EITAN RUBIN ET AL. *v.* BARNETT BRODIE ET AL. (AC 46348)

Alvord, Elgo and Prescott, Js.

Syllabus

Pursuant to the rule of practice (§ 61-11 (a)), an automatic appellate stay applies to "proceedings to enforce or carry out the judgment."

The plaintiffs, three individuals, including R and G, and three limited liability companies, including E Co., commenced this civil action to recover damages from the defendants for, inter alia, breach of fiduciary duty. The plaintiffs' complaint alleged that the defendant B had engaged in certain ultra vires actions that constituted self-dealing, and, therefore, breached his fiduciary duties in managing the LLCs. Prior to the commencement of this action, the parties' dispute was submitted to a binding rabbinical arbitration proceeding in which B sought to buy out the interests of R and G in E Co. The arbitrators' decision, which ordered R and G to sell their interests in E Co. to B, was issued approximately one month after this action had been commenced. B, in the same action, filed an application to confirm the arbitration award pursuant to statute (§ 52-417 et seq.). B and the other defendants thereafter filed motions to dismiss the action. The parties agreed that the trial court should resolve the motions to dismiss prior to the hearing on the application to confirm. The court granted the motions to dismiss for lack of subject matter jurisdiction and rendered judgment thereon, from which the plaintiffs appealed to this court. Subsequently, B attempted to reclaim his application to confirm the arbitration award. The clerk issued an order indicating that no hearing would be scheduled, as the case was "stayed during the pendency of appeal." B and various other defendants filed a motion for review, asking this court for an order clarifying whether

Practice Book § 61-11 (a) automatically stayed proceedings in the Superior Court on the pending application to confirm. *Held* that the motion for review was granted and the relief requested was granted in accordance with this court's prior order: contrary to the plaintiffs' claim, the application to confirm the arbitration award, a special statutory proceeding, survived the dismissal of the plaintiffs' complaint, as there was no dispute that B could have secured affirmative relief had he filed the application to confirm in a separate action, and, thus, assuming the conditions of § 52-417 et seq. have been met, the application to confirm can proceed to judgment separately from the judgment on the complaint; moreover, the present appeal from the judgment dismissing the complaint did not automatically stay proceedings before the court on the application to confirm the arbitration award because proceedings on that application will not "enforce or carry out the judgment" dismissing the complaint pursuant to Practice Book § 61-11 (a), the court having dismissed the entirety of the complaint, which sought damages from the defendants under various theories of liability, for lack of subject matter jurisdiction, and, should that judgment ultimately be reversed by this court, the action would be restored to the pleading stage; furthermore, the court's resolution of B's application to confirm the arbitration award will result in a separate judgment with its own appeal period, and, although the present appeal from the judgment of dismissal resulted in an automatic stay as to that judgment, this appeal did not have any effect on the eventual judgment on the application to confirm, and it did not deprive the court of authority to act on the application to confirm.

Considered February 14—officially released April 30, 2024

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the named defendant filed an application to confirm an arbitration award; thereafter, the court, *Jongbloed, J.*, granted the defendants' motions to dismiss, and rendered judgment thereon, from which the plaintiffs appealed to this court; subsequently, the named defendant et al. filed a motion for review. *Motion for review granted.*

Jack G. Steigelfest, in support of the motion.

Ridgely Whitmore Brown, in opposition to the motion.

