the parties to a contract of insurance have the right to limit or qualify the extent of the insurer's liability in any manner not inconsistent with statutory forms or provisions or contrary to public policy. . . . The reason for or purpose of an exclusion clause in a policy is to eliminate from coverage specified losses . . . which except for the exclusion clause would remain under the coverage. . . . In an insurance

exceptions. "Thus, the policy provides coverage for physical loss or damage unless an exclusion applies, and an exclusion applies unless an exception to the exclusion is 'otherwise stated' in the policy."

Next, the defendant argued that the court should strike counts one and two of the operative complaint because the policy excluded contamination by a virus, and COVID-19 is caused by the Severe Acute Respiratory Syndrome Coronavirus 2, known as the SARS-CoV-2 virus. The defendant contended that the policy did not provide coverage for property damage or time element losses resulting from a virus, as stated in the contamination exclusion. Additionally, the defendant asserted that, because COVID-19 did not cause physical loss or damage to property, most of the coverages in the insurance policy did not apply. With respect to the additional coverage for the actual presence of a communicable disease, which did not require physical loss or damage to property, the defendant asserted that the plaintiff had failed to allege the actual presence of COVID-19 on its premises. As a result of its arguments regarding counts one and two of the amended complaint, the defendant claimed that counts three and four failed as well.

On June 16, 2021, the plaintiff filed a memorandum of law in opposition to the defendant's motion to strike. At the outset, it stated that, unlike other insurance companies, the defendant "issued a unique policy form to the [plaintiff] that *expressly* covers communicable disease as insured physical loss or damage." (Emphasis

policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. . . . [T]he word exclusion signifies . . . circumstances in which the insurance company will not assume liability for a specific risk or hazard that otherwise would be included within the general scope of the policy." (Citations omitted; internal quotation marks omitted.) *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588–89, 573 A.2d 699 (1990); see also *Viking Construction, Inc.* v. *777 Residential, LLC*, 190 Conn. App. 245, 255, 210 A.3d 654, cert. denied, 333 Conn. 904, 214 A.3d 381 (2019).

in original; internal quotation marks omitted.) Additionally, it explained that COVID-19 is not a virus but rather a communicable disease caused by SARS-CoV-2. Next, the plaintiff contended that it had pleaded the actual presence of COVID-19 at its business locations. The plaintiff then argued that the contamination exclusion contained in the policy did not exclude coverage for loss caused by a communicable disease. Finally, the plaintiff countered that it sufficiently had alleged claims for common-law bad faith and violations of CUTPA in counts three and four of the operative complaint.

On July 14, 2021, the defendant filed a reply memorandum of law in support of its motion to strike. Therein, the defendant repeated that (1) the contamination exclusion barred the plaintiff's claims for losses caused by COVID-19, (2) the plaintiff failed to plead sufficient facts establishing that COVID-19 tangibly altered the property as required by case law to meet the policy's threshold requirement of physical loss or damage for the property damage and time element loss coverages, (3) the plaintiff failed to allege the actual presence of COVID-19 and, therefore, the claim under the communicable disease coverage provision failed, and (4) counts three and four of the operative complaint alleging common-law bad faith and CUTPA violations should be stricken because the complaint failed to establish that the plaintiff was entitled to coverage under the policy. Additionally, it emphasized that the operative complaint had referred to SARS-CoV-2, a virus, and COVID-19, a communicable disease, collectively as COVID-19.

On August 18, 2021, the court, *Moukawsher*, *J.*, issued a memorandum of decision granting, in part, the defendant's motion to strike. At the outset, the court explained that, although the plaintiff purchased an all risk insurance policy with approximately $1.6 billion in coverage, the language of the policy provided exclusions and limits for various specified damages. It also concluded that

the policy language was unambiguous, and, therefore, the court would interpret the policy coverage as a matter of law. The court then stated: "After reading [the policy], any reasonable person would have to conclude that a virus is a contamination and contamination isn't covered. It means that . . . the policy assumes, unless otherwise provided for, that no costs due to a virus are covered—costs like those incurred when the Pequot casino was shuttered by government edict, lost business, and had to be cleaned up and recalibrated." The policy, however, contained two types of "extra" coverages; namely, for communicable disease response costs and communicable disease business interruption loss (communicable disease provisions).[13] These provisions were capped in the aggregate at $1 million per year. The court rejected the defendant's contention that the plaintiff had failed to plead the actual, rather than suspected, presence of a communicable disease, as required by the communicable disease provisions. Furthermore, the court expressly declined to address whether the damage from COVID-19 constituted physical damage to or loss of the property, the necessary predicate for property damage or time element coverages, or the issues of concurrent and indirect causation.

The court concluded that all four counts of the operative complaint survived the partial granting of the defendant's motion to strike, but that certain arguments had been resolved. "To the extent that counts one and two claim no limit bars or exclude the [plaintiff's] claims for coverage beyond the communicable disease provisions and their liability limits, the court strikes those allegations because they fail as a matter of law. To the extent

[13] We note that the United States Court of Appeals for the Tenth Circuit recently observed: "Just because the policy excludes all-risk and business-interruption coverage for viruses like COVID-19 does not mean it cannot also provide additional, limited coverage under separate provisions." *Monarch Casino & Resort, Inc.* v. *Affiliated FM Ins. Co.*, 85 F.4th 1034, 1041 (10th Cir. 2023).

that [it seeks] covered costs under the policy provisions for communicable disease response and [communicable disease business interruption loss], the motion to strike is denied. . . . Counts three and four of the complaint are for bad faith and unfair trade practices. [The defendant] moves to strike them because they are dependent on there being coverage, and [the defendant] says there isn't any coverage. Because the court has held [that] there is some coverage, [the defendant's] motion to strike these claims is granted and denied to the same extent it is granted and denied as to counts one and two. . . . In short, what is left of the [plaintiff's] claim under the policy is for covered costs under the provisions granting coverage for communicable disease response and [communicable disease business interruption loss]. [The defendant's] liability under the policy is limited to: (1) $1 million in the aggregate during any policy year for communicable disease response, and (2) $1 million in the aggregate during any policy year for interruption by communicable disease." (Footnote omitted.)

On September 3, 2021, the plaintiff filed a motion seeking the entry of judgment consistent with the court's memorandum of decision granting, in part, the defendant's motion to strike, and a written determination to allow an immediate appeal pursuant to Practice Book § 61-4 (a). On June 2, 2022, the parties filed a joint stipulation in which the plaintiff withdrew, with prejudice, its claims that remained following the court's August 18, 2021 decision. That same day, the plaintiff also filed a motion for judgment pursuant to Practice Book § 10-44. On June 3, 2022, the court, *Noble*, *J.*, granted the plaintiff's motion and rendered judgment accordingly.[14]

[14] "As a general rule, [a]fter a court has granted a motion to strike, the plaintiff may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as] [t]he filing of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the [motion

The plaintiff filed the present appeal on June 22, 2022. Approximately one month later, this court, sua sponte, stayed the appeal pending the final disposition by our Supreme Court of two pending appeals, *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64. On January 27, 2023, our Supreme Court issued its decisions in those appeals.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion to strike. Specifically, the plaintiff argues that it sufficiently and specifically pleaded that COVID-19 physically altered its property and that the policy expressly recognized the presence of a communicable disease as a physical loss or damage. The defendant counters that the plain language of the policy, specifically, the contamination exclusion, expressly bars coverage for "any condition of property due to the actual or suspected presence of any . . . virus." (Internal quotation marks omitted.) The defendant further argues that, pursuant to our Supreme Court's decisions in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64, the alleged presence of COVID-19 does not constitute a physical loss or damage, the necessary trigger for coverage under this type of insurance policy. For these reasons, the defendant maintains that the decision of the trial court should be affirmed. We agree with the defendant.

We begin by setting forth our standard of review and the legal principles regarding the granting of a motion to strike. "The purpose of a motion to strike is to contest

to strike] the original pleading." (Internal quotation marks omitted.) *Lavette* v. *Stanley Black & Decker, Inc.*, 213 Conn. App. 463, 469 n.6, 278 A.3d 1072 (2022); see also *Tunick* v. *Tunick*, 217 Conn. App. 106, 111 n.6, 287 A.3d 1132 (2022).

. . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . [The court takes] the facts to be those alleged in the complaint . . . and [construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Citation omitted; internal quotation marks omitted.) *Plainville* v. *Almost Home Animal Rescue & Shelter, Inc.*, 182 Conn. App. 55, 63, 187 A.3d 1174 (2018); see also *Greenwald* v. *Van Handel*, 311 Conn. 370, 374–75, 88 A.3d 467 (2014); *Himmelstein* v. *Windsor*, 304 Conn. 298, 307, 39 A.3d 1065 (2012); see generally Practice Book § 10-39.[15] Our review of a trial's court decision to grant a motion to strike is plenary. *Stevens* v. *Khalily*, 220 Conn. App. 634, 645, 298 A.3d 1254, cert. denied, 348 Conn. 915, 303 A.3d 260 (2023); *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 325, 220 A.3d 890 (2019). The legal conclusions contained in a complaint, however, are not deemed to be admitted by a court ruling on a motion to strike. *Hughes* v. *Board of Education*, 221 Conn. App. 325, 329–30, 300 A.3d 1209, cert. denied, 348 Conn. 922, 304 A.3d 147 (2023).

[15] Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ."

Next, we set forth the principles relevant to the interpretation of an insurance policy. "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 . . . ." (Internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 239–40, 291 A.3d 1051 (2023); see also *Jemiola* v. *Hartford Casualty Ins. Co.*, 335 Conn. 117, 128–29, 229 A.3d 84 (2019); *Liberty Ins. Corp.* v. *Johnson*, 222 Conn. App. 656, 665–66, 306 A.3d 1143 (2023). As a general matter, "[w]hile the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." *Nationwide Mutal Ins. Co.* v. *Pasiak*, 327 Conn. 225, 239, 173 A.3d 888 (2017). Additionally, we note that, "[w]hen construing exclusion clauses, the language should be construed in favor of the insured

unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 365, 216 A.3d 629 (2019).

The specific language of the insurance policy between the parties in this case provided in relevant part: "This [p]olicy covers property, as described in this [p]olicy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this [p]olicy." The time element coverage provided: "This policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured: 1) to property described elsewhere in this [p]olicy and not otherwise excluded by this [p]olicy or otherwise limited in the TIME ELEMENT COVERAGES below . . . ." For these two primary coverages, the maximum limit of liability for an occurrence was $1,655,000,000, subject to certain provisions.

Additionally, the policy included the following contamination exclusion: "This [p]olicy excludes the following unless directly resulting from other physical damage not excluded by this [p]olicy: 1) contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If contamination due only to the actual and not suspected presence of contaminant(s) directly results from other physical damage not excluded by this [p]olicy, then only physical damage caused by such contamination may be insured." (Emphasis omitted.) The policy set forth the following definitions. The term "contaminant" was defined as "anything that causes contamination" which, in turn, was defined as "*any condition of property due to the actual or suspected presence of* any

foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, fungus, mold or mildew [or legionellosis]." (Emphasis added.)

The policy also provided for certain additional coverages,[16] including a communicable disease response[17] and interruption by communicable disease.[18] These two communicable disease provisions were subject to a $1 million sublimit, in the aggregate, during any policy year

[16] The policy contains other additional sublimits of liability for events such as damage to vegetation of a golf course, nonphysical damage to computer systems, data, programs or software, earth movement, flood, land and water contaminant cleanup, removal or disposal.

[17] The communicable disease response coverage provided: "If a location owned, leased, or rented by the [plaintiff] had the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an [o]fficer of the [plaintiff] as a result of the actual not suspected presence of communicable disease, this [p]olicy covers the reasonable and necessary costs incurred by the [plaintiff] at such location with the actual not suspected presence of communicable disease for the: 1) cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property; and 2) actual costs of fees payable to public relations services or actual costs of using the [plaintiff's] employees for reputation management resulting from the actual not suspected presence of communicable diseases on insured property. This [a]dditional [c]overage will apply when access to such location is limited, restricted or prohibited in excess of 48 hours. This [a]dditional [c]overage does not cover any costs incurred due to any law or ordinance with which the [plaintiff] was legally obligated to comply prior to the actual not suspected presence of communicable disease." (Emphasis omitted.)

[18] The interruption by communicable disease coverage provided in relevant part: "If a location owned, leased or rented by the [plaintiff] has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an [o]fficer of the [plaintiff] as a result of the actual not suspected presence of communicable disease, this [p]olicy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the [plaintiff] during the PERIOD OF LIABILITY at such location with the actual not suspected presence of communicable disease." (Emphasis omitted.)

regardless of the number of locations, coverages or occurrences involved.[19] The policy defined "communicable disease" as "transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges . . . ."

It follows that, as the trial court explained, the policy the plaintiff purchased, like many insurance policies, begins with a broad promise to cover all risks, but then subjects and limits coverage with various exclusions. The policy also contains exceptions to the policy exclusions as well as additional coverage for certain specified situations, subject to financial limitations.[20] Guided by this approach, we will commence our analysis by determining whether the plaintiff's claims (1) fall within the grant of coverage for physical damage or loss, or time element loss, and (2) are subject to any exclusions to those coverages. On the basis of our review of the relevant policy language and case law, we conclude that the plaintiff's claims do not fall within the grant of coverage for physical loss or damage or time element loss, and, additionally, are subject to the contamination exclusion.[21]

[19] At oral argument before this court, counsel for defendant represented that the plaintiff had been paid $1 million pursuant to the communicable disease response coverage.

[20] See, e.g., *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 773–74, 67 A.3d 961 (2013) ("The commercial general liability policy is a standard form developed by the Insurance Services Office, Inc., and has been used throughout the United States since 1940. . . . It begins with a broad grant of coverage in the insuring agreement, followed by a series of exclusions (and exceptions to the exclusions) that define the contours of coverage. Accordingly, we begin our analysis with the initial grant of coverage in the insuring agreement and then consider the effect of the exceptions and exclusions to the policy's coverage." (Citation omitted; footnote omitted; internal quotation marks omitted.)).

[21] As previously set forth in this opinion, the trial court expressly declined to address whether the damage from COVID-19 constitutes physical damage to the property to trigger the physical loss or damage or time element coverages. Unlike the trial court, we have the benefit of our Supreme Court's decisions in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra,

As previously noted, the policy covers the property described therein against all risks of physical loss or damage.[22] The policy, however, does not define the phrase "physical loss or damage." Our Supreme Court interpreted this language in the context of commercial insurance policies in *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 67 A.3d 961 (2013) (*Capstone*). That case involved the construction of the Hilltop student housing complex (Hilltop project) at the University of Connecticut (UConn). Id., 763. The plaintiffs in that case served as the general contractor and project developer for the Hilltop project, while the defendant was the successor in interest to the insurer that issued a commercial general liability policy that insured the plaintiffs and their work on this project. Id., 763–64. Our Supreme Court concluded, inter alia, that defective work, standing alone, or repairs to that defective work, do not constitute property damage and was not, therefore, covered under the insurance policy. Id., 764.

In *Capstone*, UConn notified the plaintiffs of the alleged defects after discovering elevated levels of carbon monoxide in various areas three years after the completion of the Hilltop project. Id., 767–68. One of the plaintiffs notified the defendant and demanded that the defendant defend against UConn's claims. Id., 768.

346 Conn. 64. Furthermore, the parties have briefed and argued on appeal whether the physical loss or damage or time element coverages were triggered in light of those recent Supreme Court decisions. We will, therefore, apply the reasoning and conclusions from those cases as part of our resolution of the present appeal. "It is axiomatic that [w]e may affirm a proper result of the trial court for a different reason." *Barbara* v. *Colonial Surety Co.*, 221 Conn. App. 337, 380, 301 A.3d 535, cert. denied sub nom. *Colonial Surety Co.* v. *Phoenix Contracting Group*, 348 Conn. 924, 304 A.3d 443 (2023); see also *Stevens* v. *Khalily*, 220 Conn. App. 634, 644, 298 A.3d 1254, cert. denied, 348 Conn. 915, 303 A.3d 260 (2023).

[22] Although the policy does not specifically include the term "direct" with regard to "physical loss or damage," we note that it excludes "indirect or remote loss or damage."

The defendant determined that UConn's claims were not covered under the policy: "As the liability at issue arises out of [one of the plaintiffs'] own work, including its role as general contractor and heating and plumbing installation, there can be no coverage for this matter . . . under the policy." (Internal quotation marks omitted.) Id. Eventually, the plaintiffs and UConn reached a settlement. Id., 770. The plaintiffs filed separate actions against the defendant alleging breach of contract and bad faith; these actions were removed to federal court, which subsequently certified questions to our Supreme Court. Id., 770–71.

First, the court concluded that defective workmanship can give rise to an occurrence under a commercial general liability insurance policy. Id., 776. It then turned to the term "property damage," which was defined in the policy as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." (Internal quotation marks omitted.) Id., 776–77. In addressing whether the presence of carbon monoxide, an odorless gas, constituted "property damage," our Supreme Court concluded that it was not. Id., 782. Relying on the reasoning set forth in a decision from the New Hampshire Supreme Court,[23] it concluded that the gas "[c]aused no physical, tangible alteration to any property . . . ." (Internal quotation marks omitted.) Id., 782–83.

Our Supreme Court subsequently applied the *Capstone* reasoning in the context of COVID-19 in both *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64. In the former, the court identified the dispositive issue as "whether a

[23] *Concord General Mutual Ins. Co.* v. *Green & Co. Building & Development Corp.*, 160 N.H. 690, 694, 8 A.3d 24 (2010).

property insurance policy providing coverage for direct physical loss of or physical damage to covered property provides coverage for business income losses arising from the suspension of business operations during the COVID-19 pandemic." (Internal quotation marks omitted.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 36. In that case, three plaintiffs that owned and operated health care facilities at various locations in Connecticut suspended their business operations during the COVID-19 pandemic and suffered lost business income and additional expenses; id.; including daily sanitation and the erection of physical barriers for the protection of patients and staff. Id., 38–39. The plaintiffs filed claims against their respective insurance companies. Id., 36. The defendant insurance companies denied the claims on the basis that the coronavirus did not cause property damage. Id., 39. The plaintiffs filed actions seeking, inter alia, a declaratory judgment that the defendants were obligated to provide coverage. Id. In their answer, the defendants denied the substantive allegations in the plaintiffs' complaint and raised a special defense that the claims were excluded by a virus exclusion contained in the policy.[24] Id., 39–40.

Both the plaintiffs and the defendants moved for summary judgment. Id., 40. The defendants argued that no genuine issue of material fact existed as to whether the insurance policies covered the claimed losses because there was no direct physical loss or physical damage to any covered property. Id. Furthermore, the defendants claimed that, even if a covered loss had occurred, it was subject to the virus exclusion contained in the policies. Id. The trial court rendered summary judgment

[24] Specifically, the policy excluded "loss or damage caused directly or indirectly by . . . [the] [p]resence, growth, proliferation, spread or any activity of fungi, wet rot, dry rot, bacteria or virus." (Internal quotation marks omitted.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 40.

in favor of the defendants on the basis of the virus exclusion. Id.

On appeal, the plaintiffs contended that the trial court improperly rendered summary judgment in favor of the defendants on the basis of the virus exclusion. Id. The defendants disagreed with the plaintiffs' appellate claim; further, they argued "as an alternative ground for affirmance, that the insurance policies did not cover the losses because there was no direct physical loss or physical damage to any property covered by the policies." (Internal quotation marks omitted.) Id. Our Supreme Court agreed with the defendants' alternative ground of affirmance and determined, therefore, that it did not need to address whether the virus exclusion precluded coverage. Id., 40–41.

The court began its analysis with the relevant policy language of the insurance policies, stating: "Although this court has not previously construed this specific policy language, we considered the meaning of a similar policy provision in *Capstone Building Corp.* v. *American Motorist Ins. Co.*, [supra, 308 Conn. 760]. . . . We rejected the plaintiffs' claim in *Capstone* that this provision entitled them to coverage for the loss of the use of defectively installed chimneys, which resulted in the escape of carbon monoxide into the building, on the ground that the gas caused no physical, tangible alteration to any property, and, therefore, under the plain language of the policy provision, the loss of use of the defective chimneys, standing alone, did not constitute property damage . . . . "[25] (Citation omitted; internal

[25] The plaintiffs in *CT Dermatology* contended that any reliance on *Capstone Building Corp.* v. *American Motorist Ins. Co.*, supra, 308 Conn. 760, was misplaced, as that case involved a claim for property damage, while they had alleged the physical loss of property. *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 45 n.10. In rejecting the effort to distinguish *Capstone*, our Supreme Court explained: "Although we agree that our decision in *Capstone* is not directly on point, it does provide some insight into the meaning of the term 'physical,' as applied to claims involving the loss of or damage to property. In any event, even if

quotation marks omitted.) *Connecticut Dermatology Group, PC* v. *Twin City Ins. Co.*, supra, 346 Conn. 43–44.

Next, our Supreme Court considered a decision from the United States Court of Appeals for the Second Circuit, *Farmington Village Dental Associates, LLC* v. *Cincinnati Ins. Co.*, Docket No. 21-2080-cv, 2022 WL 2062280, *1 (2d Cir. June 8, 2022), which extrapolated the reasoning from *Capstone* and "concluded that, under Connecticut law, a policy covering accidental physical loss or accidental physical damage to property did not cover a loss incurred as a result of the suspension of business operations during the COVID-19 pandemic because the loss was not physical, and the virus did not tangibly alter the property." (Internal quotation marks omitted.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 44. The court then emphasized that "[t]he overwhelming majority of federal and state courts construing language similar or identical to the language contained in the policies at issue in the present case have reached the same conclusion."[26] Id., 44–45.

The court also considered other language in the policy, specifically, the provision regarding the "period of restoration," which provided that the loss of business income was covered when the property was repaired, rebuilt, or replaced. Id., 49–50. "These terms strongly imply that a direct physical loss, unlike a loss resulting from the necessary suspension of business operations to avoid the transmission of a communicable disease,

the plaintiffs were correct that *Capstone* provides no insight into the meaning of 'direct physical loss,' as used in their policies, that would not change our conclusion, based on the other reasons stated herein, that the phrase does not include losses resulting from the suspension of business operations during the COVID-19 pandemic." (Emphasis omitted.) Id.

[26] See *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 46–49 nn.11 and 12 (collecting federal and state cases).

is one that involves a physical alteration of the property such that the property is susceptible to being restored to its original condition." (Internal quotation marks omitted.) Id., 50.

Ultimately, our Supreme Court concluded "that the plain meaning of the term direct physical loss of . . . [p]roperty does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, *the phrase direct physical loss of . . . [p]roperty clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible*." (Emphasis added; internal quotation marks omitted.) Id., 51.

Finally, the court addressed the arguments the plaintiffs presented. Significantly, it concluded that there was nothing in the record to indicate that the plaintiffs' property had undergone a "physical transformation" as a result of the COVID-19 pandemic that transformed "ordinary business properties into potential viral incubators that were imminently dangerous to human beings." (Internal quotation marks omitted.) Id., 52. Our Supreme Court observed that, as a result of the COVID-19 pandemic, there was a change to governmental and societal expectations and behaviors that negatively impacted the plaintiffs' businesses. Id. Additionally, our Supreme Court explained that a loss of use of property was not the same as the loss of property. Id., 53–54. Additionally, the court rejected the plaintiffs' contention that the construction of physical barriers and the purchase of additional personal protective equipment were repairs to the property. Id., 55. "We conclude that, just as the properties were not physically altered in any way by the COVID-19 pandemic, the plaintiffs' activities designed to prevent the transmission of the

coronavirus on the properties were not 'repairs' in any ordinary sense of the word." Id.

Furthermore, the court was not persuaded by the plaintiffs' reliance on cases that have held that contamination of property by harmful substances or bacteria constitutes a direct physical loss. Id., 58. First, the court noted that the plaintiffs had not claimed an actual coronavirus contamination or that their business had been closed due to the actual presence of the virus. Id., 58–59. Second, "[i]n any event, even if the plaintiffs had claimed that their properties were actually contaminated by the coronavirus, we find persuasive the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants."[27] Id., 59. On the basis of this reasoning, our Supreme Court affirmed the summary judgment rendered in favor of the defendants. Id., 64.

Our Supreme Court similarly affirmed the summary judgment rendered in favor of the insurance company in *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 67, in which it also considered whether business losses suffered during the COVID-19 pandemic were covered by insurance for direct physical loss of or direct physical damage to property. In that case, the defendants purchased two insurance policies from the plaintiff: a package policy, which covered direct physical loss of or direct physical damage to covered property, namely, a spring line of shoes sold to department stores and other retailers; and a marine policy that covered the shoes from direct physical loss or direct physical

[27] See *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 60 n.24 (collecting federal and state cases distinguishing coronavirus from other substances such as radiation, chemical dust, gas, ammonia, and asbestos).

damage from any external cause, subject to certain exclusions, while they were in transit and storage. Id., 68–69. The plaintiff insurer moved for summary judgment, arguing that, under either policy, the defendants had not suffered a direct physical loss of or direct physical damage to property and that the virus exclusion applied with respect to the package policy. Id., 70. The trial court granted the plaintiff's motion for summary judgment, determining that the virus exclusion applied, and, in the case of the marine policy, coverage was limited to physical damage to the property itself under New York law. Id., 70–71.

On appeal, the court relied on the holding from *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 36–37, that, under nearly identical policy language, there must be some physical, tangible alteration to, or deprivation of property, rendering it physically unusable or inaccessible; mere loss of use or access was insufficient, and, therefore, the defendants' claims of loss were without merit. *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 72–73. "That claim fails as a matter of law because the losses . . . suffered did not result from any tangible physical alteration to [the] stock or real property. Rather, those losses resulted from a transformation in governmental and societal expectations and behavior that had a seriously negative impact on [the] businesses. . . . The plain language of the package policy does not provide coverage for such losses." (Citation omitted; internal quotation marks omitted.) Id., 73. The court further explained that "[*c*]*ontamination with the SARS-CoV-2 virus, even if it could be proved, is not sufficient to establish that the shoes were physically lost or damaged within the meaning of the package policy*." (Emphasis added.) Id., 74.

With respect to the marine policy, our Supreme Court applied the law of New York to conclude that "such

language does not describe business income losses incurred as a result of COVID-19 related closures [when] the insured property itself was not alleged or shown to have suffered direct physical loss or physical damage." (Internal quotation marks omitted.) Id., 76. Ultimately, our Supreme Court determined that the defendants' losses were not covered by either insurance policy, and, therefore, the trial court properly rendered summary judgment in favor of the plaintiff. Id., 79.

Having reviewed the precedent from our Supreme Court regarding property insurance policies and claims of business income loss arising from the suspension of business operations due to COVID-19, we return to the specific policy language in the present case. As we previously have noted, the policy sold to the plaintiff by the defendant covered property from all risks of physical loss or damage, and time element losses, but the requisite predicate for this coverage was physical loss or damage to covered property. We acknowledge that this policy's language is not identical to that of the policies in *CT Dermatology* or *Moda*. See, e.g., *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 37 (defendants will pay for direct physical loss of or physical damage to covered property and actual loss of business income sustained due to necessary suspension of operations during period of restoration and for reasonable and necessary extra expenses incurred during period of restoration that it would not have incurred if there had been no direct physical loss or physical damage to covered property); *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 68–69 (package and marine policies covered direct physical loss of or direct physical damage to covered property and loss of business income incurred due to necessary interruption of business operations due to period of restoration due to direct physical loss of or direct physical damage). We conclude, however, that

the physical loss or damage language in the present case is sufficiently similar to the language of the policies at issue in *CT Dermatology* and *Moda*. We emphasize, therefore, that, in order to obtain coverage, the plaintiff must allege facts showing "*some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible.*" (Emphasis added.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 51.

In the operative complaint in the present case, the plaintiff alleged in a conclusory fashion that COVID-19 caused a physical, tangible alteration to property. The plaintiff, however, failed to allege facts showing the manner in which this alteration occurred. We note that, although the facts alleged in a complaint are deemed admitted for the purposes of ruling on a motion to strike, legal conclusions are not. *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 481, 246 A.3d 513 (2021), aff'd, 345 Conn. 76, 282 A.3d 1253 (2022). Stated differently, "[a] motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) Id.; see *Bridgeport Harbour Place I, LLC* v. *Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011); *Sempey* v. *Stamford Hospital*, 194 Conn. App. 505, 513, 221 A.3d 839 (2019); see also *Perez* v. *Carlevaro*, 158 Conn. App. 716, 726, 120 A.3d 1265 (2015) (legal conclusion pleaded in complaint disregarded if inconsistent with or unsupported by facts alleged). It is, therefore, insufficient for the plaintiff merely to assert in its complaint that a physical, tangible alteration to its property has occurred due to COVID-19.

The plaintiff further alleged that COVID-19 can remain viable on objects or surfaces for up to twenty-eight days. It claimed that the prospect of COVID-19 being present on the property "is a risk of direct physical loss or damage, and it causes physical loss or damage

to property" and then reasserted that the presence of COVID-19 caused a physical, tangible alteration to the property. In several more instances, the plaintiff offered the conclusory allegation that COVID-19 caused a risk of physical loss or damage to property, or the presence of COVID-19 was a risk of physical loss or damage. Furthermore, the operative complaint baldly stated that COVID-19 caused the plaintiff to sustain time element loss as a direct result of physical loss and damage.[28]

[28] We note that numerous cases have recognized that, while COVID-19 harms people, the insurance policies and coverages at issue, like in the present case, apply to property. "The fact that the property could become a vector for transmission of a virus that poses a risk to human health due to the presence of SARS-CoV-2 in the air at the property is not relevant to the question of whether there has been physical loss of or damage to property, because the policies insure property, not people. [T]he danger of the virus is to people in close proximity to one another, not to the real property itself. . . . As one court observed, SARS-CoV-2 presents a mortal hazard to humans, but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another. . . . [Stated differently] [t]he virus harms human beings, not property." (Citations omitted; internal quotation marks omitted.) *Schleicher & Stebbins Hotels, LLC* v. *Starr Surplus Lines Ins. Co.*, 175 N.H. 744, 756, 302 A.3d 67 (2023); see *Stetson Real Estate, LLC* v. *Sentinel Ins. Co., Ltd.*, Docket No. 22-1748, 2023 WL 6563870, *2 (2d Cir. October 10, 2023) ("COVID-19 virus injures people, not property" (internal quotation marks omitted)); *Procaccianti Cos.* v. *Zurich American Ins. Co.*, Docket No. C.A. 20-512 (WES), 2023 WL 3536233, *3 (D. R.I. May 18, 2023) (whether doorknob is contaminated with COVID-19 and poses risk to human health is absolutely irrelevant to whether that doorknob is physically lost or damaged for purposes of insurance coverage); *DZ Jewelry, LLC* v. *Certain Underwriters at Lloyds London*, 525 F. Supp. 3d 793, 799–800 (S.D. Tex. 2021) (courts repeatedly have stated that "COVID-19 does not cause physical damage to property; it causes people to get sick" (internal quotation marks omitted)); *Uncork & Create, LLC* v. *Cincinnati Ins. Co.*, 498 F. Supp. 3d. 878, 884 (S.D. W. Va. 2020) (COVID-19 poses serious risk to people gathered in proximity to each other, but property is not physically damaged or rendered unusable or uninhabitable by presence of it), aff'd, 27 F.3d 929 (4th Cir. 2022); *Starr Surplus Lines Ins. Co.* v. *Eighth Judicial District Court*, 535 P.3d 254, 264 (Nev. 2023) ("SARS-CoV-2's virality in the air is evidence of harm imperiling people, not property"); *Huntington Ingalis Industries, Inc.* v. *Ace American Ins. Co.*, 287 A.3d 515, 541 (Vt. 2022) (Carroll, J., dissenting) (virus does not infect lightbulbs, desk or walls and these objects cannot develop COVID-19; virus infects and causes COVID-19 in humans).

Given our Supreme Court's reasoning in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64, the allegations set forth in the plaintiff's operative complaint are insufficient to establish physical risk or loss, which is required to trigger coverage under the policy for property damage or time element loss. The plaintiffs have not sufficiently alleged that COVID-19 causes some physical, tangible alteration to or results in the deprivation of property that renders it physically unusable or inaccessible. See *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 51. Again, "use of property and property are not the same thing, and the loss of the former does not necessarily imply the loss of the latter." (Internal quotation marks omitted.) Id., 53. As our Supreme Court explained, the SARS-CoV-2 virus is not the type of physical contaminant that creates the risk of physical loss because, once the contaminated surface is cleaned, or simply left alone for a few days, it no longer presents a threat to occupants. See id., 59.

In addition to the binding precedent from our Supreme Court,[29] we note that a substantial number of decisions from state and federal courts have concluded that the presence of COVID-19 does not constitute physical damage or loss to trigger coverage under insurance policies akin to the one in the present case. For example, in *10012 Holdings, Inc.* v. *Sentinel Ins. Co., Ltd.*, 21 F.4th

[29] As we recently and repeatedly have recognized, "[i]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 214 Conn. App. 511, 522–23 n.10, 281 A.3d 501, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022); see also *Lavette* v. *Stanley Black & Decker, Inc.*, 213 Conn. App. 463, 481, 278 A.3d 1072 (2022); *Onofrio* v. *Mineri*, 207 Conn. App. 630, 645 n.4, 263 A.3d 857 (2021).

216, 218–20 (2d Cir. 2021), the United States Court of Appeals for the Second Circuit considered whether the District Court, applying the law of New York, properly dismissed the plaintiff's claims for insurance coverage following the forced suspension of its business operations. The central issue on appeal was whether the policy provided coverage for these losses, even though the plaintiff had not alleged that its closure had resulted from physical damage to its property or adjoining property. Id., 220. Applying the reasoning from a New York state appellate court decision,[30] which required direct physical damage to property to trigger coverage, the Second Circuit concluded that the motion to dismiss properly had been granted. Id., 220–21. Additionally, the Second Circuit observed: "We are unaware of any contrary authority in New York that diverges from [this] holding . . . which state and federal courts in New York have (at either the motion to dismiss stage or on summary judgment) uniformly applied since the start of the COVID-19 pandemic to deny coverage under similar insurance provisions where insured property was not alleged or shown to have suffered direct physical loss or physical damages."[31] (Citations omitted.) Id., 221.

[30] *Roundabout Theater Co.* v. *Continental Casualty Co.*, 302 App. Div. 2d 1, 751 N.Y.S.2d 4 (2002).

[31] See also *Mario Badescu Skin Care, Inc.* v. *Sentinel Ins. Co., Ltd.*, Docket No. 22-0380-cv, 2023 WL 6567266, *1 (2d Cir. October 10, 2023) (Second Circuit and state courts of New York consistently and repeatedly have held under New York law that COVID-19 does not trigger insurance policy provisions that provide coverage for losses arising from direct physical loss or physical damage to covered property); *Stetson Real Estate, LLC* v. *Sentinel Ins. Co., Ltd.*, Docket No. 22-1748, 2023 WL 6563870, *1 (2d Cir. October 10, 2023) (same and collecting cases); *147 First Realty, LLC* v. *Aspen American Ins. Co.*, Docket No. 22-220, 2023 WL 3014780, *1 (2d Cir. April 20, 2023) (Second Circuit, applying law of New York, has held that policy provisions establishing coverage for physical loss of or physical damage to property does not extend to claims for loss and expenses resulting from business suspension in response to COVID-19 related public health restrictions); *Connecticut Children's Medical Center* v. *Continental Casualty Co., CNA Financial Corp.*, Docket No. 22-322, 2023 WL 2961738, *1 (2d Cir. April 17, 2023) (District Court properly dismissed complaint for

Cases from other jurisdictions also have reached the same conclusion with respect to this issue. For example, the United States Court of Appeals for the First Circuit recently addressed the issue of whether, under Massachusetts law, the plaintiff had failed to state a claim that the SARS-CoV-2 virus caused direct physical loss of or damage to property in *Lawrence General Hospital* v. *Continental Casualty Co.*, 90 F.4th 593 (1st Cir. 2024). The insurance policy in that case provided "broad coverage for direct physical loss of or damage to property." (Internal quotation marks omitted.) Id., 595–96. The plaintiff hospital alleged that it suffered physical loss of and damage to its property due to the continuous reintroduction of SARS-CoV-2 particles, which chemically bonded to surfaces, making them hard to detach. Id., 596.

The First Circuit considered a trilogy of cases[32] decided under Massachusetts state law to determine whether the hospital's allegations would survive a motion to dismiss for failure to state a claim under the Federal

failure to state claim as facts alleged failed to plausibly show direct physical loss or damage due to COVID-19 following our Supreme Court's analysis in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64); *ITT, Inc.* v. *Factory Mutual Ins. Co.*, Docket No. 22-1245, 2023 WL 1126772, *1 (2nd Cir. January 31, 2023) (noting that Connecticut had joined general consensus of state and federal courts holding that physical loss or damage requires physical damage or alteration to property and therefore District Court properly dismissed plaintiff's claim under all risk insurance policy because coverage was not triggered); *Kim-Chee, LLC* v. *Philadelphia Indemnity Ins. Co.*, Docket No. 21-1082-cv 2022 WL 258569, *1–2 (2d Cir. January 28, 2022) (under New York law, direct physical loss unambiguously does not extend to mere loss of use of property where there has been no physical damage to property and no allegation that any part of building or anything inside of it was damaged to point of repair, replacement, or total loss).

[32] See *Legal Sea Foods, LLC* v. *Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *SAS International, Ltd.* v. *General Star Indemnity Co.*, 36 F.4th 23 (1st Cir. 2022); *Verveine Corp.* v. *Strathmore Ins. Co.*, 489 Mass. 534, 184 N.E.3d 1266 (2022).

Rules of Civil Procedure. Id., 599. First, the court noted that property does not sustain physical loss or damage unless (1) it needs to be actively repaired or undergo remediation measures to correct the claimed damage or (2) the business must be moved to a new location. Id. It further explained that direct physical loss of or damage to property "requires some distinct, demonstrable, physical alteration of the property . . . and of course property cannot repair itself. . . . By contrast, the [e]vanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property." (Citations omitted; internal quotation marks omitted.) Id., 600. The court emphasized that the dissipation of the virus on its own and the removal of surface level contamination by simply cleaning supported the conclusion that the virus did not cause property damage, despite more detailed allegations in those other cases. Id. Ultimately, the First Circuit, relying on the facts that (1) direct physical loss of or damage to property exists only if a party must take active efforts to repair it and SARS-CoV-2 particles dissipate or become noninfectious within seven to twenty-eight days, effectively resulting in the "repair" of any "damage" to the property without intervention, (2) the presence of the virus was distinguishable from other contaminants such as ammonia and gasoline, and (3) "the clear consensus of courts throughout the country, which cuts against [the hospital] and demonstrates the flaws in its arguments," concluded that the District Court properly had granted the motion to dismiss filed by the defendant.[33] Id., 601–602.

[33] See also *Wilson* v. *USI Ins. Service, LLC*, 57 F.4th 131, 141–44 (3rd Cir. 2023) (under Pennsylvania and New Jersey law, loss of use of property due to COVID-19 did not constitute direct physical loss of or damage to property to trigger insurance coverage). As noted by the Third Circuit, other United State Courts of Appeals have reached the same conclusion. Id., 143 n.6 (citing, inter alia, *Legal Sea Foods, LLC* v. *Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *Uncork & Create, LLC* v. *Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Terry Black's Barbeque, LLC.* v. *State Auto Mutual Ins. Co.*,

In its efforts to distinguish the present case from the binding precedent of our Supreme Court, as well as the

22 F.4th 450 (5th Cir. 2022); *Goodwill Industry of Central Oklahoma, Inc.* v. *Philadelphia Indemnity Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Sandy's Point Dental, P.C.* v. *Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *MudPie, Inc.* v. *Travelers Casualty Ins. Co. of America*, 15 F.4th 885 (9th Cir. 2021); *Santo's Italian Café, LLC* v. *Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Oral Surgeons, P.C.* v. *Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021)).

Furthermore, as the Louisiana Supreme Court noted in *Cajun Conti, LLC* v. *Certain Underwriters at Lloyd's, London*, 359 So. 3d 922 (La. 2023): "[*N*]*umerous state supreme courts have reached a similar result when analyzing comparable policy language.* E.g., [*Neuro-Communication*] [*Services*], *Inc.* v. *Cincinnati Ins. Co.*, [171 Ohio 3d St. 606, 611, 219 N.E.2d 907 (2022)] (The definition of the term loss is clear: for coverage to be provided, there must be loss or damage to [c]overed [p]roperty that is physical in nature. Such loss or damage does not include a loss of the ability to use [c]overed [p]roperty for business purposes.); *Sullivan* [*Management*], *LLC* v. *Fireman's Fund Ins. Co.*, [437 S.C. 587, 594–95, 879 S.E.2d 742] (2022) (Because neither the presence of the coronavirus nor the government order prohibiting indoor dining constitutes direct physical loss or damage, the policy's triggering language is not met.); *Tapestry, Inc.* v. *Factory* [*Mutual*] *Ins. Co.*, [482 Md. 223, 252, 286 A.3d 1044] (2022) ([T]he presence of [c]oronavirus in the air and on surfaces at [the plaintiff's] properties did not cause physical loss or damage as that phrase is used in the [p]olicies.); *Hill & Stout, PLLC* v. [*Mutual*] *of Enumclaw Ins. Co.*, 200 Wn. 2d 208, 212, 515 P.3d 525] (2022) (It is unreasonable to read direct physical loss of . . . property in a property insurance policy to include constructive loss of intended use of property. Such a loss is not physical.); *Colectivo Coffee Roasters, Inc.* v. [*Society*] *Ins.*, [401 Wis. 2d 660, 672, 974 N.W.2d 442] (2022) ([T]he presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property.); *Verveine Corp.* v. *Strathmore Ins. Co.*, [489 Mass. 534, 541, 184 N.E.3d 1266] (2022) (We conclude that no reasonable interpretation of direct physical loss of or damage to property supports the plaintiffs' claims.)." (Emphasis added; internal quotation marks omitted.) *Cajun Conti, LLC* v. *Certain Underwriters at Lloyd's, London*, supra, 928–29.

We acknowledge that this reasoning has not been adopted *universally*. See, e.g., *Huntington Ingalis Industries, Inc.* v. *Ace American Ins. Co.*, 287 A.3d 515, 533–34 (Vt. 2022) (Vermont has extremely liberal notice-pleading standards and threshold plaintiff must cross to meet standard is exceedingly low and based on such standards; statement in complaint adequately alleged virus physically altered properly when it adhered to surface); see also *Marina Pacific Hotel and Suites, LLC* v. *Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 109, 296 Cal. Rptr. 3d 777 (2022) (determining plaintiff "unquestionably pleaded direct physical loss or damage to covered property" and recognizing this conclusion "is at odds with almost all (but

reasoning of the legion of federal and state cases, the plaintiff asserts that the insurance policy at issue here provides that the presence of a communicable disease at a covered property constitutes a physical loss or damage that is insured.[34] Specifically, the plaintiff points to the first line of the "Additional Coverages" section of the policy, which states: "This [p]olicy includes the following [a]dditional [c]overages for *insured physical loss or damage*." (Emphasis added.) One such additional coverage is the communicable disease response. The plaintiff argues, therefore, that given this prefatory language, the presence of a communicable disease constitutes insured physical loss or damage under the language of the policy.

We disagree with the plaintiff's attempt to classify the actual presence of a communicable disease as a physical loss or damage under the policy language. The communicable disease response coverage extension does not require physical loss or damage. That specific section of the policy is triggered if a location owned, leased or rented by the plaintiff has the actual, not suspected, presence of a communicable disease and access to such location is limited, restricted, or prohibited by either an order of an officer of the plaintiff or an authorized governmental agency regulating the actual presence of a communicable disease. Furthermore, this extension covers only reasonable and necessary costs for the cleanup, removal, and disposal of

not all) decisions" considering issue). We find these decisions unpersuasive because Connecticut is a fact pleading state. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 213 n.7; *Godbout* v. *Attanasio*, 199 Conn. App. 88, 111–12, 234 A.3d 1031 (2020).

[34] See, e.g., *Sacramento Downtown Arena, LLC* v. *Factory Mutual Ins. Co.*, 637 F. Supp. 3d 865, 870 (E.D. Cal. 2022) (policy can reasonably be interpreted as defining presence of communicable disease as physical loss or damage); *Live Nation Entertainment, Inc.* v. *Factory Mutual Ins. Co.*, Docket No. LA CV21-00862 (JAK), 2022 WL 390712, *8 (C.D. Cal. February 3, 2022) (same).

the actual presence of a communicable disease from insured property and the actual costs of fees for a public relations service or the use of employees for reputation management. On the basis of the entirety of the policy language,[35] including the communicable disease provisions that provide coverage distinct from the property damage and time element coverages, we are not persuaded by the plaintiff's efforts to establish that, under this policy, the actual presence of a communicable disease constitutes physical loss or damage. Simply stated, we agree with the defendant that "disease outbreaks are a different sort of risk than physical loss or damage." See, e.g., *Froedtert Health, Inc.* v. *Factory Mutual Ins. Co.*, 620 F. Supp. 3d 811, 816–17 (E.D. Wis. 2022) (prefatory language in communicable disease response extension of insurance policy, without more, did not plausibly suggest that parties had agreed that communicable disease such as COVID-19, caused physical loss or damage).