Opinion

PRESCOTT, J. The issues before this court are whether an application to confirm an arbitration award filed in a pending civil action survives the dismissal of the civil action and, if so, whether an appeal from the judgment dismissing the civil action operates to automatically stay proceedings on the application to confirm the arbitration award. We reject the argument that the application to confirm did not survive the dismissal of the complaint and conclude that this appeal does not automatically stay proceedings before the Superior Court on the pending application to confirm an arbitration award filed by the named defendant, Barnett Brodie. Accordingly, we grant the motion for review filed by Brodie and other defendants and grant the relief requested in accordance with this court's February 14, 2024 order.[1]

On February 15, 2022, the individual plaintiffs, Eitan Rubin, Reuven Gidanian, and Eitan Rubin by power of attorney on behalf of George Rohr,[2] on their own behalf and purportedly on behalf of the plaintiff limited liability companies (LLCs)—E.R. Holdings, LLC; L.E. Ventures, LLC; and Whalley Group, LLC—commenced this civil action. The plaintiff LLCs owned land and rental properties in and around New Haven (assets). Brodie was the managing member of the plaintiff LLCs and owned a 30 percent membership interest in each of those entities. The individual plaintiffs, Rubin, Gidanian and Rohr,

[1] On February 14, 2024, this court granted the motion for review and granted the relief requested, in part, by clarifying that Practice Book § 61-11 (a) does not automatically stay proceedings before the Superior Court on the pending application to confirm the arbitration award. Our order indicated an opinion would follow. This opinion explains our reasons for that determination.

[2] One contested issue in this appeal is whether George Rohr is properly a party plaintiff to this action. Rohr's party status, however, is not relevant to the automatic stay issue, and we decline to address it.

owned the remaining membership interests in the plaintiff LLCs. Brodie also owns or controls five additional business entities that were named as defendants (Brodie defendants).[3]

In the first count of their complaint, the plaintiffs sought damages for Brodie's alleged ultra vires actions and breaches of his fiduciary duties in his management of the plaintiff LLCs. They alleged that Brodie acted beyond the scope of his authority under the relevant operating agreements and engaged in self-dealing by dissolving and merging the plaintiff LLCs "into the downstream Brodie controlled entities," and by improperly obtaining mortgages on the assets.

The plaintiffs named additional defendants in this action, including holders of mortgages on the underlying assets, CoreVest American Finance Lender, LLC, formerly known as Colony American Finance Lender, LLC (CoreVest), and 5 Arch Funding Corporation (5 Arch), as well as Attorney Lawrence Levinson. In the second count of the complaint, which is directed to the Brodie defendants, CoreVest, and 5 Arch, the plaintiffs sought to quiet title to the listed asset properties. In count three, they sought to recover damages from all defendants for their alleged violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. Finally, count four alleged legal malpractice by Levinson arising out of his representation of the plaintiff LLCs.

The dispute at the heart of the plaintiffs' complaint was also the subject of a binding rabbinical arbitration proceeding in which Brodie sought to buy out the interests of Rubin and Gidanian in E.R. Holdings, LLC. Hearings before the arbitrators occurred prior to the commencement of this action and terminated on February

[3] The Brodie defendants include Brodie and the following defendant entities: Reichman Brodie Real Estate, LLC; RBC DE2, LLC; Sperry Group DE2, LLC; Riley Group DE2, LLC; and TZ DE2, LLC.

15, 2022, the day this action was commenced. The decision of the arbitrators was issued on March 23, 2022, approximately one month after the plaintiffs commenced this action. The arbitrators ordered that Rubin and Gidanian sell their interests in E.R. Holdings, LLC, to Brodie for $168,425. On March 24, 2022, in this civil action, Brodie filed an application to confirm the arbitration award pursuant to General Statutes § 52-417 et seq.[4]

On March 28, 2022, the Brodie defendants filed a motion to dismiss the plaintiffs' complaint for lack of personal and subject matter jurisdiction. The other defendants—Levinson, CoreVest and 5 Arch—separately moved to dismiss the plaintiffs' complaint. The plaintiffs objected to these motions, and the defendants filed replies. The court scheduled a hearing on Brodie's application to confirm the arbitration award. The parties ultimately agreed that the court should resolve the motions to dismiss prior to hearing the application to confirm.