Next, the plaintiff argues that the issue of whether COVID-19 physically alters property cannot be determined at the motion to strike phase of the litigation. We disagree. First, in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 52, our Supreme Court, albeit in the context of a motion for summary judgment,[36] determined that the properties in that case were not altered as a result of the COVID-19 pandemic. Specifically, it explained that this pandemic caused a transformation in governmental and societal expectations and behaviors that negatively impacted business in a substantial manner; in other words, the "property did not change . . . [t]he world around it

[35] "It is axiomatic that a contract of insurance must be viewed in its entirety . . . ." (Internal quotation marks omitted.) *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 869, 261 A.3d 825 (2021).

[36] See, e.g., *Arnone* v. *Connecticut Light & Power*, 90 Conn. App. 188, 203–206, 878 A.2d 347 (2005) (discussing differences between motion to strike and motion for summary judgment).

did." (Internal quotation marks omitted.) Id. Additionally, our Supreme Court explained that, "[*i*]*n any event, even if the plaintiffs had claimed that their properties were actually contaminated by the coronavirus*, we find persuasive the cases that have held that the virus is not the type of physical contamination that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants." (Emphasis added.) Id., 59. Similarly, in *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 74, the court wrote: "*Contamination with the SARS-CoV-2 virus, even if it could be proved, is not sufficient to establish that the shoes were physically lost or damaged within the meaning of the package policy*." (Emphasis added.) Given this language, we conclude that the holdings and reasoning set forth in these cases apply to the present appeal, despite the different procedural contexts.

Second, courts, even at the pleading stage have concluded that COVID-19 does not physically alter property. See *Dr. Jeffrey Milton, DDS, Inc.* v. *Hartford Casualty Ins. Co.*, 588 F. Supp. 3d 266, 277 (D. Conn. 2022); *Connecticut Children's Medical Center* v. *Continental Casualty Co.*, 581 F. Supp. 3d 385, 391–93 (D. Conn. 2022), aff'd, United States Court of Appeals, Docket No. 22-322 (2d Cir. April 17, 2023); *Cosmetic Laser, Inc.* v. *Twin City Fire Ins. Co.*, 554 F. Supp. 3d 389, 407 (D. Conn. 2021).

Third, we note that in its complaint the plaintiff pleaded only conclusory allegations that COVID-19 causes a physical, tangible alteration to property and listed several types of property thereby affected but did not provide any specifics as to how the property purportedly was altered. See, e.g., *Wynn Resorts, Ltd.* v. *Factory Mutual Ins. Co.*, United States District Court, Docket No. 2:21-cv-01230 (CDS-EJY) 2023 WL 5319772,

*3 (D. Nev. August 10, 2023) (complaint failed to specifically identify what physical loss or damage was caused by respiratory droplets or how virus caused physical alteration of property). This type of legal conclusion is insufficient to state a claim under our law. "A [motion to strike] . . . does not admit legal conclusions." (Internal quotation marks omitted.) *Desmond* v. *Yale-New Haven Hospital, Inc.*, 212 Conn. App. 274, 284, 275 A.3d 735, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022). We conclude, therefore, that the plaintiff's efforts to distinguish *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 33, and *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 66, are unavailing and that, pursuant to the reasoning set forth in those cases, it was proper for the court to strike the counts in the plaintiff's operative complaint.

Additionally, we agree with the reasoning set forth in the trial court's memorandum of decision regarding the applicability of the contamination exclusion. As the court observed, "[c]osts caused by a virus are the very thing the policy does not cover by virtue of the contamination exclusion. Any argument that simply brings you back to costs caused by the virus brings you back to the costs that are expressly excluded. By definition, damage from the virus cannot be directly resulting from other physical damage not excluded by this policy." (Emphasis omitted; internal quotation marks omitted.) The trial court's ultimate determination to grant, in part, the defendant's motion to strike rested on this reasoning regarding the contamination exclusion.

The relevant language of the policy provides: "This [p]olicy excludes the following unless directly resulting from other physical damage not excluded by this [p]olicy: 1) contamination, and any cost due to contamination, including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If contamination due only to the actual

not suspected presence of contaminant(s) directly results from other physical damage not excluded by this [p]olicy, then only physical damage caused by such contamination may be insured." (Emphasis omitted.) The policy defines contamination as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew." On the basis of this plain language, therefore, it is clear that the policy specifically excludes coverage for any cost for the condition of property due to the actual or suspected presence of a virus such as SARS-CoV-2, unless it directly resulted from other physical damage not excluded.

We are mindful that, "[i]n an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." (Internal quotation marks omitted.) *Viking Construction, Inc.* v. *777 Residential, LLC*, 190 Conn. App. 245, 255, 210 A.3d 654, cert. denied, 333 Conn. 904, 214 A.3d 381 (2019). Such clauses are valid, as parties to an insurance contract have the right to qualify or limit the liability of the insurer in any manner that remains consistent with our law and does not violate public policy. *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588, 573 A.2d 699 (1990).

The policy in the present case contains clear and unambiguous language that excludes costs resulting from the SARS-CoV-2 virus from the physical loss or damage and time element coverages. Numerous federal and state cases have relied upon the similar policy language to reach this conclusion.[37] As noted by Judge

[37] See *Kids Indoor Playground, Inc.* v. *Northfield Ins. Co.*, Docket No. 23-55076, 2023 WL 8542622, *1 (9th Cir. December 11, 2023) (policy's virus exclusion unambiguously barred coverage for business losses and damages allegedly sustained due to COVID-19 and shutdown orders); see also *Froedtert Health, Inc.* v. *Factory Mutual Ins. Co.*, 69 F.4th 466, 470 (7th Cir. 2023); *Goodwill Industries of Central Oklahoma, Inc.* v. *Philadelphia Indemnity*

Dooley in *One40 Beauty Lounge, LLC* v. *Sentinel Ins. Co.*, Docket No. 3:20-CV-00643 (KAD), 2021 WL 5206387, *2 (D. Conn. November 9, 2021), appeal withdrawn, United States Court of Appeals, Docket No. 21-3007 (2d Cir. April 25, 2022), "[t]he [c]ourt does not write on a blank slate. Indeed, numerous courts have examined identical policy provisions and determined the [v]irus [e]xclusion is unambiguous and applies to claims arising out of losses caused by the COVID-19 virus."[38]

The plaintiff, however, argues that the contamination exclusion does not apply to a communicable disease,

Ins. Co., 21 F.4th 704, 713–14 (10th Cir. 2021); *Mashallah, Inc.* v. *West Bend Mutual Ins. Co.*, 20 F.4th 311, 320–22 (7th Cir. 2021); *Dr. Jeffrey Milton, DDS, Inc.* v. *Harford Casualty Ins. Co.*, 588 F. Supp. 3d 266, 273–74 (D. Conn. 2022); *Little Stars, LLC* v. *Sentinel Ins. Co., Ltd.*, 554 F. Supp. 3d 378, 384–86 (D. Conn. 2021); *Ralph Lauren Corp.* v. *Factory Mutual Ins. Co.*, Docket No. 20-10167 (SDW) (LDW), 2021 WL 1904739 (D. N.J. May 12, 2021); *LJ New Haven, LLC* v. *AmGUARD Ins. Co.*, 511 F. Supp. 3d 145, 151–56 (D. Conn. 2020). State cases include: *Coast Restaurant Group, Inc.* v. *Amguard Ins. Co.*, 90 Cal. App. 5th 332, 344–45, 307 Cal. Rptr. 3d 133 (Cal. App. 2023) (policy did not cover business loss or damage directly or indirectly caused by virus such as coronavirus); *American Rag Cie, LLC* v. *Harford Fire Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-22-6153983-S (August 1, 2023) (applying California law, virus exclusion barred any coverage for plaintiff's COVID-19 related losses); *Hill & Stout, PLLC* v. *Mutual of Enumclaw Ins. Co.*, 200 Wn. 2d 208, 229, 515 P.3d 525 (2022) (no issue of material fact that virus exclusion applied).

[38] The District Court in *One40 Beauty Lounge, LLC* v. *Sentinel Ins. Co., Ltd.*, supra, United States District Court, Docket No. 3:20-CV-00643 (KAD), set forth several cases. See *Cosmetic Laser, Inc.* v. *Twin City Fire Ins. Co.*, 554 F. Supp. 3d 389, 401–402 (2021) (finding identical virus exclusion unambiguous and rejecting argument that canons of construction are necessary to determine scope of exclusion, though noting that, even if canons applied, those argued by plaintiff do not change outcome); see also *Little Stars, LLC* v. *Sentinel Ins. Co., Ltd.*, 554 F. Supp. 3d 378, 385 (2021) (concluding that identical virus exclusion is unambiguous and precludes coverage for losses caused by COVID-19 virus); *CFIT Holding Corp.* v. *Twin City Fire Ins. Co.*, 548 F. Supp. 3d 701, 708 (2021) (same); *Kirkland Group, Inc.* v. *Sentinel Ins. Co., Ltd.*, Docket No. 3:20-cv-496-DPJ-FKB, 2021 WL 2772561, *2 (S.D. Miss. June 29, 2021) (same); *Arrowhead Health & Racquet Club, LLC* v. *Twin City Fire Ins. Co.*, Docket No. 1:20-cv-08968-NLH-KMW, 2021 WL 2525739, *5 (D. N.J. June 21, 2021) (same); *Garces* v. *Sentinel Ins. Co., Ltd.*, Docket No. 5:21-cv-00189-JWH-SPX, 2021 WL 2010357, *3 (C.D. Cal. May 18, 2021) (same); *Coffey & McKenzie, LLC* v. *Twin City Fire Ins. Co.*, Docket No. 2:20-cv-01671-BHH, 2021 WL 1310872, *3 (D. S.C. April 8, 2021) (same).

such as COVID-19. As we have noted in this opinion, contamination is defined by the policy as any condition of property due to the actual or suspected presence of any foreign substance including, inter alia, bacteria, a virus, or a disease or illness causing agent. The plaintiff argues that a communicable disease, defined by the policy as a disease transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges or legionellosis, is not a contaminant. It further claims that COVID-19 is a communicable disease, and it reasserts the contentions that the policy treats it as physical damage to the property and, therefore, the contamination exception does not apply. This argument, however, is plagued with several flaws.

First, the plaintiff's attempts to draw a bright-line distinction between the virus SARS-CoV-2 and the communicable disease COVID-19 are betrayed by the allegations in the operative complaint in which the plaintiff inextricably intertwined the two.[39] Specifically, the plaintiff alleged that "SARS-CoV-2 causes COVID-19, a disease that attacks the respiratory system and causes other harm to humans. *SARS-CoV-2 and COVID-19 are collectively referred to in this complaint as COVID-19*." (Emphasis added.) Second, we already have rejected the plaintiff's claim that a communicable disease such as COVID-19, under the language of this policy, constitutes a physical loss or damage to covered property. The plaintiff's reliance on the language that the contamination exclusion does not apply if the contamination directly results from other physical damage not excluded is, therefore, unfounded. Third, in considering the policy language as a whole, it is clear that the

[39] One court has described the attempt to distinguish a virus from a communicable disease in this context as a "red herring." *Ralph Lauren Corp.* v. *Factory Mutual Ins. Co.*, Docket No. 20-10167 (SDW) (LDW), 2021 WL 1904739, *4 n.8 (D. N.J. May 12, 2021).

definition of communicable disease is to determine the applicability of the communicable disease provisions, and their corresponding sublimit of $1 million, while the contamination exclusion, and the definition of contaminant, is used to determine whether a claim is generally excluded from the property damage and time element coverages.[40] For these reasons, we conclude that the court properly concluded that the contamination exclusion in the present case applied and defeated the plaintiff's claims for coverage under the property damage and time element coverages. For the reasons set forth herein, we conclude that the court properly granted the defendant's motion to strike.

The judgment is affirmed.

In this opinion the other judges concurred.

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[40] In support of its claim, the plaintiff cites to *Thor Equities, LLC* v. *Factory Mutual Ins. Co.*, 531 F. Supp. 3d 802, 804–805 (S.D.N.Y. 2021), in which the District Court denied the defendant's motion for judgment on the pleadings pursuant to rule 12 (c) of the Federal Rules of Civil Procedure. The court concluded that the contamination exclusion was ambiguous and therefore denied the insurance company's motion. Id., 809. We join the other judicial decisions that determined that this decision to be inapposite or unpersuasive. See *Harvey B. Pats, M.D., P.A.* v. *Hartford Ins. Co.*, United States District Court, Docket No. 3:20CV00697 (SALM) (D. Conn. December 17, 2021); see also *Dana, Inc.* v. *Zurich American Ins. Co.*, Docket No. 21-4150, 2022 WL 2452381, *3 n.4 (6th Cir. July 6, 2022); *Ralph Lauren Corp.* v. *Factory Mutual Ins. Co.*, Docket No. 20-10167 (SDW) (LDW), 2021 WL 1904739, *4 n.8 (D. N.J. May 12, 2021).

Additionally, the Southern District Court of New York subsequently granted the defendant insurer's partial motion for summary judgment, concluding "as a matter of law, the presence of the COVID-19 virus does not qualify as damage to property, and [the plaintiff] has failed to satisfy the conditions for recovery under the [c]ommunicable [d]isease [p]rovisions." *Thor Equities, LLC* v. *Factory Mutual Ins. Co.*, Docket No. 20 Civ. 3380 (AT), 2023 WL 7928097, *3 (S.D.N.Y. November 16, 2023), appeal filed (2d Cir. December 21, 2023) (No. 23-8063).

STATE OF CONNECTICUT *v.* BRANDON ROBERTS (AC 46906)

Elgo, Moll and Keller, Js.

Syllabus

The defendant, who had been convicted, following a jury trial, of, inter alia, carrying a pistol without a permit in violation of statute ((Rev. to 2017) § 29-35 (a)), appealed to this court from the judgment of the trial court denying his motion to dismiss and/or set aside the conviction. Although the defendant had grown up in Bridgeport, he claimed to be a resident of Ohio who was visiting his family in Connecticut when he shot and killed a woman he had been dating. He purchased the pistol he used to commit the murder in Ohio, and he never applied for or obtained a permit to carry the weapon in Connecticut. In his motion to dismiss, the defendant claimed that his conviction should be vacated in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen* (597 U.S. 1), which was decided the day before his sentencing, because § 29-35 (a) violated his right to bear arms under the second amendment to the United States constitution and subjected him to disparate treatment as a nonresident of Connecticut in violation of the privileges and immunities clause of the United States constitution. The trial court denied the motion, and the defendant appealed, arguing that the conviction violated his second amendment rights because he could not have applied for or obtained a permit under the statute governing the issuance of permits to Connecticut residents, ((Rev. to 2017) § 29-28 (b)), as he was not a bona fide permanent resident of Connecticut, and he could not have applied for or obtained a permit pursuant to § 29-28 (f), as that subsection applied only to nonresidents who had a permit or license to carry a pistol or revolver issued by the authority of another state, and he did not have a permit from Ohio because he was not required to have one in that state. The defendant further argued that his conviction violated his rights under the privileges and immunities clause to the United States constitution because Connecticut's permitting process placed an additional burden on nonresidents by requiring them to obtain permits in their home states that were not otherwise required prior to obtaining a nonresident permit. *Held*:

1. It was not necessary for this court to address the merits of the state's argument that, because the defendant did not apply for, and was never denied, a Connecticut nonresident permit, he lacked standing to challenge the constitutionality of § 29-28 (f), this court having determined, under the first prong of the test set forth in *State* v. *Golding* (213 Conn. 233), that the record was inadequate to establish whether § 29-28 (f) even applied to the defendant.

2. The defendant did not distinctly raise in the trial court the second amendment claim that he raised on appeal and, therefore, it was unpreserved: in his motion to dismiss, the defendant alleged only that, in light of *Bruen*, § 29-35 (a) appeared to create an unconstitutional restriction on his right to carry a pistol or a revolver outside of his home; moreover, the motion to dismiss was not predicated on the defendant's claimed Ohio residency, it did not refer to § 29-28 (f) or reference the process that governed a nonresident's application for and ability to obtain a permit to carry a pistol or revolver in Connecticut, and it made no mention of Ohio or its permit requirements, and defense counsel was silent on these matters during his argument to the trial court in support of the motion; accordingly, the trial court was not asked to decide, nor did it address, whether, in light of *Bruen*, § 29-28 (f) violated the second amendment.

3. The defendant could not prevail on either of his unpreserved constitutional claims under *Golding* because the record was inadequate to establish that his conviction for carrying a pistol without a permit violated his rights under the federal constitution:

a. It was not clear whether, at the time of the murder, the defendant had a bona fide permanent residence in Connecticut sufficient for him to have obtained a permit pursuant to § 29-28 (b): when the trial court denied the motion to dismiss, it did not address this claim or make any factual findings regarding the defendant's residency or his eligibility to apply for and obtain a pistol permit in Connecticut; moreover, contrary to the defendant's claim, the record that existed arguably supported the conclusion that the defendant had plans to remain in Connecticut with some sense of permanency and, accordingly, belied the conclusion that he could not have applied for and obtained a Connecticut resident permit pursuant to § 29-28 (b); furthermore, there was no evidence in the record to explain how applications for permits were evaluated or what type of information was needed to satisfy any of the requirements under § 29-28 (b) or (f), as defense counsel did not cross-examine any of the state's witnesses who were familiar with the permitting process in Connecticut nor did he call any witnesses or submit any documentary evidence to address and explain the permitting process during the hearing on the motion to dismiss; accordingly, even if this court, as a reviewing court, could determine whether the defendant had a bona fide permanent residence in Connecticut at the time of the murder, there was no framework within which to assess the applicable evidence.

b. It was unclear whether § 29-28 (f) was implicated in this case and, therefore, whether the defendant was required to undertake what he described as the additional burden of obtaining a permit in Ohio prior to applying for a permit in Connecticut: contrary to the defendant's claim, even assuming that he was a resident of Ohio at the time of the murder, there was no evidence that he was not required to have a permit to carry his guns in that state, as a permit was required in Ohio for concealed

carry and there was a dearth of evidence with respect to the manner in which the defendant carried his guns while in that state.

Argued November 15, 2023—officially released April 2, 2024

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, robbery in the first degree, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *Hernandez*, *J.*; verdict of guilty; thereafter, the court, *Hernandez*, *J.*, denied the defendant's motion to dismiss and/or set aside the conviction; subsequently, the court, *Hernandez*, *J.*, vacated the defendant's conviction of felony murder and rendered judgment of guilty of murder, robbery in the first degree, and carrying a pistol without a permit, and the defendant appealed. *Affirmed.*

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

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Brandon Roberts, appeals[1] from the judgment of conviction, rendered following a jury trial, of carrying a pistol without a permit in violation of General Statutes (Rev. to 2017) § 29-35 (a).[2] The

[1] The defendant appealed from the judgment directly to our Supreme Court pursuant to General Statutes § 51-199 and our Supreme Court transferred the appeal to this court pursuant to Practice Book § 65-1.

[2] General Statutes (Rev. to 2017) § 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

All references herein to § 29-35 are to the 2017 revision unless otherwise indicated.

defendant claims that his conviction for this offense should be vacated "[i]n light of" the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).[3] Specifically, he argues that the firearm permitting laws in Connecticut place on him an unconstitutional burden that violates his right to bear arms under the second amendment to the United States constitution[4] and subject him to disparate treatment as a non-Connecticut resident (nonresident), in violation of the privileges and immunities clause set forth in article four, § 2, clause 1 of the United States constitution.[5]

Both of the defendant's claims find their genesis in General Statutes (Rev. to 2017) § 29-28,[6] which, as of the date of the commission of the crime, set the parameters for how and to whom a pistol permit required by § 29-35 (a) was to be issued. Section 29-28 (b) governs how permits are issued to Connecticut residents,[7] and

[3] The defendant also was charged with and convicted of murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c, and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2). The court vacated his felony murder conviction because it was cumulative of his murder conviction; see *State* v. *Miranda*, 317 Conn. 741, 749, 120 A.3d 490 (2015) (holding that vacatur is appropriate remedy for cumulative conviction that violates double jeopardy protections); *State* v. *Kennibrew*, 208 Conn. App. 568, 578, 264 A.3d 1127 (2021) (confirming that murder and felony murder are single crime for double jeopardy purposes); and the defendant is not challenging in this appeal his conviction as to the other two charges.

[4] The second amendment to the United States constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II.

[5] Article four, § 2, clause 1 of the United States constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[6] Unless otherwise indicated, all references to § 29-28 in this opinion are to the 2017 revision of the statute.

[7] General Statutes (Rev. to 2017) § 29-28 (b) provides in relevant part: "Upon the application of any person having a bona fide permanent residence within the jurisdiction of any such authority, such chief of police, warden

§ 29-28 (f) governs how permits are issued to nonresidents.[8] The defendant claims that he was a resident of the state of Ohio in 2018 when he shot and killed the twenty-five year old victim[9] in Connecticut with a pistol for which he did not have a Connecticut permit. He claims, therefore, that he could not have applied for or obtained a permit as a bona fide permanent Connecticut resident pursuant to § 29-28 (b). He further claims that he could not have applied for or obtained a permit as a nonresident pursuant to § 29-28 (f) because that section provides in relevant part that a nonresident "who has a permit or license to carry a pistol or revolver issued by the authority of another state or subdivision of the United States, may apply directly to the Commissioner of Emergency Services and Public Protection for a permit to carry a pistol or revolver in this state," and he did not have a permit from Ohio because he was not required to have one there. Although he acknowledges that Ohio did issue permits, and in fact required

or selectman may issue a temporary state permit to such person to carry a pistol or revolver within the state . . . . Upon issuance of a temporary state permit to carry a pistol or revolver to the applicant, the local authority shall forward the original application to the [C]ommissioner [of Emergency Services and Public Protection]. Not later than sixty days after receiving a temporary state permit, an applicant shall appear at a location designated by the commissioner to receive the state permit. . . ."

[8] General Statutes (Rev. to 2017) § 29-28 (f) provides: "Any bona fide resident of the United States having no bona fide permanent residence within the jurisdiction of any local authority in the state, but who has a permit or license to carry a pistol or revolver issued by the authority of another state or subdivision of the United States, may apply directly to the Commissioner of Emergency Services and Public Protection for a permit to carry a pistol or revolver in this state. All provisions of subsections (b), (c), (d) and (e) of this section shall apply to applications for a permit received by the commissioner under this subsection."

[9] In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

them under some circumstances in 2018, he questions why he should be required to obtain an "optional" or "otherwise unnecessary" permit from Ohio in order to procure a nonresident permit in Connecticut. The defendant argues that punishing him for carrying a pistol without a permit under these circumstances infringes on his federal constitutional rights.[10] We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found from the largely undisputed evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. During the evening hours of December 8, 2018, at a secluded portion of a beach near 365 Seaview Avenue in Bridgeport, the defendant[11] took a Smith & Wesson semi-automatic pistol from his waistband and shot the victim in the back of her head, killing her. The defendant did not have a permit to carry a pistol in Connecticut, nor had he ever applied for one.

The defendant grew up in Bridgeport, attended and graduated from high school in Ansonia, and had intended to go to college in Ohio, where he was living with his father in 2018. On November 15, 2018, the defendant purchased a Smith & Wesson semiautomatic pistol from the Gold Star Pawn Shop, LLC, in Eastlake, Ohio. He left from there and drove to Connecticut, where he had plans to spend the upcoming Thanksgiving holiday with his family in the state. He had with him both the Smith & Wesson pistol he had just purchased and a .45 caliber semiautomatic Taurus pistol he had purchased from the same shop in Ohio on

[10] Although the defendant has appealed from the judgment of conviction for his violation of § 29-35 (a), he is indirectly challenging the constitutionality of § 29-28 (f) as it applied to his circumstances.

[11] We note that the defendant testified at trial. The jury also viewed and listened to the video recorded statement that the defendant gave to the police at the time of his arrest.

November 7, 2018, eight days earlier. The defendant testified that he brought the Smith & Wesson pistol with him "for protection to be out here . . . ." As he explained in his statement to the police, he had once been shot and injured in Bridgeport. He also testified that he brought the Taurus pistol with him to sell in Connecticut, which he ultimately did, "to somebody on the street . . . ." In fact, the defendant admitted during cross-examination that he "came to Connecticut with the intention of committing a crime of selling a firearm on the street."

The defendant became acquainted with the victim after he arrived in Connecticut. He connected with her through an online dating application called "Plenty of Fish." They met in person for the first time on November 20, 2018, and started a relationship. After that meeting, the victim sent the defendant a text message asking him to "explain to me why you're here if you actually live here or if you're visiting that's all." The defendant responded: "And I told you this last night. I plan on living here. I jus came out here."

The victim's mother testified that the victim "[fell] hard" for the defendant and immediately considered him her boyfriend. The victim gave the defendant money when he asked for it, let him use her car, and even tried to convince her mother to let him stay with her in her bedroom at her parents' house in Bethel, where she lived with her parents and her brother. The defendant and the victim had unprotected sexual relations on several occasions, and they discussed the possibility that the victim might have become pregnant.

The defendant admitted that he was in constant need of money and that the victim had been particularly generous with hers.[12] The victim routinely gave the

[12] The defendant was candid with the victim about his need for money. When the victim sent him a text message on December 4, 2018, asking if he had "like a semi-plan? Are you going back to Ohio?," he sent a text

defendant money for gas and food. She also gave the defendant money to repair his car, which, as he explained to her in a text message, he "ha[d] to find a way to get . . . up and ready so I can get a job! Delivery jobs are everywhere." After the defendant sent the victim a text message on December 6, 2018, asking for "help" with his car, as he had an interview the next day, she gave him approximately $250.[13] The victim also shared with the defendant the PIN for her ATM card and told him, in a December 6, 2018 text message, that she had $1200 in her bank account.[14]

During his testimony at trial, the defendant described the brief relationship he had with the victim as an "iffy situation, iffy as in one minute [the victim] wants to continue the relationship, the next minute [the victim] wants to break it off . . . ." The victim's family did not approve of the relationship and the victim felt "stuck." The defendant "was getting tired of the iffy situation" and felt that the victim was "playing with [his] emotions." On December 7, 2018, he told her in a series of text messages that a "hot moment has an cold ending" and that "you really push me to the point where I stop giving chances."

On December 8, 2018, the victim sent a text message to the defendant stating that she and the defendant

message in response indicating that that "[m]ight have to be the plan going back idk yet. Either way I still need to get my hands into money."

[13] It appears that the defendant was able to make that interview as a result. On December 7, 2018, he sent a text message to the victim confirming that he "went to do the app for the staffing agency today" and that "[t]hey set up an interview for me on Monday." Moreover, after the murder, when he was interviewed by Connecticut police officers in Ohio, the defendant told the police that if he was still in Connecticut, he "would've been working. I had interviews and shit . . . [at] a staff agency in Seymour. And I had an interview today, the second interview today, so I would have been working."

[14] The defendant responded to the victim's text message by saying "OK hun, we don't have to put down a deposit we can jus work on saving up . . . . That way we won't be going broke getting a spot you know."

should just be friends. The defendant sent a text message in response asking if they could "hang one last time?" He told her that he wanted the victim to meet him so "we can discuss things in person and I can tell you how I feel. We can park up by the sand and water and discuss some real shit." The victim agreed. They met, as "per usual," at the hotel in Stratford, where the defendant had been staying with his uncle, Bradford Belcher.[15] They drove in the victim's car to a Dunkin Donuts and then, at the defendant's suggestion, to the beach by the boat ramp on Seaview Avenue in Bridgeport. After they got out of the car and walked onto the beach and up to the water, the defendant pulled his Smith & Wesson pistol out of the waistband of his pants and shot the victim in the back of her head. The defendant then took the victim's belongings, including her cell phone and her ATM card, left in the victim's car, drove to a nearby ATM and withdrew $450 from the victim's bank account. He realized after doing so that there was still money left in the victim's account, so he drove in the victim's car to a nearby market that had an ATM inside and withdrew an additional $50 from the victim's bank account.[16] The defendant then discarded the victim's cell phone on the side of the highway and drove to a New York rest area where he slept in the victim's car.

The following morning, the defendant drove the victim's car back to the hotel in Stratford, left it there, and picked up his own car. He then drove to his father's home in Ohio. A few days later, he went to a corner store in Cleveland, Ohio, and sold the Smith & Wesson pistol to someone there.[17] Before he sold the murder

[15] The defendant's uncle had been displaced from his home in Stratford due to a plumbing incident.

[16] There was $9.63 remaining in the victim's account after this second withdrawal.

[17] During his interview with two Connecticut police officers on December 14, 2018, the defendant explained that he did not sell the Smith & Wesson pistol back to the pawn shop where he purchased it because it was a murder weapon and he was "not stupid . . . ."

weapon, he had it with him "[i]n the car, in the apartment, wherever [he] went." The defendant was subsequently apprehended at his father's home in Ohio and brought back to Connecticut, where he was arrested and charged with, among other things, carrying a pistol without a permit in violation of § 29-35 (a). See footnote 2 of this opinion.

During its case-in-chief at trial, the state presented one witness who testified about the defendant's pistol purchases in Ohio and three witnesses who testified about the defendant's violation of § 29-35 (a). Anthony Zaffiro was the owner of the Gold Star Pawn Shop, LLC, in Eastlake, Ohio, where the defendant purchased the two firearms he brought with him to Connecticut. Zaffiro is also a licensed federal firearms dealer. He explained the process applicable to the purchase of a firearm from a licensed federal firearms dealer in Ohio in 2018. First, the prospective purchaser was required to present a valid identification from the state of Ohio that had "the person's name and local address on it." The purchaser also had to fill out an application for a federal background check. Next, the dealer was required to enter the purchaser's information into an online Federal Bureau of Investigation (FBI) background checking system and wait for a response. Zaffiro testified that there were three possible directives the dealer could receive from the FBI in response: "proceed," which meant the transaction could go forward and the purchaser could immediately leave with the gun; "delay," which meant that the purchaser had to wait five business days to receive a final decision as to whether he will be allowed to make the purchase; and "den[y]," which precluded the sale. When the defendant came to Zaffiro's shop on November 7, 2018, to purchase the Taurus pistol, and again on November 15, 2018, to purchase the Smith & Wesson pistol, he provided an Ohio driver's license that reflected an Ohio address and filled out the

necessary applications. On both occasions, the dealer submitted the defendant's information to the FBI database and was directed to "proceed" with the respective transaction. Thus, the defendant was able to immediately purchase the Taurus pistol on November 7, 2018, and the Smith & Wesson pistol on November 15, 2018.

Detective Rachel Crosby of the Stratford Police Department also testified. Her responsibilities included maintaining the records of temporary permit applications by Stratford residents and the temporary permits that the department had issued. Upon questioning by the court, Crosby explained that the Connecticut permitting process requires a resident applicant to first apply for a temporary permit from his or her local police department. The applicant would then have sixty days after receiving his or her temporary permit to apply for and secure a permanent permit from the Connecticut State Police Department. Crosby reviewed the Stratford Police Department's records and confirmed that there was no application by the defendant for a temporary permit and no temporary permit issued to the defendant on file there.

Officer Devin Polite, a member of the Bridgeport Police Department Permit Unit, which is the unit involved in the permitting process for Bridgeport residents, also testified. Polite reviewed the records of the Bridgeport Police Department and confirmed that there was no application by the defendant for a temporary permit and no temporary permit issued to the defendant on file there.

Trooper Gregory Sawicki of the Special Licensing and Firearms Unit of the Connecticut State Police, which is the unit responsible for issuing permanent pistol permits in Connecticut, also testified. Sawicki confirmed that his unit did not issue temporary permits but that it did process and act on applications for permanent

pistol permits that were submitted with locally issued temporary state permits. Sawicki reviewed the unit's records and confirmed that there was no application by the defendant for a permanent permit and no such permit was issued to the defendant.[18]

Defense counsel did not cross-examine these witnesses on the permitting process. The defense also did not elicit testimony from the defendant when he testified, or from any of the other defense witnesses, that addressed why the defendant never availed himself of the Connecticut permitting process as either a resident or nonresident pursuant to § 29-28 (b) or (f).[19] Defense counsel did not submit any documentary evidence that addressed this issue either. The main focus of the defendant's case was his affirmative defense that he was suffering from an extreme emotional disturbance when he shot and killed the victim.[20] During closing argument,

[18] Both Crosby and Polite testified respectively about applications for temporary permits in Stratford, where the defendant had been living with his uncle, and Bridgeport, where the defendant grew up. They were, therefore, describing the permitting process applicable to Connecticut residents, not nonresidents. Compare General Statutes (Rev. to 2017) § 29-28 (b) (Connecticut residents must submit application for temporary permit to their "local authority" before they can apply to Commissioner of Emergency Services and Public Protection for permanent permit), with General Statutes (Rev. to 2017) § 29-28 (f) (nonresidents "apply directly to the Commissioner of Emergency Services and Public Protection" for nonresident permits). Defense counsel did not object to Crosby's or Polite's testimony as irrelevant. Sawicki's testimony, like Crosby's and Polite's, appears to describe the permitting process for Connecticut residents, not nonresidents. Defense counsel did not object to Sawicki's testimony as irrelevant, nor did they seek clarification by way of cross-examination.

[19] At trial, the defense called the victim's stepfather; Tiffany Teixeira, an investigator with Public Defender Services; and the defendant as witnesses.

[20] "Extreme emotional disturbance, an affirmative defense that reduces the crime of murder to manslaughter, is set forth in the applicable statute defining murder: [I]t shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall

defense counsel argued that "much of this case is not in dispute. Sadly, [the defendant] intentionally shot and killed [the victim] with a gun for which he had no permit. . . . The very narrow issues . . . in this case pertain to [the defendant's] mental and emotional state at the time of the shooting." He argued, therefore, that "the right thing" for the jury to do would be to find the defendant "guilty of manslaughter in the first degree, *guilty of carrying a pistol without a permit*, and not guilty of everything else." (Emphasis added.)

The jury found the defendant guilty on all counts, including carrying a pistol without a permit. After accepting the verdict, the court scheduled the defendant's sentencing for June 24, 2022.

On the day of the defendant's sentencing, his counsel filed a "motion to dismiss and/or to set aside the conviction pertaining to the count charging a violation of . . . § 29-35 (a)." Citing to the Connecticut rules of practice, the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 1, which had been decided and released the day prior, "and his rights under the second and fourteenth amendments to the United States constitution and article first, § 15, of the Connecticut constitution,"[21] the defendant argued that "the count in the information charging him with a violation of . . . [§] 29-35 (a) [should] be dismissed and/or that the conviction on that

constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime." (Internal quotation marks omitted.) *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 254 n.6, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021); see also General Statutes § 53a-12 (b) (providing that, "[w]hen a defense declared to be an affirmative defense is raised at a trial, the defendant shall have the burden of establishing such defense by a preponderance of the evidence").

[21] Article first, § 15, of the Connecticut constitution provides: "Every citizen has a right to bear arms in defense of himself and the state." The defendant is not pursuing a claim under the Connecticut constitution on appeal.

count be set aside." In that motion, he claimed that, "[i]n light of *Bruen*," "which held that a New York statute requiring a permit to carry a handgun in public was unconstitutional . . . [and] noted [that] '[n]othing in the [s]econd [a]mendment's text draws a home/public distinction with respect to the right to keep and bear arms' . . . § 29-35 [a] appears to create an unconstitutional restriction on one's right to carry a pistol or revolver outside of one's home" and that, consequently, his conviction could not stand.

Before the court heard argument from defense counsel regarding the motion to dismiss, the court accepted a plea from the defendant in another pending criminal matter.[22] After the court accepted the defendant's guilty plea to that charge, his counsel made the following argument in support of the defendant's motion to dismiss: "In light of a United States Supreme Court opinion rendered yesterday in . . . *Bruen*, I thought I would be remiss if I did not raise that as an issue. And so, the motion asks the court to either dismiss or set aside the conviction of the count charging a violation of pistol without a permit, § 29-35 (a) of the General Statutes.

"I recognize—[the prosecutor] and I spoke about this just before court started that in footnote 1 of the Supreme Court's opinion, there is reference made to the Connecticut statute, but that's not—whatever's said there is dicta.[23] So, I just raise this now to preserve the issue. *The issue is whether the Supreme Court said in its opinion that nothing in the second amendment's text draws a home/public distinction with respect to the right to keep and bear arms.* Under the Connecticut

[22] The defendant pleaded guilty to assault in the first degree in violation of General Statutes § 53a-59 (a) (1) in a separate matter arising from a June 6, 2017 incident in Bridgeport, wherein the defendant shot and injured another victim.

[23] See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 14 n.1; see also General Statutes (Rev. to 2021) § 29-28 (b).

statute, there is a—no requirement for a permit for a gun that's going to be kept in the home.[24] And so, I just apply the court's reasoning from the *Bruen* case to this case, and that's the basis for the motion." (Emphasis added; footnotes added.) The prosecutor did not present an argument in response.

The court orally denied the defendant's motion. It explained: "I've read your motion. . . . I have not read the entirety of [the *Bruen*] decision, but I was following it as it wended its way. And my understanding of the problem with the New York statute[25] was that New York, in addition to the application and permit process, also required the applicant to show a need for carrying a pistol. And I think the case turned on that." (Footnote added.) The court then imposed a total effective sentence of sixty-five years of imprisonment. For carrying a pistol without a permit, the court sentenced the defendant to a term of incarceration of five years, with one year being a mandatory term of imprisonment that cannot be suspended.[26] This appeal followed.

In this appeal, the defendant advances two claims predicated on alleged violations of his rights under the United States constitution. First, the defendant argues that his conviction of carrying a pistol without a permit in violation of § 29-35 (a) violates his right to bear arms under the second amendment because, as a "nonresident," he could not apply for and obtain a permit in Connecticut without a " 'permit or license to carry a pistol' " from his home state of Ohio, and he did not have a permit or license from Ohio because he claims

[24] See General Statutes (Rev. to 2017) § 29-35 (a).

[25] N.Y. Penal Law § 400.00 (2) (f) (McKinney 2021).

[26] The court also imposed a sentence of sixty years of incarceration for the murder conviction, plus a consecutive five year enhancement pursuant to General Statutes § 53-202k, and a sentence of fifteen years of incarceration for the robbery conviction, plus a consecutive five year enhancement pursuant to § 53-202k. All of the sentences are to run concurrently.

he was not required to have either to openly carry a gun in that jurisdiction. He acknowledges that, in 2018, Ohio required permits for carrying concealed handguns, but he refers to those permits as "optional" as applied to him. He argues, therefore, that his conviction of carrying a firearm without a Connecticut permit violated his second amendment rights because he could not apply for or obtain a Connecticut permit without first securing an optional, unnecessary permit from Ohio that was irrelevant to him. He further argues that his motion to dismiss preserved this claim for appeal. To the extent that it did not, he requests review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[27]

Second, the defendant argues that his conviction also violates his rights under the privileges and immunities clause in article four, § 2, of the United States constitution. He claims that Connecticut's firearm permitting process places an "additional burden" on nonresidents who are not otherwise required to have permits in their home states to nonetheless secure permits from their home states as a prerequisite to applying for and obtaining a nonresident permit in Connecticut. For this reason, he claims, the permitting process impermissibly treats nonresidents differently from Connecticut residents, rendering his conviction unconstitutional. He concedes

[27] In *Golding*, our Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 780–81 (modifying third prong of *Golding*).

that he did not preserve this claim for appeal and thus seeks review under *Golding*.[28]

The state argues in response that neither the defendant's motion to dismiss nor his argument before the trial court preserved the defendant's claim on appeal that his conviction violated his rights as a nonresident of Connecticut under the second amendment to the United States constitution. The state further maintains that the defendant lacks standing to raise his claims. It also avers that the record is inadequate to review both unpreserved claims and, therefore, they both fail under the first prong of *Golding*. We conclude that the second amendment claim the defendant raises on appeal was not distinctly raised in the trial court, and, therefore, it is unpreserved. We further conclude that the defendant cannot prevail on either claim under *Golding* because he has failed to provide us with an adequate record for review.[29]

I

At the outset, we acknowledge that the state argues that the factual record is inadequate with respect to whether the defendant has standing to challenge the constitutionality of § 29-28 (f) because he did not apply for, and thus was never denied, a Connecticut nonresident permit and that, consequently, he has failed to

[28] The defendant's counsel also confirmed at oral argument before this court that the defendant is not pursuing his argument that his conviction violates the equal protection clause set forth in the fourteenth amendment to the United States constitution.

[29] We note that the state also addresses the merits of the defendant's constitutional claims and argues that he has failed to demonstrate the existence of a constitutional violation, as required under the third prong of *Golding*. Because we conclude that the defendant has failed to satisfy the first prong of *Golding* by providing us with an adequate record, we need not consider that alternative contention. See, e.g., *State* v. *Santana*, 313 Conn. 461, 469–70, 97 A.3d 963 (2014) (appellate tribunal is free to respond to defendant's claim by focusing on whichever prong of *Golding* is most relevant).

establish standing. In response to the state's claim regarding his standing, the defendant argues that, because the underlying basis for his criminal conviction of carrying a pistol without a permit is his violation of the requirements of § 29-28 (f), he has standing to challenge the constitutionality of his conviction for violating § 29-35 (a). He further argues that it would have been futile to apply for a Connecticut nonresident permit because he lacked the prerequisite of an Ohio permit.

We recognize that "the issue of standing is not subject to waiver and may be raised at any time"; (internal quotation marks omitted) *State* v. *Gaston*, 201 Conn. App. 276, 280, 241 A.3d 209, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020); and that we must address a claim of lack of standing because it implicates a lack of subject matter jurisdiction in the trial court to determine the cause. Although before and after the *Bruen* decision was promulgated, courts have determined that someone who has never applied for a permit lacks standing to challenge the constitutionality of a state's pistol permit licensing statutes, the defendant arguably has standing to seek to overturn a conviction for violation of a criminal statute when the underlying basis of the violation is his lack of compliance with a permitting statute he maintains is unconstitutional, thereby affecting the constitutionality of the criminal law as applied to his circumstances. In fact, after noting that a criminal defendant lacks standing to directly challenge the effects of the state's pistol permitting statutes, several courts have nevertheless analyzed the merits of the defendant's second amendment claims because the appeal lies from a criminal conviction that directly affects the defendant. See *United States* v. *Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) ("[h]aving concluded that [the defendant] is in no position to challenge the constitutionality of [18 U.S.C.] § 922 (a) (3) [2006] based on the asserted effects of New York's licensing scheme, we now consider [the

defendant's] argument that [18 U.S.C.] § 922 (a) (3) is, by its own terms, unconstitutional because it infringes on the core [s]econd [a]mendment right of law-abiding citizens to possess firearms for self-defense"), cert. denied, 568 U.S. 1092, 133 S. Ct. 838, 184 L. Ed. 2d 665 (2013); *People* v. *Frazzini*, Docket No. 70227-23/001, 2023 WL 3239952, *2 (N.Y. Sup. May 3, 2023) (decision without published opinion, 187 N.Y.S.3d 581 (N.Y. Sup. 2023)) ("[T]his [c]ourt has held [that] an individual who has not applied for, or been denied, a pistol permit does not have standing to challenge the New York [s]tate pistol permit licensing statute . . . [but] [t]he defendant is indicted and charged with [c]riminal [p]ossession of a [w]eapon in the [s]econd [d]egree. Based on the fact the defendant is directly affected by the [c]riminal [p]ossession of a [w]eapon statute, the [c]ourt will consider the merits of the defendant's challenge as it relates to the constitutionality of the [c]riminal [p]ossession of a [w]eapon statute." (Footnote omitted.)). We conclude, however, that, because we are deciding the present case in favor of the state under the first prong of *Golding*, due to the lack of an adequate record to establish whether § 29-28 (f) was even applicable to the defendant, we need not address the merits of the standing issue raised by the state.[30]

[30] Even if we could discern from this record that § 29-28 (f) was applicable to the defendant, we still would be unable to address his standing to challenge the constitutionality thereof. It is undisputed that the defendant did not apply for a nonresident permit pursuant to § 29-28 (f) and there is no evidence in this record that supports his bald assertion that it would have been futile for him to do so. See *United States* v. *Decastro*, supra, 682 F.3d 164 ("[f]ailure to apply for a license would not preclude [the defendant's constitutional] challenge if he made a substantial showing that submitting an application would have been futile" (internal quotation marks omitted)). For that matter, there is no evidence that it would have been unduly burdensome for the defendant to apply for and obtain an Ohio permit as a prerequisite to applying for a nonresident permit pursuant to § 29-28 (f). In fact, as discussed subsequently in this opinion, there is evidence that suggests that the defendant may have been legally obligated to have a permit from Ohio. As such, the record is also inadequate in these regards.