On December 23, 2022, the court, *Jongbloed, J.*, granted the defendants' motions to dismiss and dismissed the entirety of the plaintiffs' complaint for lack of subject matter jurisdiction. The court determined that the individual plaintiffs did not have standing to commence the suit as a derivative action and that they failed to plead facts that met the statutory prerequisites to demonstrate that the plaintiff LLCs had authorized the commencement of the action. This appeal followed.

After the plaintiffs filed this appeal, Brodie attempted to reclaim his application to confirm the arbitration award for a hearing before the Superior Court. The plaintiffs objected. On November 3, 2023, the clerk

[4] E.R. Holdings, LLC's 2014 operating agreement predates October 1, 2018; thus, the Revised Uniform Arbitration Act, General Statutes § 52-407aa et seq., does not apply.

issued an order indicating that "[n]o hearing to be scheduled at this time as matter is stayed during pendency of the appeal. Party may reclaim."

The Brodie defendants filed a motion to reargue on November 8, 2023. They argued that the automatic appellate stay of Practice Book § 61-11 applies to proceedings to "enforce or carry out the judgment" but does not stay all activity before the Superior Court. Instead, they argued that the court has continuing jurisdiction over the application to confirm. Accordingly, the Brodie defendants requested that the application to confirm be scheduled for argument and disposition. The plaintiffs filed an opposition, in which they argued that "[a]ny subject matter jurisdiction that the trial court may have had over the application to confirm the arbitration award was lost when the plaintiffs' case was dismissed, and the automatic appellate stay operates to preclude any further action in the case."

On November 24, 2023, the court, *Frechette, J.*, denied the Brodie defendants' motion and sustained the plaintiffs' objection. The Brodie defendants filed a timely motion for review of the court's decision, asking this court for an order clarifying whether Practice Book § 61-11 (a) automatically stays proceedings in the Superior Court on the pending application to confirm. The plaintiffs filed an opposition, renewing their arguments that the Superior Court lost jurisdiction over the application to confirm when it dismissed the plaintiffs' complaint and, alternatively, that further proceedings are automatically stayed during the pendency of their appeal.

Before reaching the applicability of an appellate stay, we must first address the plaintiffs' claim that Brodie's application to confirm the arbitration award did not survive the dismissal of the plaintiffs' complaint. We conclude that the application to confirm survived the dismissal of the plaintiffs' complaint.

"Judicial enforcement of an arbitration award in Connecticut is governed by statute. Section 52-417 controls applications for confirmation of an arbitration award and states in relevant part: 'At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court . . . for an order confirming the award. . . .' The specific steps for applying for confirmation of an arbitration award are set out in [General Statutes] § 52-421 (a), which provides: 'Any party applying for an order confirming, modifying or correcting an award shall, at the time the order is filed with the clerk for the entry of judgment thereon, file the following papers with the clerk: (1) The agreement to arbitrate, (2) the selection or appointment, if any, of an additional or substitute arbitrator or an umpire, (3) any written agreement requiring the reference of any question as provided in section 52-415, (4) each written extension of the time, if any, within which to make the award, (5) the award, (6) each notice and other paper used upon an application to confirm, modify or correct the award, and (7) a copy of each order of the court upon such an application.' [General Statutes §] 52-420 (a) directs the trial court to handle arbitration issues in an efficient manner, providing: 'Any application under section 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay.' " *Windham* v. *Doctor's Associates, Inc.*, 161 Conn. App. 348, 353–34, 127 A.3d 1082 (2015).

In *Windham*, the plaintiff claimed that the "court improperly confirmed the arbitration award because a proper application to confirm the award was not before the court. [The defendant] requested that the court confirm the award, but it did not file a separate and distinct

application to confirm." Id., 352. Instead, the defendant had included its application to confirm the award as an opposition to the plaintiff's application to vacate the award and, therefore, did not pay a filing fee. Id. The plaintiff claimed that this was fatal to the judgment confirming the award in favor of the defendant.