II

We first consider, therefore, whether the defendant's motion to dismiss preserved his second amendment claim for review. "It is well known that this court is not bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." (Internal quotation marks omitted.) *Gainty* v. *Infantino*, 222 Conn. App. 785, 802, 306 A.3d 1171 (2023), cert. denied, 348 Conn. 948, 308 A.3d 36 (2024). "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . [It must] alert the trial court to the specific deficiency now claimed on appeal." (Emphasis in original; internal quotation marks omitted.) *State* v. *Ramon A.G.*, 190 Conn. App. 483, 492–93, 211 A.3d 82 (2019), aff'd, 336 Conn. 386, 246 A.3d 481 (2020). "A claim briefly suggested is not distinctly raised." (Internal quotation marks omitted.) *Gainty* v. *Infantino*, supra, 803; see also, e.g., *State* v. *Hampton*, 293 Conn. 435, 443–44, 988 A.2d 167 (2009) (motion to suppress that did not articulate basis for constitutional challenge that defendant raised on appeal did not preserve claim).

In the present case, the defendant's motion to dismiss alleged only that, "[i]n light of *Bruen* . . . § 29-35 [a] appears to create an unconstitutional restriction on one's right to carry a pistol or revolver outside of one's home." The motion was in no way predicated on the defendant's claimed Ohio residency. It did not refer to § 29-28 (f) specifically, nor did it reference or take issue with the process that governs a nonresident's application for and ability to obtain a permit to carry a pistol or revolver in Connecticut generally. The motion also made no mention of Ohio and its permit requirements.

Defense counsel's argument to the court in support of the motion was equally silent in these regards. Counsel

stated only that he was seeking by his motion to "preserve the issue" of "whether the Supreme Court said in its opinion that nothing in the second amendment's text draws a home/public distinction with respect to the right to keep and bear arms. Under the Connecticut statute,[31] there is a—no requirement for a permit for a gun that's going to be kept in the home. And so, I just apply the court's reasoning from the *Bruen* case to this case, and that's the basis for the motion." (Footnote added.)

The United States Supreme Court held in *Bruen* that, because New York issued public carry licenses only when an applicant demonstrated a special need for self-defense, the state's licensing regime violated the United States constitution. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 70–71. It reasoned that New York's " 'may issue' " firearms permitting regime, which required citizens to show a special need for self-defense and submit to a highly discretionary licensing process in order to exercise their second amendment right to bear arms; id., 12–14; was unconstitutional because it prevented law abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. Id., 71. In reaching this conclusion, the court recognized that "the vast majority of [s]tates—[forty-three] by our count—are 'shall issue' jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." Id., 13. In footnote 1 of that opinion, the court identified those states by citing to their respective statutes and, in doing so, it described Connecticut as one of three states that "have discretionary criteria but appear to operate like 'shall issue' jurisdictions." Id., 13–14 n.1, citing General Statutes (Rev. to 2021)

[31] General Statutes (Rev. to 2017) § 29-35 (a).

§ 29-28 (b).[32] The court further stated that, "[a]lthough Connecticut officials have discretion to deny a concealed-carry permit to anyone who is not a suitable person . . . the suitable person standard precludes permits only to those individuals whose conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon. *Dwyer* v. *Farrell*, 193 Conn. 7, 12, [475 A.2d 257 (1984)] . . . ." (Citation omitted; internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 14 n.1, quoting in part General Statutes (Rev. to 2021) § 29-28 (b). Indeed, as Justice Kavanaugh observed in his concurrence, "the [c]ourt's decision [in *Bruen*] does not prohibit [s]tates from imposing licensing requirements for carrying a handgun for self-defense." Id., 79 (Kavanaugh, J., concurring). In light of the pronouncement in the majority opinion that "these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens' "; id., 38–39 n.9; Justice Kavanaugh further opined that those "[s]tates that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so." Id., 80 (Kavanaugh, J., concurring).

This is the backdrop that informed the trial court's denial of the defendant's motion to dismiss. The trial court addressed and rejected the argument the defendant made, and his reliance on *Bruen*, by explaining that the "problem" with the New York statute at issue in *Bruen* was that it improperly required applicants to

[32] We note that, during his oral argument to the trial court in support of the defendant's motion, defense counsel dismissed the United States Supreme Court's reference to, and discussion of, "the Connecticut statute" in footnote 1 of *Bruen* as "dicta." See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 14 n.1.

demonstrate a need to carry a pistol as part of the application process, and that rendered the statute unconstitutional. See N.Y. Penal Law § 400.00 (2) (f) (McKinney 2021); *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 70–71. The trial court was not asked to decide, nor did it address whether, "[i]n light of *Bruen*," § 29-28 (f) violated the second amendment.[33] The constitutional violation the defendant now argues on appeal was not distinctly raised at trial, and, therefore, it is not preserved.

III

We now turn to the defendant's request for *Golding* review of both his constitutional claims. "Under *Golding*, a defendant can prevail on an unpreserved claim only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Christopher R.*, 222 Conn. App. 763, 771, 306 A.3d 1117 (2023), cert. denied, 348 Conn. 946, 308 A.3d 34 (2024). "The first two prongs govern whether we may review the claim, [whereas] the second two control whether the defendant may prevail on his claim because there was constitutional error that requires a new trial." (Internal quotation marks omitted.) *State* v. *Johnson*, 345 Conn. 174, 189, 283 A.3d 477 (2022). This court is "free to respond to the defendant's claim by focusing on whichever *Golding*

[33] In his principal appellate brief, the defendant agrees that "Connecticut can require residents and nonresidents to have a Connecticut firearms permit in order to carry a firearm outside the home . . . ." He therefore has conceded that the argument he made in the trial court is incorrect.

prong is most relevant. . . . [T]he inability to meet any one prong requires a determination that the defendant's claim must fail." (Internal quotation marks omitted.) *State* v. *Cane*, 193 Conn. App. 95, 116, 218 A.3d 1073, cert. denied, 334 Conn. 901, 219 A.3d 798 (2019).

Our Supreme Court has explained that, "under *Golding*, an appellant may raise . . . a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Internal quotation marks omitted.) *In re Aisjaha N.*, 343 Conn. 709, 719, 275 A.3d 1181 (2022). Moreover, for any *Golding* claim, "[i]t is incumbent upon the [defendant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review. . . . Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the defendant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). "[W]e will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." *State* v. *Golding*, supra, 213 Conn. 240. Moreover, "[t]he first prong of *Golding* was designed to avoid remands for the purpose of supplementing the

record." (Internal quotation marks omitted.) *State* v. *Torres*, 230 Conn. 372, 378, 645 A.2d 529 (1994).

Here, we first note that the record is inadequate to establish that the defendant's conviction for carrying a pistol without a permit violated his rights under the federal constitution because it is not clear whether the defendant had a "bona fide permanent residence" in Connecticut. General Statutes (Rev. to 2017) § 29-28 (b) and (f). Stated another way, it is not clear on this record that the defendant was a nonresident whose ability to obtain a Connecticut pistol permit was governed by § 29-28 (f), the statute that forms the basis for both of his unpreserved constitutional challenges on appeal.

We further note that both of the defendant's unpreserved claims are predicated on the same core assertions. Specifically, the defendant asserts that (1) he was an Ohio resident in 2018 and therefore could not apply for or obtain a Connecticut resident permit in accordance with § 29-28 (b); (2) he did not have a license or permit to carry a pistol in Ohio, so he could not apply for and/or obtain a Connecticut nonresident permit in accordance with § 29-28 (f); and (3) as he was not required to have a permit to carry a pistol in Ohio in 2018, it would have been unduly burdensome for him to apply for and obtain an Ohio permit as a prerequisite for applying for and obtaining a nonresident permit in Connecticut in accordance with § 29-28 (f).[34]

There is no dispute, however, that when the trial court denied the motion to dismiss, it was not asked

[34] The state argues that the defendant has "conflated the protections afforded by the second amendment with those afforded under the privileges and immunities clause" and that what he has presented as two constitutional challenges on appeal is one challenge predicated on the privileges and immunities clause. Because the two claims as the defendant has articulated them arise from the same assertions, we assess them together and, because we conclude that the core assertions are not adequately supported by the record, we do not address this argument by the state.

to address the claims now made for the first time on appeal nor make any factual findings regarding the defendant's residency or his eligibility to apply for and obtain a pistol permit in Connecticut. The state argues that, as a result, the record does not support these necessary factual predicates. In particular, the record does not establish (1) that the defendant was an Ohio resident who could not apply for a Connecticut resident permit pursuant to § 29-28 (b), and (2) what the actual requirements and procedures were with respect to securing permits in both Connecticut and Ohio in 2018. The defendant argues, in response, that the record is adequate to establish his Ohio residency and that it was not necessary for the trial court "to make findings or hear evidence about Connecticut['s] and Ohio's licensing systems" because "[t]his is a legal issue" and "Connecticut['s] and Ohio's statutes speak for themselves . . . ." We agree with the state.

In addressing whether the defendant's claims satisfy the first prong of *Golding*, we first observe that § 29-28 (b) of the Connecticut firearm permitting law applies to "any person having a bona fide permanent residence within" Connecticut and that § 29-28 (f) applies to "[a]ny bona fide resident of the United States having no bona fide permanent residence within" Connecticut. Given that the defendant's unpreserved constitutional challenges are predicated on his claim that he could not apply for and obtain a permit in accordance with § 29-28 (f), the focus of our inquiry is not whether the record is adequate to establish the defendant's Ohio residency, as the defendant argues. Rather, the focus of our inquiry is whether the record is adequate to establish that the defendant had no bona fide permanent residence within Connecticut. This is a significant distinction because there is no basis for assuming that the defendant would have been ineligible to apply for a permit as a bona fide permanent resident of Connecticut

at or around the time of the murder. Had he been eligible to apply for a Connecticut resident permit, there would be no basis for the constitutional challenges he now raises. We simply cannot discern on this record that the defendant had no bona fide permanent residence within Connecticut in December, 2018.

"It is well established . . . that [o]ne may have two or more places of residence within a [s]tate, or in two or more [s]tates . . . ." (Internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 578, 953 A.2d 868 (2008); see also *Taylor* v. *Taylor*, 168 Conn. 619, 621, 362 A.2d 795 (1975) ("a person may have simultaneously two or more residence addresses but only one domicil at any one time"). This court has similarly observed that "[a] person's residence . . . is a place where the person intends to remain with some sense of permanency, but continuous presence is not required." *McCants* v. *State Farm Fire & Casualty Co.*, 157 Conn. App. 509, 514, 116 A.3d 844, cert. denied, 317 Conn. 923, 118 A.3d 549 (2015). A person's intent in this regard is a question of fact for the court to decide. *Adame* v. *Adame*, 154 Conn. 389, 391, 225 A.2d 188 (1966); see also 25 Am. Jur. 2d 1023, Elections § 162 (2014) ("[t]he definition of residence is rooted in traditional notions of domicil, and the determination of an individual's residence is dependent upon an individual's expressed intent and conduct" (footnote omitted)).

Here, the defendant argues that evidence that he had been living in Ohio with his father in 2018, that he had an Ohio driver's license that listed his Ohio address, and that he purchased the two pistols he brought with him to Connecticut from a federal arms dealer in Ohio, is sufficient to establish his Ohio residency. Even if this were true, however, this evidence does not also demonstrate that the defendant was unable to establish a bona fide permanent residence in Connecticut sufficient to allow him to apply for a Connecticut resident

permit. Our careful review of the record reveals evidence that the defendant grew up in Bridgeport, that he graduated from high school in Ansonia, and that he had been living in Ohio because he had intended to attend college there, although the record does not reflect that he actually enrolled in a college in Ohio. The defendant also had several family members who at all relevant times lived in Connecticut. Moreover, he started a relationship with the victim as soon as he returned to Connecticut from Ohio and he told her that he "plan[ned] on living here." In fact, he discussed with the victim via text message their plans to "[get] a spot" together. He also was actively looking for a job in Connecticut.[35] Thus, even if this court had the opportunity to consider the legal claims that the defendant attempts to raise on appeal, the record that does exist arguably supports the conclusion that the defendant had plans to "remain [in Connecticut] with some sense of permanency"; *McCants* v. *State Farm Fire & Casualty Co.*, supra, 157 Conn. App. 514; and, thus, belies the conclusion that he could not have applied for and obtained a Connecticut resident permit. Stated differently, this evidence might have supported a determination that the defendant did, in fact, have a bona fide permanent residence in Connecticut in 2018.

It is not the function of this court to find facts, however, and, thus, any conclusion we could attempt to draw in this regard would be improperly conjectural. See *State* v. *Rodriguez*, 337 Conn. 175, 188, 252 A.3d 811 (2020); see also *New Hartford* v. *Connecticut Resources*

[35] We reiterate that the defendant told the victim he had an interview in Connecticut on December 7, 2018, that he was involved with a staffing agency here, and that "[t]hey set up an interview for [him]" on Monday, December 10, 2018. After the murder, the defendant confirmed with the Connecticut police officers who interviewed him in Ohio that, if he was still in Connecticut, he "would've been working. I had interviews and shit . . . [at] a staff agency in Seymour. And I had an interview today, the second interview today, so I would have been working."

Recovery Authority, 291 Conn. 502, 510, 970 A.2d 578 (2009) ("speculation and conjecture . . . have no place in appellate review" (internal quotation marks omitted)). Although the state presented three witnesses at trial who were familiar with the permitting process in Connecticut, and one testified about the process in general, defense counsel did not cross-examine the state's witnesses or call defense witnesses to address this issue. Likewise, during the hearing on the motion to dismiss prior to sentencing, counsel did not call any witnesses or submit any documentary evidence to address and explain the permitting process, generally or with respect to residency requirements more particularly. As such, there is no evidence in the record that explains how applications were evaluated or what type of information should satisfy *any* of the various requirements, for either § 29-28 (b) or (f), let alone what information would suffice to establish "a bona fide permanent residence" within Connecticut. General Statutes (Rev. to 2017) § 29-28 (b). There is not a framework, therefore, within which to assess the evidence that suggests that the defendant may have had a bona fide permanent residence in Connecticut at or about the time of the murder, even if we could make such an assessment as a reviewing court.

It simply is not clear based on this record that the defendant could not have availed himself of the process for Connecticut residents to apply for and obtain a permit, as set forth in § 29-28 (b). It is equally unclear, then, whether § 29-28 (f), which forms the basis for both of the defendant's unpreserved constitutional claims, is even implicated. Again, if the defendant could have established "a bona fide permanent residence" within Connecticut in 2018, he would have been eligible to apply for and possibly obtain (if approved), a permit pursuant to § 29-28 (b), and he would not have needed to undertake what he refers to as "the burden" of

obtaining an additional "optional" permit from Ohio pursuant to § 29-28 (f). It is this extra step of first needing to seek a permit in Ohio that he baldly claims is burdensome and unconstitutional.

To this end, we acknowledge that there is evidence that the defendant had been living in Ohio before he returned to Connecticut in November, 2018, and told the victim that he planned to get a job and live here. Even assuming that he only had a bona fide residence in Ohio, there is no evidence that supports the conclusion that the defendant was, as he claims, not required to have a permit to carry his guns there. Although the defendant carefully argues in his reply brief that he did not need a permit "to purchase or *openly carry* a handgun" in Ohio in 2018, the fact remains that he did need an Ohio permit for concealed carry, and there is a dearth of evidence with respect to the manner in which the defendant carried his guns while in Ohio. (Emphasis added.) We do know he purchased the Taurus pistol in Ohio on November 7, 2018, and the Smith & Wesson pistol in Ohio on November 15, 2018, and that he had them with him in his car when he drove through Ohio to Connecticut on that date. We do not know, however, whether they were "open" or "concealed" during his time in Ohio. The record is thus inadequate to presume that the defendant consistently carried his guns openly throughout Ohio, thereby eliminating any need for an Ohio permit, as the defendant urges. In the absence of a record, it is just as logical to presume he, at times, concealed them,[36] which meant without an Ohio permit he was violating Ohio law at the time.[37]

[36] "The test for 'concealment' [in Ohio] is whether the weapon is so situated as not to be discernible by ordinary observation. A partially concealed weapon is a concealed weapon within the meaning of the statute. However, where darkness alone obscures visibility, the weapon is not concealed. A defendant in a room with his jacket containing the gun is carrying a concealed weapon." (Footnotes omitted.) L. Katz et al., Baldwin's Ohio Practice Criminal Law § 106:2 (3d Ed. 2023).

[37] Moreover, a reasonable inference from certain undisputed facts in the record suggests that the defendant concealed his guns at least part of the

"[I]t is incumbent upon the [defendant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review." (Internal quotation marks omitted.) *State* v. *Brunetti*, supra, 279 Conn. 63. As such, the defendant was required to clarify the record with respect to the factual predicates on which both of his constitutional clams are based. Because the facts revealed by the record are inadequate to establish whether the alleged constitutional violations did, in fact, occur, we conclude that both of the defendant's claims fail under the first prong of *Golding* and we decline to review them.

The judgment is affirmed.

In this opinion the other judges concurred.

GLORY CHAPEL INTERNATIONAL CATHEDRAL *v.* PHILADELPHIA INDEMNITY INSURANCE COMPANY ET AL.
(AC 45057)

Alvord, Cradle and Clark, Js.

Syllabus

Pursuant to the rule of practice (§ 10-44), "[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . or any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint . . . or count thereof."

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time he was in Connecticut in November and December, 2018, and there is no evidence that he acted differently when he was in Ohio. For example, the record indicates that the defendant was carrying the murder weapon in the waistband of his pants before he shot the victim. The defendant denied ordering the victim out of the car at gunpoint, and it seems probable that the victim might not have been so cooperative and gone with the defendant to the beach if his gun was openly visible to her.

The plaintiff appealed to this court from the judgment of the trial court striking all counts of its complaint against the defendant insurance company, P Co. The plaintiff filed its original complaint against both P Co. and the individual defendant, B, alleging that B had set fire to a garage adjacent to a church owned by the plaintiff. In their efforts to contain and extinguish the fire, emergency personnel severely damaged portions of the church. The complaint alleged that, at the time of the fire and resulting damage, the plaintiff was insured against such damage pursuant to an insurance policy issued by P Co. The plaintiff filed a claim with P Co., and a dispute ensued when P Co. allegedly paid amounts that were inadequate to compensate the plaintiff for the actual costs of repairs. The plaintiff's complaint contained two counts against P Co., claiming breach of contract and breach of an implied covenant of good faith and fair dealing, and one count alleging negligence against B. P Co. filed a motion to strike the two claims against it on the ground of misjoinder, arguing that the plaintiff's contractual claims against P Co. and its negligence claim against B were separate actions that did not arise out of the same transaction. The trial court granted P Co.'s motion to strike counts one and two of the complaint for misjoinder, concluding that, although the fire and its consequences were common facts to the plaintiff's claims against both defendants, that was insufficient to characterize the claims as arising out of the same transaction or transactions connected with the same subject of action. The plaintiff subsequently filed a substitute complaint pursuant to Practice Book § 10-44 that asserted only its two claims against P Co. P Co. filed an objection to the substitute complaint, arguing that P Co. had been dropped from the action and was no longer a party and that the plaintiff was therefore required to proceed only against B. The trial court sustained P Co.'s objection and, upon the plaintiff's motion, rendered judgment for P Co. on the two stricken counts against it. More than six months after the plaintiff had appealed to this court, the plaintiff filed an offer of compromise in the trial court offering to resolve the entirety of its claims against P Co. P Co. filed an objection, arguing that the plaintiff's purported offer of compromise was invalid because P Co. was no longer a defendant in the action, as judgment had been rendered in its favor and, accordingly, there were no claims pending in the litigation against it to settle. The court sustained P Co.'s objection, and the plaintiff subsequently amended its appeal to include the trial court's decision sustaining P Co.'s objection. *Held*:

1. The plaintiff could not prevail on its claim that the trial court erroneously granted P Co.'s motion to strike certain counts of the plaintiff's complaint on the basis of misjoinder: the plaintiff waived its right to appeal the merits of the court's order on the motion to strike when it elected to exercise its right to file a substitute complaint pursuant to Practice Book § 10-44; moreover, although the plaintiff argued that the waiver rule was inapplicable because the trial court rejected its substitute

complaint and therefore prevented it from exercising its right to file a substitute pleading, once the plaintiff filed its substitute complaint, that pleading became the controlling complaint by operation of law, the plaintiff provided no precedent in support of the proposition that waiver occurs only if a court accepts a substitute pleading, and the plaintiff may instead challenge the court's ruling striking the substitute complaint.

2. The trial court improperly sustained P Co.'s objection to the plaintiff's substitute complaint and rendered judgment in favor of P Co.: contrary to P Co.'s unsupported argument that it was automatically dropped from the action upon the trial court's granting of its motion to strike, nothing in the court's order granting such motion suggested that P Co. had been dropped from the action altogether, that the court was exercising any authority under the statute (§ 52-108) governing misjoinder to drop P Co. from the action or that the interests of justice so required; moreover, P Co.'s argument that Practice Book § 10-44 precluded the plaintiff from filing a substitute pleading was unavailing, as such a rule, on the contrary, would operate to deprive a plaintiff of his or her right to file a new pleading pursuant to § 10-44 to cure the defects that served as the basis for striking the complaint; furthermore, although P Co. contended that there is no authority that permits a plaintiff to choose which defendants or causes of action to drop from the case when repleading pursuant to § 10-44 to cure misjoinder, this court's construction of § 10-44 was consistent with the bedrock principle that a plaintiff is the master of his or her own complaint, and allowing a plaintiff to file a substitute pleading against whichever defendant a plaintiff chooses after a complaint has been stricken for misjoinder properly affords the plaintiff the latitude to decide which theories of recovery to pursue against which defendants in that action and to weigh the risks of proceeding with certain claims in a separate action.

3. The plaintiff could not prevail on its claim that the trial court improperly sustained P Co.'s objection to the plaintiff's offer of compromise: the statute (§ 52-192a) governing offers of compromise required the plaintiff to file its offer of compromise while claims remained pending against P Co. in the trial court and prior to the court rendering judgment for P Co., and, because judgment had been rendered for P Co. on all counts, the offer of compromise directed to P Co. was not capable of settling the claim underlying the action because that claim had already been resolved for P Co.; moreover, when the provisions of § 52-192a are read together and construed with reasonable strictness for the party to whom an offer of compromise has been made, such provisions clearly contemplate a process of making and accepting offers of compromise in the trial court prior to a court's resolution of the claims that are the subject of the offer of compromise, and allowing plaintiffs to make offers of compromise to defendants after judgment has been rendered for those defendants and while the claims are on appeal does not serve the purpose of promoting the public policy favoring the pretrial resolution of disputes

but, rather, such an interpretation would require a defendant who has already prevailed in the trial court to accept a postjudgment offer of compromise in order to avoid the punitive consequences of the statute, which would expose the party that actually prevailed in the trial court to the punitive effects of the statute; furthermore, where there is an ambiguity with respect to the provisions of § 52-192a, this court must interpret the statute in favor of the party who would be subject to the punitive consequences of the statute rather than in favor of the party who would benefit from those consequences, there is no language in the statute suggesting that the legislature intended to permit a plaintiff to file an offer of compromise directed to a defendant for whom judgment already has been rendered and while a plaintiff pursues an appeal of that judgment, and, in the absence of clear evidence that the legislature intended offers to be made in such circumstances, this court declined to interpret § 52-192a in such a manner.

Argued January 10—officially released April 2, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble, J.*, granted the named defendant's motion to strike; thereafter, the plaintiff filed a substitute complaint; subsequently, the court, *Sheridan, J.*, sustained the named defendant's objection to the substitute complaint; thereafter, the court, *Sheridan, J.*, granted the plaintiff's motion for judgment as to the named defendant and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

James J. Healy, with whom was *Leonard M. Isaac*, for the appellant (plaintiff).

Linda L. Morkan, with whom were *Steven O. Clancy* and *Scott T. Garosshen*, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiff, Glory Chapel International Cathedral (Glory Chapel), appeals from the judgment

of the trial court rendered in favor of the defendant Philadelphia Indemnity Insurance Company (Philadelphia Indemnity), striking all counts of Glory Chapel's complaint against Philadelphia Indemnity.[1] On appeal, Glory Chapel claims that (1) the court erred in striking its original complaint on the basis of misjoinder, (2) even if the claims in its original complaint were properly stricken, the court erred by rejecting the substitute complaint that it filed pursuant to Practice Book § 10-44,[2] and (3) the court erred by sustaining Philadelphia Indemnity's objection to an offer of compromise that Glory Chapel filed during the pendency of this appeal. For the reasons that follow, we agree with Glory Chapel on its second claim that the trial court improperly rejected its substitute complaint, but we disagree with it on its other claims. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

We begin with relevant facts and procedural history of the case. In September, 2019, Glory Chapel commenced this action by writ of summons and complaint against Philadelphia Indemnity and Kevon Bennett. The complaint alleged that Bennett set fire to a garage adjacent to a church owned by Glory Chapel located at 221 Greenfield Street in Hartford. In their efforts to contain and extinguish the fire, emergency personnel stationed some equipment and personnel on the roof of the church, using large quantities of water to extinguish the fire and protect surrounding property. Despite the best efforts of emergency responders, portions of the church were greatly damaged by fire, water, and smoke. The complaint alleges that, at the time of the resulting

[1] The complaint also named Kevon Bennett as a defendant. Bennett did not appear in the trial court and is not participating in this appeal.

[2] We note that the subject pleading was actually labeled by the plaintiff as "Amended Complaint." However, because Practice Book § 10-44 governs "Substitute Pleading[s]," we refer to the subject complaint throughout this opinion as the "substitute complaint" to avoid confusion with other rules of practice pertaining to the amendment or revision of pleadings.

damage, the church was insured against that damage pursuant to an insurance policy issued by Philadelphia Indemnity. Glory Chapel filed a claim with Philadelphia Indemnity and a dispute ensued when Philadelphia Indemnity allegedly paid amounts that were inadequate to compensate Glory Chapel for the true costs of repairs. Glory Chapel's complaint contains three counts: counts one and two respectively claim breach of contract and breach of an implied covenant of good faith and fair dealing against Philadelphia Indemnity and count three alleges a claim of negligence against Bennett.

On November 12, 2019, Philadelphia Indemnity filed a motion to strike the two claims against it on the ground of misjoinder, arguing that by bringing those counts and the count against Bennett in a single complaint, Glory Chapel improperly joined (1) its contractual coverage dispute with Philadelphia Indemnity stemming from Philadelphia Indemnity's alleged failure to pay insurance benefits in accordance with the policy and other purported claims handling issues with (2) its negligence action against Bennett for allegedly causing the subject fire. Philadelphia Indemnity argued that Glory Chapel's claims are "separate actions that do not arise out of the same transaction, and keeping them joined could lead to prejudice and confusion as this case progresses."

On January 2, 2020, Glory Chapel filed its objection to the motion to strike. It argued that the motion to strike lacked merit because the claims raised by Glory Chapel against both defendants arose out of the destruction of Glory Chapel's property by fire. Glory Chapel argued, among other things, that if the "court were to construe the meaning of transaction so narrowly as to find a breach of insurance contract claim arising from the casualty to be a different transaction than the casualty itself, it would require the parties to file separate lawsuits against their insurers and the tortfeasors in

every case where an insurer promised to protect a policyholder from the damages that result from a casualty loss caused by a third party. Such a holding would require, for example, a plaintiff injured in a car accident to bring separate suits against his or her underinsured motorist carrier and the tortfeasor." Glory Chapel further argued that Philadelphia Indemnity's contention that its claims should be brought in a separate suit "not only requires parties to pursue discovery of the same damages in two separate suits, but it also adds as a possibility a need for a third suit if Philadelphia [Indemnity] thereafter decides to assert subrogation claims against the tort [defendant]. [Philadelphia Indemnity's] motion to strike on joinder grounds thus urges the court to enter a ruling that would not only require the parties to conduct largely identical discovery in separate suits but would impair the ability of the tort defendant to try to resolve all claims arising from his misconduct in one suit."

On January 29, 2021, the court, *Noble*, *J.*, granted Philadelphia Indemnity's motion to strike counts one and two of the complaint for misjoinder, concluding that the claims against Philadelphia Indemnity did not arise out of the same transaction connected with the same subject of action as the tort claim against Bennett. The court stated, inter alia, that "Glory Chapel's claim against [Philadelphia Indemnity] involves issues of contractual coverage and claims handling which are completely independent of Bennett's claimed negligence in causing the initial fire. While the fire and its consequences are common facts to both, this is insufficient to characterize the claims as the 'same transaction or transactions connected with the same subject of action.' "

On February 16, 2021, Glory Chapel filed a substitute complaint pursuant to Practice Book § 10-44 that only asserted claims against Philadelphia Indemnity sounding in breach of contract and breach of an implied

covenant of good faith and fair dealing. Unlike the original complaint, the substitute complaint did not assert any claims against Bennett.

On February 25, 2021, Philadelphia Indemnity filed an objection to the substitute complaint, arguing that Philadelphia Indemnity was no longer a party to the action. Philadelphia Indemnity claimed that, pursuant to the court's decision striking the claims against it on the basis of misjoinder, it had been dropped from the action, requiring Glory Chapel to proceed only against Bennett.

On September 28, 2021, the court, *Sheridan*, *J.*, sustained Philadelphia Indemnity's objection. The order stated: "Docket entry #126, if filed as a substitute complaint or as an amended complaint, is inconsistent with the court's prior ruling on the motion to strike. A proper substitute complaint must be filed within thirty days of this order."

On October 18, 2021, following Glory Chapel's motion for judgment pursuant to Practice Book § 10-44, the court, *Sheridan*, *J.*, rendered judgment in favor of Philadelphia Indemnity on the two stricken counts against it. Glory Chapel appealed to this court the following day.

I

Glory Chapel first claims that the trial court erroneously granted Philadelphia Indemnity's motion to strike on the basis of misjoinder. Glory Chapel argues that a plaintiff's complaint may join claims against multiple defendants arising from the same "subject of action" and that its claims against Philadelphia Indemnity and Bennett arose from the very same subject of action—the fire that destroyed the church's roof and other property. Specifically, Glory Chapel claims that the tort claim against Bennett and its contractual claims against Philadelphia Indemnity both turn on an evaluation of the

very same roof damage caused by the very same fire. Philadelphia Indemnity argues both that the court properly struck counts one and two of the original complaint and that Glory Chapel waived its right to appeal the merits of the court's order striking those counts when it filed its substitute complaint. We agree with Philadelphia Indemnity that Glory Chapel waived its right to appeal from the court's order striking counts one and two of the original complaint when it elected to exercise its right to file a substitute complaint pursuant to Practice Book § 10-44.

Our standard of review is well known. "Construction of the effect of pleadings is a question of law and, as such, our review is plenary." *Ross* v. *Forzani*, 88 Conn. App. 365, 368, 869 A.2d 682 (2005).

Our case law makes clear that by filing a substitute complaint, "a plaintiff is said to have *waived* the right to appeal from the court's order striking the original complaint." (Emphasis added.) *O'Donnell* v. *AXA Equitable Life Ins. Co.*, 210 Conn. App. 662, 670, 270 A.3d 751, cert. granted, 343 Conn. 910, 273 A.3d 695 (2022); see also *Royce* v. *Westport*, 183 Conn. 177, 179, 439 A.2d 298 (1981). Indeed, "[a]fter a court has granted a motion to strike, [the plaintiff] may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive . . . ." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). But once the plaintiff files a substitute complaint, "the ruling on the [original motion to strike] ceases to be an issue." (Internal quotation marks omitted.) *Ross* v. *Forzani*, supra, 88 Conn. App. 369.

Notwithstanding the foregoing, Glory Chapel argues that the waiver rule should not apply in this case because the trial court rejected its substitute complaint and therefore prevented it from exercising its right to

file a substitute pleading. It claims that "waiver does not arise merely upon filing a substitute complaint after a ruling granting a motion to strike. . . . Rather, it is once the amendment has bec[o]me the controlling pleading and the earlier one [is] removed from the case that the plaintiff has waived the right to appeal the previous pleading." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Glory Chapel fails to recognize, however, that once it filed its substitute complaint, that pleading became the controlling complaint by operation of law, regardless of whether or not the court ultimately accepted its argument that the substitute pleading cured the defect in the earlier complaint. Glory Chapel has not provided us with any precedent in support of the proposition that waiver occurs only if a court accepts a substitute pleading. On the contrary, the great weight of our case law says that the *filing* of a substitute pleading after the original pleading is stricken serves as the waiver to challenge the granting of the motion to strike. See, e.g., *Royce* v. *Westport*, supra, 183 Conn. 177–78 ("The plaintiffs had, however, in the meantime timely pleaded over after the sustaining of the demurrer by *filing* a substitute complaint on September 19, 1978. . . . According to the Practice Book [1978] § 158 [now Practice Book § 10-45], this new September complaint became the controlling pleading and the earlier one was removed from the case." (Citation omitted; emphasis added.)); *Good Humor Corp.* v. *Ricciuti*, 160 Conn. 133, 135, 273 A.2d 886 (1971) ("[t]he *filing* of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the demurrer to the original pleading" (emphasis added)).

Although the filing of a substitute complaint operates as a waiver of the right to claim that there was error in the court's order striking the original complaint,

should the court subsequently reject or strike the substitute complaint, a plaintiff generally may challenge that decision on appeal. See, e.g., *O'Donnell* v. *AXA Equitable Life Ins. Co.*, supra, 210 Conn. App. 670–71 ("[i]f the plaintiff pleads facts in the substitute complaint which are materially different from those in the original complaint, then . . . the plaintiff can challenge the merits of the court's ruling striking the [substitute] complaint" (citation omitted; internal quotation marks omitted)). Accordingly, we conclude that Glory Chapel waived its right to appeal the merits of the court's order striking its original complaint when it filed its substitute complaint in this action.[3]

II

Glory Chapel next claims that, regardless of whether the court properly struck counts one and two of its original complaint on the basis of misjoinder, reversal is required because the court improperly rejected its substitute complaint. In particular, Glory Chapel contends that the court erred in accepting Philadelphia Indemnity's argument that the court's order striking all counts against Philadelphia Indemnity resulted in Philadelphia Indemnity being dropped from the case. Glory Chapel claims that Practice Book § 10-44 afforded it the right to file a substitute pleading within fifteen days after the granting of the motion to strike to cure any deficiencies in that initial complaint. It further contends that, in the context of an order striking a complaint for misjoinder, § 10-44 affords it the right to decide which claims to assert against which defendants. We agree.[4]

[3] We take no position with respect to whether the court properly struck counts one and two of the original complaint on the basis of misjoinder.

[4] We note that Philadelphia Indemnity argues that Glory Chapel did not properly preserve this claim for appeal because it did not argue in its opposition to the initial motion to strike that it had the sole right to decide which defendant to drop from the case. This claim lacks merit. Philadelphia Indemnity's argument effectively would require a party opposing a motion to strike to list all possible responses to an adverse ruling in advance of

As previously explained, "[c]onstruction of the effect of pleadings is a question of law and, as such, our review is plenary." *Ross* v. *Forzani*, supra, 88 Conn. App. 368. To the extent the present claim requires us to interpret the trial court's order or our rules of practice, our review is also plenary. See *Barclays Bank Delaware* v. *Bamford*, 213 Conn. App. 1, 12, 277 A.3d 151 ("[t]he interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary" (internal quotation marks omitted)), cert. denied, 345 Conn. 905, 282 A.3d 982 (2022); *Clark* v. *Clark*, 150 Conn. App. 551, 569 n.12, 91 A.3d 944 (2014) ("[t]he construction of an order is a question of law over which we exercise plenary review" (internal quotation marks omitted)).

Two or more causes of action may be joined in a single complaint. See General Statutes § 52-97; Practice Book § 10-21. Section 52-97 provides in relevant part that, "if several causes of action are united in the same complaint, they shall all be brought to recover, either . . . upon claims, whether in contract or tort or both, arising out of the same transaction or transactions connected with the same subject of action," provided that the joined claims "affect all the parties to the action . . . ." Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest . . . the joining of two or more

the adverse ruling actually being made. We have found no support in our law for that contention. The record in this case instead shows that Glory Chapel distinctly raised its right to replead and to remove Bennett instead of Philadelphia Indemnity in its response to Philadelphia Indemnity's objection to its substitute complaint. See *Asselin & Vieceli Partnership, LLC* v. *Washburn*, 194 Conn. App. 519, 524, 221 A.3d 875 (2019) ("[t]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [before the trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim" (internal quotation marks omitted)), cert. denied, 334 Conn. 913, 221 A.3d 449 (2020). Accordingly, we conclude that Glory Chapel has preserved its claim for appeal.

causes of action which cannot properly be united in one complaint, whether the same be stated in one or more counts . . . .'' Practice Book § 11-3 similarly makes clear that ''[t]he exclusive remedy for misjoinder of parties is by motion to strike.''

If a party's pleading is stricken, Practice Book § 10-44 provides in relevant part that ''[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . .''

One obvious purpose of Practice Book § 10-44 is to provide the party whose pleading was previously stricken the opportunity to remedy the defects identified by the trial court in granting the earlier motion to strike. See *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 850. Indeed, after a party files a substitute complaint, ''[t]he law in this area requires the court to compare the two complaints to determine whether the amended complaint 'advanced the pleadings' by remedying the defects identified by the trial court in granting the earlier motion to strike.'' Id., 851.

In the present case, Glory Chapel filed its substitute complaint within fifteen days of the court's order granting Philadelphia Indemnity's motion to strike counts one and two of its original complaint. Glory Chapel sought to cure any defects arising from misjoinder by asserting in its substitute complaint only the two counts against

Philadelphia Indemnity. Glory Chapel omitted the claim it previously had asserted against Bennett.

Philadelphia Indemnity filed an objection to the substitute complaint claiming that upon the court's decision striking all counts asserted against it, Philadelphia Indemnity was "dropped" from the litigation. Philadelphia Indemnity therefore argued to the court that Glory Chapel's substitute complaint asserting two claims against it did not comply with the court's prior order granting the motion to strike. The court, *Sheridan*, *J.*, sustained Philadelphia Indemnity's objection, stating that Glory Chapel's substitute complaint was "inconsistent with the court's prior ruling on the motion to strike." Upon motion of Glory Chapel, the court thereafter rendered judgment in favor of Philadelphia Indemnity on the two stricken counts.

On the basis of our review, we conclude that the court's decision sustaining Philadelphia Indemnity's objection to Glory Chapel's substitute complaint and subsequently rendering judgment in favor of Philadelphia Indemnity was improper. Nothing in the court's order striking counts one and two of the original complaint suggested, much less held, that Philadelphia Indemnity had been "dropped" from the action altogether or that Glory Chapel was precluded from filing a substitute pleading pursuant to Practice Book § 10-44. The court's order granting the motion to strike simply provided that, because "Glory Chapel's claim[s] against [Philadelphia Indemnity] do not arise out of the same transaction or transactions connected with the same subject of action as the tort claim against Bennett, the *motion to strike counts one and two* [*is*] *granted*."[5] (Emphasis added.)

[5] We also note that Philadelphia Indemnity did not request in its motion that it be dropped from the action. Rather, Philadelphia Indemnity's motion to strike provided in relevant part: "WHEREFORE, [Philadelphia Indemnity] respectfully requests that the court strike the first and second counts of . . . Glory Chapel's complaint for misjoinder."

Although we recognize that "[n]ew parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require"; General Statutes § 52-108;[6] nothing in the court's decision granting the motion to strike indicated that it was exercising any authority under § 52-108 to drop Philadelphia Indemnity from the action or that the interests of justice so required.

Furthermore, we are not persuaded by Philadelphia Indemnity's argument that it was automatically dropped from the action upon Judge Noble's granting of its motion to strike. Philadelphia Indemnity cites no cases, and we are unaware of any, in which a court has held that an order granting a motion to strike certain counts of a complaint on the basis of misjoinder automatically drops or otherwise removes the moving party from the action. On the contrary, such a rule would operate to deprive a plaintiff of his or her right to file a new pleading pursuant to Practice Book § 10-44 to cure the defects that served as the basis for striking the complaint. See *Garden Homes Profit Sharing Trust, L.P.* v. *Cyr*, 189 Conn. App. 75, 85, 206 A.3d 230 (2019) (concluding that court improperly rendered judgment immediately after finding of nonjoinder "without affording the plaintiff notice and at least fifteen days to add [a necessary party] to the action" pursuant to § 10-44).

Our rules of practice instead make clear that when a defendant's motion to strike is granted on the basis of misjoinder, the plaintiff is afforded the right to file a new pleading pursuant to Practice Book § 10-44 so as to cure the defect or, on the rendering of judgment, to file an appeal. See *Lund* v. *Milford Hospital, Inc.*,

[6] General Statutes § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require."

supra, 326 Conn. 850. By electing to replead pursuant to § 10-44 to cure misjoinder, a plaintiff may, for example, allege new facts that sufficiently link the causes of action together or, as Glory Chapel did here, elect to proceed by asserting causes of action against just one of the defendants in the original complaint. See id., 851 n.4 ("[a]n example of a proper pleading filed pursuant to . . . § 10-44 is one that [supplies] the essential allegation lacking in the complaint that was stricken" (internal quotation marks omitted)); *Fairfield* v. *Southport National Bank*, 77 Conn. 423, 427, 59 A. 513 (1904) ("Had the other defendants been dropped, the misjoinder complained of would have disappeared from the case. . . . We think the court, even upon its own assumption as to misjoinder, erred in rendering judgment as it did.); *Ferreira* v. *Estevam*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 37 47 06 (November 7, 1990) (2 Conn. L. Rptr. 712, 713) ("The granting of a motion to strike invites the losing party to file a new pleading in order to cure the defect. In the context of this case, it would permit the plaintiff either to allege facts which might link the misjoined causes of action or to elect which cause of action should remain in the original complaint and which should form the basis of a new complaint.").

Although Philadelphia Indemnity contends that there is no authority that permits a plaintiff to choose which defendants or causes of action to drop from the case when repleading pursuant to Practice Book § 10-44 to cure misjoinder, our construction of § 10-44 is consistent with the bedrock principle that a plaintiff is the master of his or her own complaint. See *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 607 n.11, 211 A.3d 976 (2019) ("[a]s the master of the complaint, the plaintiff is free to decide what theory of recovery to pursue"). Accordingly, we see no reason why a plaintiff ought to be precluded from choosing how best to amend his or

her complaint pursuant to § 10-44 to cure the defects that serve as the basis for a court's decision striking a complaint on the basis of misjoinder. Allowing a plaintiff to file a substitute pleading against whichever defendant a plaintiff chooses to proceed against after a complaint has been stricken for misjoinder properly affords the plaintiff the latitude to decide which theories of recovery to pursue against which defendants in that action and to weigh the risks of proceeding with certain claims in a separate action.[7]

Here, Judge Noble concluded that Glory Chapel's claims against Philadelphia Indemnity did not arise out of the same transaction or transactions connected with the same subject of action as the tort claim against Bennett. After Judge Noble granted Philadelphia Indemnity's motion to strike, Glory Chapel timely filed a substitute complaint pursuant to Practice Book §10-44, which clearly cured the misjoinder defects identified by the court by omitting any claims against one of the purportedly misjoined defendants. Contrary to Judge Sheridan's conclusion, Glory Chapel's substitute complaint was not inconsistent with Judge Noble's decision striking the counts against Philadelphia Indemnity. Accordingly, we conclude that the court erred when it rejected Glory Chapel's substitute complaint.[8]

[7] During oral argument before this court, counsel for Philadelphia Indemnity conceded that if Philadelphia Indemnity and Bennett had both filed motions to strike for misjoinder, and both had been granted, Glory Chapel would have been entitled to replead against either one of the defendants. See, e.g., *John's Refuse & Recycling, LLC* v. *For Like, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-15-6058890-S (May 10, 2016) (62 Conn. L. Rptr. 302, 303) ("I hereby order that the plaintiff file an amended complaint removing five of the six named defendants from the action. The plaintiff may proceed in this lawsuit with its claims against one of the named defendants."). We see no logical basis for adopting a rule that would arbitrarily reward a defendant that first moves to strike a complaint to the detriment of another defendant that elects instead to file other requests or motions, such as a request to revise or motions to dismiss, which our rules of practice require be filed prior to the filing of a motion to strike.

[8] In light of our disposition, we need not address Glory Chapel's additional claim that the trial court erred by denying its motion to reargue the court's

III

Glory Chapel's final claim is that the trial court improperly sustained Philadelphia Indemnity's objection to the offer of compromise that it filed more than six months after the trial court rendered judgment in favor of Philadelphia Indemnity and while this appeal was pending. It contends that General Statutes § 52-192a permits a plaintiff to file an offer of compromise directed to a defendant during the pendency of an appeal when judgment has already been rendered by the trial court in favor of that defendant on all counts. We are not persuaded.

The following procedural history is relevant to this claim. On October 18, 2021, after the court, *Sheridan*, *J.*, rejected Glory Chapel's substitute complaint, the court granted Glory Chapel's motion for judgment and rendered judgment in favor of Philadelphia Indemnity. On October 19, 2021, Glory Chapel filed with this court its appeal of that judgment. On April 25, 2022, while this appeal was pending, Glory Chapel filed an offer of compromise in the Superior Court stating that "[Glory Chapel] hereby offers to resolve the entirety of its claim against [Philadelphia Indemnity] by way of compromise settlement in the sum of [$675,000], including interest and costs."