This court in *Windham* determined that the trial court did not improperly confirm the arbitration award. Id., 355. In support of its conclusion, this court reasoned: (1) the defendant had provided sufficient notice of its request to confirm the award; (2) the defendant's motion "was filed within one year of the date of the arbitration award" as required by § 52-417; (3) the materials required by § 52-421 were before the court; and (4) the court's decision to consider both the application to vacate and application to confirm "simultaneously, in furtherance of judicial economy, is a reasonable way to 'dispose of the case with the least possible delay' " as required by § 52-420 (a). *Windham* v. *Doctor's Associates, Inc.*, supra, 161 Conn. App. 354–55.

Here, Brodie's application to confirm was filed in the Superior Court within days of the issuance of the award. It will be for that court to determine, in the first instance, whether the essential conditions prescribed by § 52-417 et seq. have been met. Under the rationale of *Windham*, however, the Superior Court has the authority to consider the application, even though the application was not filed independently but, instead, was made in a pending civil action. See also, e.g., *Lemma* v. *York & Chapel, Corp.*, 204 Conn. App. 471, 475–76, 254 A.3d 1020 (2021) (rejecting defendant's argument, made for first time on appeal, that Superior Court lacked jurisdiction over application to confirm arbitration award when application was filed in same docket as earlier statutory proceeding between parties).

The fact that the plaintiffs' complaint subsequently was dismissed does not alter our analysis. Proceedings

to confirm or vacate arbitration awards are special statutory proceedings. *Pickard* v. *Dept. of Mental Health & Addiction Services*, 210 Conn. App. 788, 795, 271 A.3d 178 (2022). The statutes relating to arbitration "[confer] a definite jurisdiction upon a judge and [define] the conditions under which such relief may be given . . . . [J]urisdiction is only acquired if the essential conditions prescribed by [the] statute are met." (Internal quotation marks omitted.) Id.

Principles pertaining to ordinary civil actions are nevertheless helpful in framing this discussion. "[A] counterclaim is a cause of action . . . on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action." (Internal quotation marks omitted.) *Historic District Commission* v. *Sciame*, 152 Conn. App. 161, 176, 99 A.3d 207, cert. denied, 314 Conn. 933, 102 A.3d 84 (2014). "The term [counterclaim] itself is a general and comprehensive one, naturally including within its meaning all manner of permissible counterdemands. . . . [T]he word counterclaim was intended to be the generic term for all cross demands other than setoffs, whether in law or in equity." (Citations omitted; internal quotation marks omitted.) *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 798, 54 A.3d 232 (2012); cf. *Gattoni* v. *Zaccaro*, 52 Conn. App. 274, 279–80, 727 A.2d 706 (1999) (trial court had jurisdiction to consider defendant's motion for injunctive relief, despite plaintiffs' withdrawal of complaint, where "trial court properly treated that motion as a counterclaim"). "A final judgment on a [complaint] establishes a distinct appeal period from the appeal period related to the judgment on a [counterclaim] in the same case. See Practice Book §§ 61-2 and 61-3." *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 99, 172 A.3d 1263 (2017).

There can be no dispute that Brodie could have secured affirmative relief had he filed the application

to confirm the arbitration award in a separate action. The plaintiffs have offered no authority for the proposition that the dismissal of their complaint, by itself, strips the Superior Court of jurisdiction to consider Brodie's application filed in the same case. Assuming the conditions of § 52-417 et seq. have been met, the application to confirm, like a counterclaim, can proceed to judgment separately from the judgment on the complaint. We therefore reject the plaintiffs' argument that the application to confirm the arbitration award did not survive the dismissal of their complaint.

We must next determine whether this appeal from the judgment dismissing the plaintiffs' complaint operates to stay proceedings in the Superior Court on Brodie's application to confirm the arbitration award. We conclude that it does not.[5]

The automatic appellate stay delineated in Practice Book § 61-11 (a) applies to "proceedings to enforce or carry out the judgment . . . ." Our appellate courts regularly draw distinctions between proceedings to enforce or carry out a judgment, which are automatically stayed; e.g., *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 683–84, 899 A.2d 586 (2006) (law days in foreclosure actions are automatically

[5] Our conclusion is limited to the question presented here, namely, whether Practice Book § 61-11 (a) automatically stays trial court proceedings on the application to confirm. We conclude that it does not. We express no opinion as to whether the Superior Court, in the exercise of its discretion, may impose a stay of proceedings on the application to confirm for the duration of this appeal. "We are mindful of the well established principle that [t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." (Internal quotation marks omitted.) *Fairlake Capital, LLC* v. *Lathouris*, 214 Conn. App. 750, 774, 281 A.3d 1240 (2022). But see General Statutes § 52-420 (a) (trial court is to "dispose of the case with the least possible delay").

stayed because they carry out judgment of strict foreclosure); and trial court proceedings that do *not* enforce or carry out the judgment. E.g., *All Seasons Services, Inc.* v. *Guildner*, 89 Conn. App. 781, 787–88, 878 A.2d 370 (2005) (filing judgment lien and engaging in post-judgment discovery do not violate § 61-11 (a)).

Proceedings on Brodie's application to confirm do not enforce or carry out the judgment dismissing the plaintiffs' complaint. The plaintiffs filed a civil action seeking damages from the defendants under various theories of liability. The Superior Court dismissed the entirety of their complaint for lack of subject matter jurisdiction. Should that judgment of dismissal ultimately be reversed by this court, the plaintiffs' action will be restored to the pleading stage.

The court's resolution of Brodie's application to confirm the arbitration award will result in a separate judgment with its own appeal period. "Our rules of practice unquestionably establish that, for purposes of filing an appeal, a final judgment disposing of a counterclaim is separate and distinct from a judgment on the associated complaint. . . . For example, a judgment rendered on an entire counterclaim is an immediately appealable independent judgment even if an undisposed complaint remains in the case. . . . Such a final judgment on a counterclaim establishes a distinct appeal period from the appeal period related to the judgment on a complaint in the same case." (Citations omitted.) *Sovereign Bank* v. *Licata*, supra, 178 Conn. App. 99.

"As a result of these different appeal periods, different appellate stays of execution arise, and any automatic stay that is extended as the result of filing an appeal from a counterclaim will not stay proceedings to enforce or carry out the judgment on the complaint." Id. The present appeal from the judgment of dismissal resulted in an automatic stay as to that judgment. This

appeal does not have any effect on the eventual judgment on the application to confirm.

This pending appeal also does not deprive the Superior Court of authority to act on the application to confirm. It is well settled that "the filing of an appeal does not stay a trial court's continuing authority to adjudicate any properly filed motions to reargue, reconsider or open the judgment that is the subject of the appeal; see Practice Book § 11-11; irrespective of the possibility that the trial court's action on such a motion potentially could render the appeal moot. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 482–84, 706 A.2d 960 (1998). Said another way, although the filing of an appeal may, in certain instances, result in a stay of actions to enforce or carry out the judgment on appeal . . . any such appellate stay does not affect a court's authority to rule on motions filed with the trial court . . . ." (Citation omitted; emphasis omitted.) *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 762 n.8, 286 A.3d 467 (2022).

We conclude that proceedings before the Superior Court on Brodie's application to confirm the arbitration award would not run afoul of the automatic appellate stay described in Practice Book § 61-11 (a) because such proceedings would not "enforce or carry out" the judgment dismissing the plaintiffs' complaint.

The motion for review is granted and the relief requested is granted in accordance with this court's February 14, 2024 order.

In this opinion the other judges concurred.