On May 25, 2022, Philadelphia Indemnity filed an objection to Glory Chapel's offer of compromise, arguing that Glory Chapel's purported offer of compromise was invalid because Philadelphia Indemnity was no longer a defendant in the action, as judgment had been rendered in its favor. Philadelphia Indemnity argued that there were no claims pending in the litigation against it to settle and that this was just another attempt by

decision sustaining Philadelphia Indemnity's objection to the substitute complaint. See *Doe* v. *West Hartford*, 168 Conn. App. 354, 359 n.5, 147 A.3d 1083 (2016), aff'd, 328 Conn. 172, 177 A.3d 1128 (2018).

Glory Chapel to "cause annoyance, oppression, undue burden, and expense." Philadelphia Indemnity also requested that the court award it reasonable attorney's fees and costs associated with filing its objection.

On June 13, 2022, the court, *Cobb*, *J.*, sustained Philadelphia Indemnity's objection to Glory Chapel's offer of compromise. On June 16, 2022, Glory Chapel amended its appeal to include the court's decision sustaining Philadelphia Indemnity's objection to its offer of compromise.

Our resolution of this claim turns on an interpretation of § 52-192a. It is well established that statutory construction is a question of law over which we exercise plenary review. See, e.g., *Larmel* v. *Metro North Commuter Railroad Co.*, 341 Conn. 332, 339, 267 A.3d 162 (2021); *Nunno* v. *Wixner*, 257 Conn. 671, 677, 778 A.2d 145 (2001). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Cerame* v. *Lamont*, 346 Conn. 422, 426, 291 A.3d 601 (2023).

Glory Chapel contends that the fundamental purpose of § 52-192a is to encourage prompt settlements and to avoid wasting judicial resources. It claims that the plain language of the statute permits a party to file an offer

of compromise during an appeal from a pretrial ruling and that prohibiting offers of compromise in such circumstances would run contrary to the purpose of the statute. Philadelphia Indemnity disagrees. It claims that there is no authority supporting Glory Chapel's claim that the statute permits a party to file a postjudgment offer of compromise, and the "better interpretation" is that § 52-192a forbids it. We agree with Philadelphia Indemnity and conclude that § 52-192a does not permit a plaintiff to file an offer of compromise directed to a defendant for whom judgment has already been rendered.

We begin with the text of § 52-192a. Subsection (a) of that statute provides in relevant part: "Except as provided in subsection (b) of this section, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant in such action but not later than thirty days before trial, file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. . . ." General Statutes § 52-192a (a).

Subsection (a) further provides that, "[w]ithin thirty days after being notified of the filing of the offer of compromise and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written acceptance of the offer of compromise agreeing to settle the claim underlying the action for the sum certain specified in the plaintiff's offer of compromise. . . . Any such offer of compromise and any acceptance of the offer of compromise shall be included by the

clerk in the record of the case." General Statutes § 52-192a (a). Subsection (c) of § 52-192a provides in relevant part that "[a]fter trial[9] the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ." (Footnote added.)

Glory Chapel contends that because the statute authorizes a plaintiff to file an offer of compromise any time after 180 days following service of process and up until thirty days before trial, its April 25, 2022 offer was timely filed because "[t]he case obviously has not yet proceeded to 'trial' . . . ."

Philadelphia Indemnity counters that Glory Chapel engages in a hyper technical construction of the statute. It points to the language in § 52-192a (a) stating that a plaintiff's offer of compromise is to settle the " 'claim underlying the action . . . .' " In Philadelphia Indemnity's view, after judgment had been rendered for it, there was no longer any "claim underlying the action" that could be settled because those claims had already been resolved in its favor. As a result, it argues that Glory Chapel's offer of compromise was invalid and properly stricken by the court.

Section 52-192a is silent as to whether a plaintiff may file an offer of compromise after judgment has been rendered for a defendant on all claims in the trial court

[9] In *Tureck* v. *George*, 44 Conn. App. 154, 162, 687 A.2d 1309, cert. denied, 240 Conn. 914, 691 A.2d 1080 (1997), this court concluded that the term "after trial" in § 52-192a (b) means after a "final judgment," holding that a plaintiff is not entitled to obtain prejudgment interest until after a final judgment has been rendered.

and during the pendency of an appeal. In reviewing the statute and the parties' competing arguments, we conclude that the statute is not clear and unambiguous on this point. See, e.g., *Branford* v. *Santa Barbara*, 294 Conn. 803, 812, 988 A.2d 221 (2010) ("[t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)).

Although we often look to the legislative history of a statute to discern its meaning when its language is ambiguous, we have found nothing in the legislative history of § 52-192a that sheds light on the precise question presented here. The body of case law interpreting various provisions of § 52-192a, however, lends some assistance for present purposes. See *Stiffler* v. *Continental Ins. Co.*, 288 Conn. 38, 43, 950 A.2d 1270 (2008) ("we note that we are not writing on a clean slate as the purpose and structure of our offer of judgment statute have been identified"). To that end, in construing § 52-192a, our Supreme Court has explained "that its purpose is to encourage pretrial settlements and, consequently, to conserve judicial resources." *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 742, 687 A.2d 506 (1997). "[T]he strong public policy favoring the pretrial resolution of disputes . . . is substantially furthered by encouraging defendants to accept reasonable offers of judgment." (Internal quotation marks omitted.) *Yeager* v. *Alvarez*, 302 Conn. 772, 783, 31 A.3d 794 (2011), citing *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 153, 998 A.2d 730 (2010). The statute "encourages fair and reasonable compromise between litigants by penalizing a party that fails to accept a reasonable offer of settlement." (Internal quotation marks omitted.) *Cardenas* v. *Mixcus*, 264 Conn. 314, 321, 823 A.2d 321 (2003). "The statute is admittedly punitive in nature," but "[i]t is the punitive aspect of the statute that effectuates

the underlying purpose of the statute and provides the impetus to settle cases." (Internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, supra, 752, quoting *Lutynski* v. *B. B. & J. Trucking, Inc.*, 31 Conn. App. 806, 812–13, 628 A.2d 1 (1993), aff'd, 229 Conn. 525, 642 A.2d 7 (1994). Because § 52-192a is punitive in nature, our case law instructs that "we are required to construe it with reasonable strictness . . . ." (Emphasis omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 149; see also *Barton* v. *Norwalk*, 163 Conn. App. 190, 218, 135 A.3d 711 (2016), aff'd, 326 Conn. 139, 161 A.3d 1264 (2017). Indeed, when ambiguity exists, "we must interpret it in favor of the party who would be subject to the punitive consequences of the statute rather than in favor of the party who would benefit from those consequences." *Branford* v. *Santa Barbara*, supra, 294 Conn. 814–15.

With these principles in mind, and for the reasons that follow, we conclude that, although § 52-192a permits a plaintiff to file an offer of compromise not later than thirty days before trial, it also requires a plaintiff to file its offer of compromise while claims remain pending against a defendant in the trial court and prior to the court rendering judgment in favor of that defendant. First, as Philadelphia Indemnity points out, the statute makes clear that an offer of compromise is an offer "*to settle the claim underlying the action* . . . ." (Emphasis added.) General Statutes § 52-192a (a). Where, as here, judgment has been rendered for a defendant on all counts, an offer of compromise directed to such defendant is not capable of settling the "claim underlying the action" because that claim has already been resolved in favor of the defendant. In other words, once a judgment has been rendered for a defendant, there is no longer a "claim underlying the action" for purposes of the statute. Furthermore, the statute instructs that

an offer of compromise and a defendant's written acceptance must be filed "with the clerk of the court" and "shall be included by the clerk in the record of the case." General Statutes § 52-192a (a). Any written acceptance of the offer of compromise must be filed "[w]ithin thirty days after being notified of the filing of the offer of compromise and *prior to the rendering of a verdict by the jury or an award by the court* . . . ." (Emphasis added.) General Statutes § 52-192a (a).

These provisions, when read together and construed with reasonable strictness in favor of the party to whom an offer of compromise is made; see, e.g., *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 149; contemplate a process of making and accepting offers of compromise in the trial court prior to a court's resolution of the claims that are the subject of the offer of compromise. As we have explained, the statute embodies a strong public policy favoring the *pretrial* resolution of disputes—that is, resolution of the claims by the parties before the court or a jury resolves those claims. Allowing plaintiffs to make offers of compromise to defendants after judgment has been rendered for those defendants and while the claims are on appeal does not serve the purpose of promoting *pretrial* resolutions. On the contrary, such an interpretation would require a defendant who has already prevailed in the trial court to accept a postjudgment offer of compromise in order to avoid the punitive consequences of the statute. Far from promoting the chief policy goal of the statute, such an interpretation would expose the party that actually prevailed in the trial court to the punitive effects of the statute. As noted, our Supreme Court has held that where there is an ambiguity with respect to the provisions of § 52-192a, "we must interpret it in favor of the party who would be subject to the punitive consequences of the statute rather than in favor of the party who would benefit from those

consequences." *Branford* v. *Santa Barbara*, supra, 294 Conn. 814–15.

We therefore conclude that § 52-192a requires that an offer of compromise be filed while claims remain pending against a defendant in the trial court and prior to the time judgment has been rendered for that defendant. See General Statutes § 52-192a (a). There simply is no language in the statute suggesting that the legislature intended to permit a plaintiff to file an offer of compromise directed to a defendant for whom judgment already has been rendered and while a plaintiff pursues an appeal of that judgment. In the absence of clear evidence that the legislature intended offers to be made in such circumstances, we decline to interpret the statute in such a manner. See *Branford* v. *Santa Barbara*, supra, 294 Conn. 815 ("in the absence of clear evidence that the legislature intended the offer of judgment statute to apply to condemnation appeals prior to 2007, we cannot impose the consequences of § 52-192a on the town in the present case"). Accordingly, we conclude that the trial court properly sustained Philadelphia Indemnity's objection to Glory Chapel's postjudgment offer of compromise.[10]

The judgment is reversed with respect to the order sustaining Philadelphia Indemnity's objection to the substitute complaint and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[10] Nothing in this opinion should be construed to prohibit Glory Chapel from filing a timely offer of compromise on remand, at which time its claims against Philadelphia Indemnity will have been restored by virtue of our decision in this appeal.

WESTCHESTER MODULAR HOMES OF FAIRFIELD COUNTY, INC. *v.* ARBELLA PROTECTION INSURANCE COMPANY
(AC 45433)

Alvord, Elgo and Keller, Js.

Syllabus

The plaintiff insured appealed to this court from the summary judgment rendered in favor of the defendant insurance company, claiming that the trial court improperly concluded that the defendant had no duty to defend the plaintiff against a counterclaim filed by third-party homeowners in an action arising out of a contract for the construction of a modular home. During construction, disputes arose between the plaintiff and the homeowners, and the homeowners ultimately terminated their contract with the plaintiff. The plaintiff filed a mechanic's lien on the property and commenced an action to foreclose on the lien. The homeowners filed a counterclaim, alleging that the plaintiff had breached the construction contract in various ways, including by performing work that was substandard, unreasonable, and unworkmanlike. Several months later, the homeowners disclosed M, a licensed architect and professional engineer, as an expert witness. During M's deposition by the plaintiff's attorney, M testified that the windows in the home were not installed with pan flashing, which was a building code violation and would allow water to leak down between the window and the siding and rot the wall. He further testified that the repairs required to correct the issue would cost the homeowners a considerable amount of money. Three weeks after M's deposition, the attorney for the homeowners sent the plaintiff's attorney an email informing the plaintiff that M had further investigated the issues about which he had testified and concluded that the windows were installed with pan flashing but that it was not installed correctly, which, along with other allegedly defective work by the plaintiff, would result in water condensation and eventually water damage to the roof if the issues were not remedied. The plaintiff filed a claim for coverage under a commercial general liability policy issued to it by the defendant. The plaintiff also submitted to the defendant documents from the underlying litigation, including the homeowners' counterclaim, the expert witness disclosure of M, the transcript of M's deposition, and the email regarding M's further investigation of the issues. The defendant acknowledged receipt of the materials submitted by the plaintiff. One month later, the defendant issued a disclaimer of coverage and reservation of rights to the plaintiff stating, inter alia, that the operative counterclaim filed in the underlying litigation did not allege "property damage" caused by an "occurrence" as defined by the insurance policy and, therefore, it did not trigger coverage under the policy. Prior to the trial

in the underlying litigation, the plaintiff and the homeowners agreed to arbitrate their claims. The plaintiff prevailed in the arbitration and received an award in its favor. The plaintiff subsequently commenced the present action against the defendant, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. Both parties filed motions for summary judgment, and, after oral argument, the trial court issued a memorandum of decision in which it denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment. With respect to the plaintiff's breach of contract claim, the court determined that the pleadings in the underlying litigation did not allege property damage and that the extrinsic documents submitted to the defendant by the plaintiff established only the existence of possible defective work that could lead to future property damage if not remedied but that they did not demonstrate the existence of current property damage that would trigger the defendant's duty to defend. *Held* that the plaintiff could not prevail on its claim that the trial court improperly granted the defendant's motion for summary judgment: contrary to the plaintiff's argument, the homeowners' counterclaim alleged contract damages and construction defects and did not allege that the defects caused damage to other, nondefective property or that there was property damage of any kind; moreover, M's deposition testimony did not trigger a duty to defend because it did not suggest that property damage had, in fact, occurred, but rather it suggested that he had identified defective work that, if not remedied, could lead to property damage in the future; furthermore, the plaintiff did not present this court with any case law holding that the presence of water, in the absence of actual damage, amounts to covered physical damage that would trigger a duty to defend, and, thus, the plaintiff's notification of the mere presence of water, without the necessary resulting physical injury to tangible property, did not provide the defendant with actual knowledge of facts establishing a reasonable possibility of coverage because the presence of water did not constitute property damage within the terms of the policy.

Argued January 3—officially released April 2, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Shaban, J.*, denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Anita C. Di Gioia, for the appellant (plaintiff).

Ashley A. Noel, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Westchester Modular Homes of Fairfield County, Inc., appeals from the summary judgment rendered in favor of the defendant, Arbella Protection Insurance Company. On appeal, the plaintiff claims that the court improperly concluded that, pursuant to a commercial general liability policy, the defendant had no duty to defend the plaintiff against a counterclaim filed by a third party in an action arising out of a contract for the construction of a modular home. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. On or about April 27, 2016, the plaintiff entered into a contract with Diana Lada L'Henaff and Jean Jacques L'Henaff for the construction of a new modular home on property located in New Canaan (property). During construction, disputes arose between the L'Henaffs and the plaintiff. Ultimately, the L'Henaffs terminated their contract with the plaintiff on December 14, 2016. The plaintiff filed a mechanic's lien on the property on or about February 3, 2017, and commenced an action to foreclose on the lien on or about April 7, 2017 (underlying litigation).

The L'Henaffs filed a counterclaim in the underlying litigation. In their operative first revised counterclaim, filed on August 22, 2017, the L'Henaffs alleged, in relevant part, that they "desired to build a modern home and had very carefully and specifically specified the type of insulation, materials, and finishes that they required the builder that won the job to satisfy." The L'Henaffs alleged that prior to signing the contract, the

plaintiff "often responded to [their] frequent queries in a manner that revealed its lack of knowledge, experience, and expertise with modern construction." The L'Henaffs alleged that "work on the project progressed slowly and with constant problems." The L'Henaffs alleged that the plaintiff had breached the construction contract by: "[f]ailing to complete construction within the time set forth in the construction contract . . . [f]ailing to complete construction in accordance with the plans and specifications incorporated by reference into the construction contract . . . [p]erforming work that was substandard, unreasonable, and unworkmanlike . . . [d]isregarding [the L'Henaffs'] repeated requests for timelines to complete . . . [d]isregarding [the L'Henaffs'] repeated requests for materials that complied with the plans and specifications to review and approve . . . [f]ailing to construct the building in accordance with the approved plans . . . [m]aking material changes to the building design layout without consulting [the L'Henaffs] . . . [f]ailing to ensure proper plumbing connections were used throughout the building . . . [f]ailing to take reasonable steps to ensure that construction progressed in a timely manner . . . [f]ailing to complete rough electrical and plumbing in accordance with plans . . . [f]ail[ing] to provide hardware, lighting, and various other finishes for which [the plaintiff] charged [the L'Henaffs] . . . [f]ail[ing] to properly construct boulder retaining wall . . . [f]ail[ing] to construct walls that were true and plumb; and . . . [f]ail[ing] to properly complete site work." The L'Henaffs alleged in their counterclaim that, "[a]s a direct and proximate result of [the plaintiff's] material breach of the terms of the construction contract, the [L'Henaffs have] suffered, and will continue to suffer, damages to be ascertained at trial."

Also in the underlying litigation, in a June 29, 2018 supplemental disclosure of expert witness, the L'Henaffs disclosed Carl Mezoff, a licensed architect and

licensed professional engineer. The disclosure stated that Mezoff was expected to testify, inter alia, "about his opinions concerning the construction work performed by the plaintiff and its agents, the timeliness of said work, the processes employed by the plaintiff in connection with its work and planning, the status of the work performed by the plaintiff as of the date of termination, the quality of workmanship of the work performed by the plaintiff as of the date of termination, [and] the work performed by third parties after the termination of the plaintiff that was within the scope of the plaintiff's contract, including the plaintiff's allegations pertaining to the costs incurred by the [L'Henaffs] to both repair work performed by the plaintiff and complete work left incomplete by the plaintiff."[1]

On August 1, 2018, the plaintiff's attorney deposed Mezoff regarding the condition of the property. In his

[1] The June 29, 2018 supplemental disclosure of expert witness also stated: "It is expected that Mezoff will testify consistent [with] his review of the project and experience in the areas of residential design, construction, and construction process. Mezoff is further expected to testify with respect to his review and examination of the operative pleadings, discovery responses, documents produced in this litigation, and his personal inspection of the project site."

The disclosure stated that Mezoff was expected to testify to the following facts and opinions: "(I) the work performed, both completed and incomplete, (1) was not performed in substantial compliance with the construction contract, plans and specifications, and customary practices applicable to residential construction, including sequencing and process, (2) was not performed timely and in a reasonable and workmanlike manner, and (3) demonstrated a failure by the plaintiff to understand the specific requirements and challenges presented by 'modern' architectural design; (II) the plaintiff failed to properly request and obtain change orders in accordance with the requirements of the contract; (III) the plaintiff failed to properly and timely identify and secure items specified [in] the contract and attached schedules and specifications; (IV) the plaintiff failed to properly plan for the changes that it made to the plans and/or design during the construction phase to ensure the plaintiff would meet contract deadlines; [and] (V) the costs of completion of, and corrections to, the work by the [L'Henaffs] was appropriate, reasonable, and necessary."

deposition, Mezoff testified that "one of the major problems that we've run into or at least discovered is that the windows are improperly installed in this building . . . ." Specifically, Mezoff testified that "[t]he windows were not installed with pan flashing. There's no pan flashing under the windows. That's a building code violation, and that *will* allow water to leak down between the window and the siding and rot the building below. So to correct that, they're going to have to pull out all the windows, reflash them, reinstall the windows, and that's a considerable cost." (Emphasis added.) He further explained: "Because there's no pan flashing, *if* water gets past my finger there, it's going to get into the wall and rot the wall." (Emphasis added.)

Three weeks after Mezoff's deposition, on August 21, 2018, the L'Henaffs' attorney sent the plaintiff's attorney an email informing the plaintiff that Mezoff had "investigated further the issues related to the window flashing and insulation in the ceiling that he testified about" (August, 2018 email). The August, 2018 email states that Mezoff has concluded that "the windows were installed with pan flashing, however, the flashing does not extend out over the second layer of exterior foam insulation; water, therefore, is being directed between the two foam layers, and as a result, water is, and will continue, to collect in the soffit areas." The email also states that Mezoff "has opened the ceiling and discovered (a) there is no insulation in the drop ceiling on the second floor, and (b) there is no vapor barrier between the bottom of the open cell insulation and the top of the drywall in the ceiling finished by the factory. Therefore, the ceiling is not code compliant, and the lack of a vapor barrier will result in water condensation, thus resulting in water damage to the roof structure if not remedied. Further there is insufficient insulation both to meet

code and to comply with the contract. Please advise when you would like to re-depose him."[2]

In September, 2018, the plaintiff, as a named insured under a commercial general liability policy issued by the defendant (policy), filed a claim for coverage with the defendant. The policy's general insuring provision states in relevant part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."

The following definitions in the policy, which we discuss subsequently in more detail, are relevant to our analysis.

"13. 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. . . .

"17. 'Property damage' means:

"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

[2] In an August 22, 2018 supplement to a motion for continuance filed in the underlying litigation, the plaintiff's counsel states that "[t]he plaintiff and its experts are currently investigating the claims brought up at the deposition of [the L'Henaffs'] new expert [Mezoff] that took place on August 1, 2018. The plaintiff requires sufficient time to inspect, investigate and obtain expert testimony."

"b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

In connection with its claim for coverage, on September 11, 2018, the plaintiff submitted to the defendant certain pleadings from the underlying litigation, including the L'Henaffs' first revised counterclaim, the plaintiff's reply to the L'Henaffs' special defenses and answer to the counterclaim with its own special defenses, a second amended complaint, the L'Henaffs' answer to the amended complaint, the supplemental disclosure of expert witness, and a supplement to a motion for continuance. The plaintiff also submitted to the defendant Mezoff's deposition transcript and the August, 2018 email. The defendant acknowledged receipt of the materials submitted by the plaintiff.

On October 15, 2018, the defendant issued a disclaimer of coverage and reservation of rights to the plaintiff. The defendant disclaimed coverage, inter alia, on the basis that the first revised counterclaim filed in the underlying litigation did not allege "property damage" caused by an "occurrence" and, therefore, it did not trigger coverage under the policy. (Internal quotation marks omitted.)

Prior to trial in the underlying litigation, the plaintiff and the L'Henaffs agreed to arbitrate their claims. The plaintiff prevailed in the arbitration and received an award in its favor on July 6, 2020.[3]

[3] The arbitration award, which was attached as an exhibit to the plaintiff's memorandum of law in support of its motion for summary judgment in this case, provided that the plaintiff "shall also recover reasonable [attorney's] fees and costs of collection, as provided in the contract, in an amount to be determined after further argument on that sole issue on the basis of the affidavit submitted by [the plaintiff's] counsel with its posthearing brief, all as previously agreed by counsel. Counsel shall confer and, within five (5) business days of receipt of this award, shall advise the undersigned whether they want said argument to proceed by conference call or Zoom conference and state at least two proposed dates/times for said argument."

In October, 2020, the plaintiff commenced the present action against the defendant alleging breach of contract and breach of the implied covenant of good faith and fair dealing. In count one, the plaintiff alleged, inter alia, that the policy obligated the defendant to provide a defense to the plaintiff when presented with a claim to which the policy may apply. The plaintiff alleged that it timely provided the defendant with information demonstrating that the defendant was obligated to defend the plaintiff in the underlying litigation and, thus, the defendant's disclaimer of coverage constituted a breach of the policy. The plaintiff alleged that it suffered damages in excess of $500,000 in the form of defense costs incurred in the underlying litigation.

In count two, the plaintiff alleged that, "[d]espite the plaintiff providing the defendant with voluminous documents and information that demonstrated that the plaintiff was entitled to a defense and indemnification under the policy when the L'Henaffs refined and amplified their claim in the summer of 2018, the defendant relied exclusively on the revised counterclaim from the underlying litigation dated August 22, 2017, to disclaim coverage." The plaintiff alleged that the defendant's failure to consider the materials was purposeful and arose out of the defendant's dishonest purpose to deny coverage.

The defendant filed an answer and special defenses, asserting, inter alia, that coverage was not triggered by the policy or was excluded pursuant to certain of the policy's exclusions. The plaintiff denied the defendant's special defenses.

On September 9, 2021, the plaintiff filed a motion for summary judgment on liability as to count one of its complaint alleging breach of contract, a memorandum of law in support thereof, and exhibits. The plaintiff argued that there existed no genuine issue of material fact that the defendant had a duty to defend under the

policy and the exclusions to coverage did not apply. Specifically, the plaintiff contended that the pleadings from the underlying litigation when considered together with Mezoff's deposition transcript and the August, 2018 email demonstrated that the L'Henaffs were claiming that the plaintiff's defective work "was damaging work that was not itself defective," thus triggering the defendant's duty to defend.

On September 10, 2021, the defendant filed its own motion for summary judgment, accompanied by a memorandum of law and supporting exhibits, as to both counts of the plaintiff's complaint. Therein, the defendant argued that it "did not have a duty to defend the plaintiff against the revised counterclaim in the underlying [litigation]. The revised counterclaim did not allege 'property damage' caused by an 'occurrence' and therefore did not trigger coverage under the applicable policy. Extrinsic documents submitted by the plaintiff to [the defendant] in support of its claim for coverage similarly did not raise the possibility of coverage under the policy. Furthermore, even if coverage was initially triggered, coverage was precluded by certain policy exclusions. As a result, [the defendant] did not have a duty to defend the plaintiff and therefore did not breach the policy." The defendant also argued that, because the plaintiff cannot recover for common-law bad faith where there exists no wrongful denial of benefits under the policy, it was entitled to judgment as a matter of law on count two of the plaintiff's complaint.

Both parties filed memoranda of law in opposition to summary judgment, and the plaintiff filed a reply to the defendant's opposition. The court, *Shaban*, *J.*, heard oral argument on both motions for summary judgment on December 6, 2021.

On March 29, 2022, the court issued a memorandum of decision in which it denied the plaintiff's motion for

summary judgment and granted the defendant's motion for summary judgment. With respect to count one of the plaintiff's complaint, the court determined that the pleadings in the underlying litigation did not allege property damage. As to the extrinsic documents submitted to the defendant by the plaintiff, the court determined that such evidence established only the existence of possible defective work that could lead to future property damage if not remedied but that it did not demonstrate the existence of current property damage. Because it concluded that "neither the pleadings nor the other extrinsic documents provided to [the defendant] by [the plaintiff] in the underlying litigation allege or provide actual knowledge that property damage, [affecting] other nondefective property, resulted from an occurrence that triggered coverage and a duty to defend," the court did not need to consider whether coverage was barred under any exclusions to the policy. With respect to count two of the plaintiff's complaint, the court determined that the plaintiff could not recover on its claim alleging a breach of the covenant of good faith and fair dealing because there was no wrongful denial of coverage under the policy. This appeal followed.[4]

We first set forth our standard of review and relevant legal principles. "Whether the trial court properly rendered summary judgment in favor of the defendant is a question of law subject to our plenary review. . . . Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary

[4] On appeal, the plaintiff does not claim that the court erred in rendering summary judgment in favor of the defendant on count two of its complaint.

judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Nash Street, LLC* v. *Main Street America Assurance Co.*, 337 Conn. 1, 8, 251 A.3d 600 (2020).

Because there are no factual issues in dispute in the present case, the legal question is whether the defendant had a duty to defend the plaintiff. "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." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 240, 291 A.3d 1051 (2023).

Moreover, "[a]n insurer may be obligated to provide a defense not only based on the face of the complaint but also if any facts known to the insurer suggest that the claim falls within the scope of coverage. . . . Where the insurer has sufficient knowledge to show that a claim falls within coverage even though not properly pleaded to [invoke] coverage, the carrier cannot make the face of the complaint argument . . . . [W]e should

not employ a wooden application of the four corners of the complaint rule [that] would render the duty to defend narrower than the duty to indemnify and . . . the sounder approach is to require the insurer to provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage. . . . After all, the duty to defend derives from the insurer's contract with the insured, not from the complaint." (Citations omitted; internal quotation marks omitted.) *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 466–67, 876 A.2d 1139 (2005); see also *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 161, 61 A.3d 485 (2013) ("[w]e often have stated that the duty to defend must be determined by the allegations set forth in the underlying complaint itself, with reliance on extrinsic facts being permitted only if those facts support the duty to defend"). We will not, however, "predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 218 Conn. App. 240.

"Our analysis is guided by our usual procedures for interpreting insurance policies. [C]onstruction of a contract of insurance presents a question of law . . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . [and construing] any ambiguity in the terms . . . in favor of the insured . . . .

"The commercial general liability policy is a standard form developed by the Insurance Services Office, Inc., and has been used throughout the United States since 1940. . . . It begins with a broad grant of coverage in the insuring agreement, followed by a series of exclusions (and exceptions to the exclusions) that define the contours of coverage." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 773–74, 67 A.3d 961 (2013) (*Capstone*).

With these principles in mind, we turn to the plaintiff's appeal. In deciding whether the defendant was obligated to defend the plaintiff in the underlying litigation, we begin our analysis with the initial grant of coverage in the policy's insuring agreement, which provides in relevant part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." The insuring agreement also specifies: "This insurance applies to 'bodily injury' and 'property damage' only if . . . [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory' . . . ."

"Occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy defines "property damage" as "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

"b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

On appeal, the plaintiff claims that the court improperly determined that the defendant had no duty to defend the plaintiff in the underlying litigation. The plaintiff contends that it presented the defendant with sufficient information, including the previously discussed extrinsic documents, in support of a potential covered claim. Specifically, the plaintiff argues that the L'Henaffs claimed in the underlying litigation that the plaintiff caused property damage to nondefective property at their house. The defendant responds that neither the allegations of the L'Henaffs' counterclaim nor the extrinsic documents submitted raised the possibility of existing property damage.[5] Specifically, the defendant contends that the extrinsic documents suggested, "at most, that the construction deficiencies *could potentially* result in water damage to nondefective areas of the property *if not fixed*." (Emphasis in original.) Thus, the defendant argues that the court properly determined that it did not have a duty to defend the plaintiff in the underlying litigation.[6] We agree with the defendant.

Our Supreme Court's decision in *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn.

[5] The defendant did not argue, either before the trial court or in the present appeal, that alleged negligent work of the plaintiff could not give rise to an "occurrence" under the insuring agreement. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 776 ("because negligent work is unintentional from the point of view of the insured, we find that it may constitute the basis for an 'accident' or 'occurrence' under the plain terms of the commercial general liability policy"). Accordingly, we focus on the property damage requirement of the insuring agreement.

[6] The defendant asserts, as an alternative ground for affirmance, that certain policy exclusions bar coverage. Because we affirm the judgment on the basis that the court properly determined that there was no property damage within the terms of the policy, we need not reach the defendant's proposed alternative ground for affirmance.

760, informs our determination of whether the allegations of the revised counterclaim assert property damage. In *Capstone*, the court examined what constitutes property damage under a commercial general liability policy with the same definition as the present policy. See id., 764, 782. The court first noted a lack of "consensus on the meaning of the term property damage in the context of claims for defective work under commercial general liability policies." Id., 777. The court determined, "[o]n the basis of the language of the policy, 'physical injury to tangible property' would not include construction deficiencies unless they damage other, nondefective property." Id., 785. In other words, "the commercial general liability policy covers claims for property damage caused by defective work, but not claims for repair of the defective work itself." Id., 787.

In applying the property damage requirement of the insuring agreement, the court in *Capstone* first noted that, "[a]lthough the majority of the allegedly defective work involved defective construction, poor quality, or building code violations, without more," the plaintiffs in that case had argued that "assertions made by [the University of Connecticut] that the [p]roject suffered water damage, mold damage, elevated carbon monoxide exposure, cracked piping, and structural problems" clearly involved property damage. (Internal quotation marks omitted.) Id., 779–81. The court stated that "building code violations, defective construction and poor quality control" did not constitute physical injury to tangible property. Id., 783. Additionally, the escape of carbon monoxide, without more, did not constitute property damage because the gas " 'caused no physical, tangible alteration to any property' . . . ." Id., 782. Water damage and mold damage, however, "to portions of the insured's project, beyond the defective work itself," did constitute property damage and, accordingly, the claims based on that physical injury were within the insuring agreement's coverage. Id.

In the present case, the first revised counterclaim alleges construction defects and does not allege damage that the defects caused to other, nondefective property. We agree with the trial court that "[t]he first revised counterclaim provides no allegations concerning defective installation of windows, a defective vapor barrier, water leakage or water damage, or any 'property damage' of any kind." Additionally, the counterclaim's allegation that, "[a]s a direct and proximate result of [the plaintiff's] material breach of the terms of the construction contract, the [L'Henaffs have] suffered, and will continue to suffer, damages to be ascertained at trial" reasonably alleges contract damages, not property damage. See *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 218 Conn. App. 247 ("an insurer has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy" (emphasis in original; internal quotation marks omitted)).

We next consider whether the extrinsic documents submitted to the defendant provided it with " 'actual knowledge of facts establishing a reasonable possibility of coverage.' "[7] *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, supra, 274 Conn. 467. The plaintiff relies primarily on two submissions. First, it relies on Mezoff's deposition testimony. Second, it relies on the August, 2018 email from the L'Henaffs' counsel advising the counsel representing the plaintiff in the underlying

[7] In its appellate brief, the plaintiff contends that "the trial court erred when it required the plaintiff to demonstrate that information outside of the counterclaims must provide the defendant with 'actual knowledge of a coverable claim' . . . instead of sufficient knowledge demonstrating the possibility of a covered claim." (Citation omitted.) Although the trial court in one instance in its memorandum of decision used the language "actual knowledge of a coverable claim," it correctly quoted and applied the law stating that "an insurer must provide a defense when 'it has actual knowledge of facts establishing a reasonable possibility of coverage.' " Furthermore, because our review is plenary, the trial court's choice of words is immaterial to our analysis. Accordingly, we reject the plaintiff's contention.

litigation of the results of Mezoff's further investigation. The defendant acknowledged receipt of this information.

As noted previously, Mezoff testified that "[t]he windows were not installed with pan flashing. There's no pan flashing under the windows. That's a building code violation, and that *will* allow water to leak down between the window and the siding and rot the building below. So to correct that, they're going to have to pull out all the windows, reflash them, reinstall the windows, and that's a considerable cost." (Emphasis added.) He further explained: "Because there's no pan flashing, *if* water gets past my finger there, it's going to get into the wall and rot the wall." (Emphasis added.)

We conclude that Mezoff's deposition testimony does not trigger a duty to defend because it does not suggest that property damage has, in fact, occurred. Rather, it suggests that he has identified defective work that, if not remedied, could lead to property damage in the future. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 785 n.23 ("[r]epairs to structural deficiencies, made for the purpose of preventing [p]hysical injury to tangible property . . . before the alleged deficiency has caused property damage are not within the insuring agreement's definition of property damage" (internal quotation marks omitted)).

The August, 2018 email presents a closer question. The email indicates that Mezoff concluded that "the windows were installed with pan flashing, however, the flashing does not extend out over the second layer of exterior foam insulation; water, therefore, is being directed between the two foam layers, and as a result, water is, and will continue, to collect in the soffit areas."

The plaintiff argues that, taken together, Mezoff's deposition testimony that rot would occur if water leaked into the space below the windows and Mezoff's

statement, as reported through counsel in the email, that water was collecting in the soffits, amounts to a "belie[f]" held by Mezoff that "water was entering the area of the exterior walls where the window flashing was defective, collecting, and rotting the 'house' below."[8] The defendant highlights the discrepancy between Mezoff's deposition testimony, wherein he testified that there was "no pan flashing" under the windows, and his discovery, upon returning to the property after his deposition, that "the windows were installed with pan flashing, however, the flashing does not extend out over the second layer of exterior foam insulation . . . ." The defendant contends that Mezoff "effectively retracted his opinions concerning the lack of pan flashing" and, thus, the discovery that flashing was present "mooted

[8] The plaintiff relies on *County Wide Mechanical Services, LLC* v. *Regent Ins. Co.*, Docket No. 3:20-CV-1135 (SVN), 2022 WL 1514941 (D. Conn. May 13, 2022), to illustrate the principle that, if an allegation of the complaint falls even possibly within coverage, the insurer must defend the insured. We find this case distinguishable because the question before the court in that case was whether certain building systems, alleged to have been affected by the defective work of a company that installed a heating, ventilation, and air conditioning (HVAC) system, constituted nondefective property. See id., *6.

Specifically, the court considered the following allegation made in underlying litigation against the HVAC company: "[a]s a result of the failures [of the HVAC system], The Saybrook has replaced multiple compressors in the HVAC system *and several circuit boards, valves, and other components*." (Emphasis added; internal quotation marks omitted.) Id., *1. The court in the ensuing insurance coverage dispute determined that "the allegation plausibly states that the allegedly damaged circuit board, valves, and other components are external to the HVAC system because the phrase 'in the HVAC [s]ystem' appears to modify only the phrase 'multiple compressors,' and not the phrase 'circuit boards, valves and other components.' " (Emphasis omitted.) Id., *6. The court also stated that the allegation that The Saybrook had " 'suffered damages' " as a result of the HVAC company's defective work was "not alleged to have been limited to the HVAC system itself." Id. Accordingly, the court concluded that the "underlying complaint plausibly suggests that its injury includes damage to nondefective property beyond the HVAC system—circuit boards, valves, and other components—which raises the possibility that [the underlying plaintiff's] injury constitutes 'property damage' as defined by the insurance policy . . . ." Id.

all of his testimony regarding the hypothetical future water damage that could result from the lack of pan flashing."[9] The defendant further argues that the plaintiff conflates water collection with water damage. Because there was no indication of water damage, and considering Mezoff's statement that "the lack of a vapor barrier will result in water condensation, thus resulting in water damage to the roof structure if not remedied," the defendant argues that Mezoff opined, at most, that "construction deficiencies could potentially result in water damage to nondefective areas of the property if not fixed." (Emphasis omitted.) According to the defendant, this possibility of future damage does not qualify as "property damage" under our Supreme Court's decision in *Capstone*.

In construing the phrase "physical injury," our Supreme Court in *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 786–87, quoted *Travelers Ins. Co.* v. *Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 757 N.E.2d 481 (2001), in which the Supreme Court

[9] In response to the defendant's argument, the plaintiff, in its appellate reply brief, argues that factual uncertainty exists with regard to the defendant's duty to defend. The plaintiff relies on *Nash Street, LLC* v. *Main Street America Assurance Co.*, supra, 337 Conn. 1, wherein our Supreme Court stated that "[b]ecause all that is necessary to trigger an insurer's duty to defend is a possibility of coverage, any uncertainty as to whether an alleged injury is covered works in favor of providing a defense to an insured, and uncertainty may be either factual or legal." Id., 10. The court explained that "[f]actual uncertainty arises when it is unclear from the face of the complaint whether an alleged injury occurred in a manner that is covered by the policy." Id. The court also gave an example of factual uncertainty, explaining that if a policy was active for the 2019 calendar year and the underlying complaint did not specify when the alleged injury occurred, that would constitute an example of factual uncertainty "because it is impossible to know from the face of the complaint whether the alleged injury took place during the coverage period." Id.

We disagree with the plaintiff that the revised counterclaim gives rise to factual uncertainty. The counterclaim does not allege property damage. It is not that the allegations of the revised counterclaim are uncertain and require clarification but that they are altogether insufficient.

of Illinois stated that " 'physical injury' unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension." Id., 312; see also 9A J. Plitt et al., Couch on Insurance (3d Ed. Rev. 2023) § 129:7 ("[i]n relation to the first prong of the [property damage] definition, property suffers physical, tangible injury when the property is altered in appearance, shape, color, or in some other material dimension").

It is clear that damage to nondefective property in the form of rot or mold caused by water intrusion would be property damage within the terms of the policy language. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 782 ("under the plain language of the commercial general liability policy, water and mold damage to portions of the insured's project, beyond the defective work itself, would qualify as 'physical injury to tangible property' "); see also *Assurance Co. of America* v. *Lucas Waterproofing Co.*, 581 F. Supp. 2d 1201, 1209 (S.D. Fla. 2008) ("given that damage to the buildings included water in the soffit beams, mildew, stucco damage, and peeling and bubbling paint, which constitute 'property damage' in this case, it is probable that at least part of the state court judgment is attributable to repairing damage to other parts of the property caused by [the waterproofing company's] defective work").[10]

[10] During oral argument before this court, the court ordered the parties to submit supplemental briefs addressing *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 95 A.3d 1031 (2014) (*Travelers*), in which our Supreme Court concluded that a complaint in underlying litigation triggered The Netherlands Insurance Company's duty to defend, under a commercial general liability policy, a company contracted to perform masonry for the construction of a law library. See id., 716–17. The complaint in the underlying litigation in that case alleged that "[d]uring the months and years following completion of the project and occupancy by the state, the state began to experience problems with water intrusion into the [law] library." (Internal quotation marks omitted.) Id., 744. The complaint alleged that numerous defects had "caused tangible and physical harm to the [law] library . . . ." (Internal quotation marks omitted.) Id., 745.

This case, however, presents the question of whether the extrinsic documents suggesting that water was being directed between the two foam layers and collecting in the soffit areas constitutes property damage, in other words, whether the notification to the insurer of the mere presence of water is sufficient to trigger a duty to defend. The plaintiff has not presented this court with any case law holding that the presence of water, in the absence of actual damage, amounts to covered physical damage.[11]

In its supplemental briefing, the plaintiff relies on the court's statement in *Travelers* in rejecting the argument that repeated water intrusions constituted one occurrence, that "the occurrence is the defective work, whereas the property damage—in this case water intrusion—results from that occurrence." (Internal quotation marks omitted.) Id., 746. The plaintiff argues that *Travelers* is not definitive but "lends some support" to the plaintiff's position that "water collecting in areas where it is not intended to be is itself property damage." We conclude that the court's statement, considered in context, does not impact our analysis of the issue presented in this case. As the plaintiff acknowledges, the complaint in the underlying litigation in *Travelers* "indicated that the water intrusion had in fact caused physical damage to property," and the *Travelers* decision addressed the question of whether the property damage that had been alleged extended into certain policy periods, not whether property damage had been alleged at all.

[11] Although not directly on point, our Supreme Court's recent decisions in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, 346 Conn. 33, 288 A.3d 187 (2023) (*Connecticut Dermatology*), and *Hartford Fire Ins. Co.* v. *Moda, LLC*, 346 Conn. 64, 288 A.3d 206 (2023) (*Moda*), are instructive. In *Connecticut Dermatology*, our Supreme Court considered whether a policy provision covering "direct physical loss of or physical damage to" certain property applied to losses caused by the suspension of an insured's business operations during the COVID-19 pandemic. (Emphasis omitted; internal quotation marks omitted.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 43. The court concluded that "the plain meaning of the term 'direct physical loss of . . . [p]roperty' does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase 'direct physical loss of . . . [p]roperty' clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." Id., 51. The court further explained that "the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants." Id.,

We also find the decision in *Amtrol, Inc.* v. *Tudor Ins. Co.*, Docket No. Civ.A.01-10461 (DPW), 2002 WL 31194863 (D. Mass. September 10, 2002), persuasive. In that case, the defendant insurer had issued a standard form commercial general liability policy to its insured, Amtrol, Inc. (Amtrol), a corporation that manufactures and sells residential water heaters. See id., *1. The water heaters began to develop "leaks in various locations in their coil assemblies causing hot water to leak from the units." Id., *2. In seeking coverage, Amtrol contended that the leakage of water from the water heater constituted property damage. See id., *5. In other words, it contended that "the unwanted presence of water within the home or building in which the [water heater] was installed is per se physically injurious." Id., *6. The court disagreed, stating that, "in order to meet the physical damage requirement, one must show that the water has somehow exacted a physical harm upon tangible property that required remediation or otherwise diminished the value of the property itself. . . . *A leak that results in no damage beyond the mere presence of water that can be removed or evaporates without harm does not constitute property damage.*" (Citation omitted; emphasis added.) Id.

In the present case, the extrinsic documents provided by the plaintiff to the defendant, at most, alerted the defendant to the mere presence of water, without the necessary resulting physical injury to tangible property.[12] We conclude that the notification of the mere

59. In the companion case of *Moda*, our Supreme Court relied on its holding from *Connecticut Dermatology* to conclude that the losses the insured had suffered did not result from any tangible physical alteration to its stock or property and, thus, there was no coverage for such losses under the policy language. See *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 73. We find the reasoning in *Connecticut Dermatology* and *Moda* relevant to the present case because the presence of the virus, like the presence of water, does not suggest a tangible alteration to nondefective property.

[12] The present case is different from *B&W Paving & Landscape, LLC* v. *Employers Mutual Casualty Co.*, Docket No. 3:21-cv-01624 (JBA), 2022 WL 17716492 (D. Conn. December 15, 2022). In that case, the underlying com-

presence of water, without some corresponding physical damage, did not provide the defendant with "actual knowledge of facts establishing a reasonable possibility of coverage" because the presence of water does not constitute property damage within the terms of the policy.

Accordingly, the defendant did not have a duty to defend the plaintiff in the underlying litigation, and the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

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plaint broadly alleged property damage caused by the insured plaintiff. See id., *2. When the complaint was considered together with an expert report concluding that defects in the plaintiff's work caused damage to other, nondefective work, the insurer's duty to defend was triggered. See id., *3.