BRIAN LEPKOWSKI *v.* PLANNING COMMISSION OF THE TOWN OF EAST LYME ET AL.
(AC 46146)
(AC 46159)

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

Syllabus

Pursuant to a provision of the East Lyme Subdivision Regulations (§ 4-14-3), "[s]ubdivisions of 20 lots or more where more than 50% of the parcel(s) to be subdivided consist of environmentally sensitive resources such as wetlands, steep slopes (>25%), watercourses, flood hazard areas or ridge lines, shall be subject to an [Environmental Review Team] evaluation . . . ."

The plaintiff appealed to the Superior Court from a decision of the defendant Planning Commission of the Town of East Lyme, approving the defendant R Co.'s resubdivision application. The plaintiff, an abutting landowner, opposed the application, claiming, inter alia, that, pursuant to § 4-14-3 of the subdivision regulations, the defendants were required to obtain an evaluation to assess the natural resources on the property before the application was approved. The defendants were unable to obtain such an evaluation prior to the approval of the application because, when the commission contacted E Co., the entity that performed the evaluations, E Co. informed the commission that it was forgoing such evaluations until it had time to develop a new protocol for the reviews. E Co. did not specify a date on which it would resume conducting the evaluations. In light of this, the commission determined that it was impossible for R Co. to comply with § 4-14-3, and it approved the application. The Superior Court sustained the plaintiff's appeal only with respect to his claim regarding R Co.'s failure to obtain an evaluation. The court determined that § 4-14-3 applied to the application, that the evaluation was a mandatory requirement pursuant to § 4-14-3, that the subdivision regulations did not expressly convey to the commission the authority to waive the requirement, and that, therefore, the commission illegally waived § 4-14-3. On the granting of certification, the defendants filed separate appeals to this court. *Held* that the Superior Court improperly sustained the plaintiff's appeal with respect to his claim premised on § 4-14-3 of the subdivision regulations: the commission complied with § 4-14-3 of the subdivision regulations, which required it to request an evaluation in connection with R Co.'s application and to give E Co. a reasonable opportunity to perform the evaluation but did not mandate that the evaluation had to be completed, as, in contrast to other provisions in § 4-14 of the East Lyme Subdivision Regulations, § 4-14-3 does not indicate that a report with respect to an evaluation must be submitted to the commission, nor does it restrict the commission's ability to act

on the application if an evaluation is not performed or assign the weight that the commission must afford to such a report; moreover, the interpretation that the evaluation was not mandatory aligned with the broader dictionary definitions of the phrase "subject to" as used in § 4-14-3; furthermore, as a municipal legislative enactment, § 4-14-3 was entitled to a presumption of validity and construing the regulation to mandate the completion of an evaluation would have rendered the provision invalid as an impermissible delegation of authority by the commission to E Co.; accordingly, by requesting the evaluation, the commission complied with § 4-14-3 despite that E Co. did not perform the evaluation and indicated that it had no intention of doing so until it established a new protocol for such evaluations at some unspecified future date.

Argued January 10—officially released April 30, 2024

Procedural History

Appeal from the decision of the named defendant approving a resubdivision application filed by the defendant Real Estate Service of Conn., Inc., brought to the Superior Court in the judicial district of New London and tried to the court, *O'Hanlan, J.*; judgment sustaining in part the plaintiff's appeal, from which the defendants, on the granting of certification, filed separate appeals to this court. *Reversed in part*; *judgment directed.*

Mark S. Zamarka, for the appellant in Docket No. AC 46146 and the appellee in Docket No. AC 46159 (named defendant).

Matthew Ranelli, with whom was *Chelsea C. McCallum*, for the appellant in Docket No. AC 46159 and the appellee in Docket No. AC 46146 (defendant Real Estate Service of Conn., Inc.).

Paul H. D. Stoughton, with whom, on the brief, was *John F. Healey*, for the appellee in both appeals (plaintiff).

Opinion

MOLL, J. The defendants, the Planning Commission of the Town of East Lyme (commission) and Real Estate

Service of Conn., Inc. (RESC), each appeal from the judgment of the Superior Court sustaining in part the appeal brought by the plaintiff, Brian Lepkowski, from the commission's decision approving a resubdivision application filed by RESC.[1] The dispositive claim asserted by the defendants is that the court incorrectly determined that § 4-14-3 of the East Lyme Subdivision Regulations (subdivision regulations)[2] required the completion of an Environmental Review Team (ERT) evaluation in connection with RESC's application and that, consequently, the court improperly concluded that the commission illegally waived § 4-14-3 in granting RESC's application without an ERT evaluation having been performed. We agree with the defendants and, accordingly, reverse in part the judgment of the Superior Court.

The following facts, as set forth by the court or as undisputed in the record, and procedural history are relevant to our resolution of these appeals. The plaintiff owns and resides on property located at 27 Green Valley Lake Road in East Lyme. The plaintiff's property abuts land controlled by RESC. In 2017, RESC filed an application for a resubdivision of the land abutting the plaintiff's property (2017 application). In connection with the 2017 application, Gary Goeschel, the town of East Lyme's planning director, and Jeanne Davies, the executive director of Connecticut Resource Conservation and Development Area, Inc. (RC&D), the organization responsible for performing ERT evaluations,[3] exchanged email

[1] The defendants' respective direct appeals, although not consolidated, were heard together at oral argument before this court.

[2] All references to the East Lyme Subdivision Regulations are to the revised regulations effective March 24, 2016, which are the governing regulations in this case.

Section 4-14-3 of the East Lyme Subdivision Regulations provides in relevant part that certain subdivisions "shall be subject to an evaluation by the Eastern Connecticut Environmental Review Team. . . ."

[3] See footnote 11 of this opinion.

correspondence, which correspondence was entered into the administrative record. The emails reflected that (1) on July 17, 2017, Goeschel asked Davies for information about requesting an ERT evaluation in relation to the 2017 application, and (2) Davies responded on July 19, 2017, writing in relevant part that (a) the ERT program was a "limited program these days . . . for municipalities and land trust[s] who want to evaluate the natural resources on [a] property," (b) although RC&D was "working to expand the program at some point," ERT evaluations for development applications "became rare about [five] years ago, due to the time constraints and the availability of volunteers," (c) the ERT evaluation process takes approximately two to three months to complete, and (d) the commission was invited to "talk" if it had the "three months [that are] needed for an ERT [evaluation] . . . ." RESC subsequently withdrew the 2017 application.

On May 18, 2018, RESC filed a new resubdivision application, seeking to create a twenty-three lot "Conservation Design Development" on the land abutting the plaintiff's property (2018 application). The commission conducted a public hearing on the 2018 application over the course of six days between June 26 and October 9, 2018. The plaintiff, as an abutting landowner and a statutory intervenor pursuant to General Statutes § 22a-19 (a) (1),[4] opposed the 2018 application.

[4] General Statutes § 22a-19 (a) (1) provides: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

During the public hearing, there were discussions regarding whether an ERT evaluation would be performed in connection with the 2018 application. One of the exhibits entered into the administrative record consisted of emails that Goeschel and Davies exchanged in September and October, 2018. The emails reflected in relevant part that (1) on September 4, 2018, Goeschel requested an ERT evaluation with regard to the 2018 application, and (2) on October 1, 2018, Davies informed Goeschel that, "[b]ased on feedback from our attorney . . . and the turnaround time for the subdivision public hearing closure in East Lyme, the Executive Committee and ERT Task Force decided, with regret, to [forgo ERT] development reviews until they have time to develop [a] new protocol, as advised by our attorney, for ERT development reviews."

On December 4, 2018, the commission unanimously voted to approve a resolution granting the 2018 application, with several conditions. In granting the 2018 application, the commission determined in relevant part that it was "impossible" for RESC to comply with § 4-14-3 of the subdivision regulations[5] in light of Davies' correspondence reflecting that ERT evaluations were not being done for development applications pending the establishment of a new protocol.

The plaintiff appealed to the Superior Court from the commission's decision granting the 2018 application. The plaintiff raised several claims on appeal, including that the commission improperly granted the 2018 application notwithstanding that an ERT evaluation had not been performed as required pursuant to § 4-14-3 of the subdivision regulations. The plaintiff further asserted that RESC had not requested a waiver of § 4-14-3, and, in any event, such a waiver was not authorized pursuant

[5] The commission referred to § 4-13-3 of the subdivision regulations, which provision does not exist. We construe this reference to be a scrivener's error.

to the subdivision regulations. In their respective briefs on the merits, the commission and RESC argued in relevant part that the administrative record demonstrated, as the commission had determined, that compliance with § 4-14-3 was impossible because RC&D was not performing ERT evaluations for development applications at the time. RESC further argued that § 4-14-3 was inapplicable to the 2018 application.

On May 13, 2022, the trial court, *O'Hanlan, J.*, issued a memorandum of decision sustaining the plaintiff's appeal only insofar as the plaintiff claimed that the commission improperly granted the 2018 application because an ERT evaluation had not been completed in accordance with § 4-14-3 of the subdivision regulations.[6] The court framed the legal issue to be "whether the commission's action, in not requiring the ERT evaluation, essentially waived the requirement of . . . § 4-14-3 for [the 2018] application without authority, and thus violated its own regulations." The court determined that (1) § 4-14-3 applied to the 2018 application, (2) an ERT evaluation is a "mandatory" requirement prescribed by § 4-14-3, and (3) the subdivision regulations did not expressly convey authority permitting the commission to waive § 4-14-3.[7] The court proceeded to conclude that, in granting the 2018 application without an ERT evaluation, the commission illegally waived § 4-14-3.[8]

[6] The court stated that the plaintiff had abandoned all but seven of the claims raised in his brief on the merits. The court denied the plaintiff's appeal as to his remaining claims, with the exception of his claim regarding § 4-14-3 of the subdivision regulations.

[7] Section 4-13 of the East Lyme Subdivision Regulations provides in relevant part: "Only as specifically authorized within these Regulations, the Commission may waive certain requirements by a three-quarters vote of all members, when it is demonstrated that strict compliance with such Regulations will cause an exceptional difficulty or undue hardship. The applicant shall submit a waiver request in writing at the time of application, and the Commission shall require a public hearing, and shall not grant a waiver unless it finds the following [enumerated] conditions are met . . . ."

[8] With regard to the issue of whether compliance with § 4-14-3 of the subdivision regulations was impossible, the court stated that "[t]here is

On June 1, 2022, the defendants each filed a motion to reargue, both of which the court summarily denied on August 22, 2022. Thereafter, the defendants each filed a petition for certification to appeal from the trial court's judgment, both of which this court granted on December 13, 2022. These appeals followed.

On February 16, 2023, in response to a motion for articulation filed by the commission, the court issued an articulation of its decision. The court articulated in relevant part that, "[a]ccording to § 4-14-3 of the [subdivision regulations] . . . an [ERT] evaluation . . . was required. The commission did not require such an evaluation in its approval [of the 2018 application]. Thus, the court concluded that the commission illegally 'essentially waived' § 4-14-3 . . . ."[9] (Citation omitted.)

The defendants' dispositive claim in these appeals is that the court incorrectly determined that § 4-14-3 of the subdivision regulations required that an ERT evaluation be performed in connection with the 2018 application and, consequently, improperly concluded that the commission illegally waived § 4-14-3 in granting the 2018 application despite the absence of an ERT evaluation.[10] The defendants maintain that (1) § 4-14-3 requires

some apparent factual inconsistency about the 'impossibility' conclusion . . . ." The court further stated that "[t]he characterization of 'impossibility' articulated in the record by [RESC] and adopted by the commission . . . may explain why the requirement cannot be met. But that does not explain how, meaning under what authority, the commission excused, or waived, this clear . . . requirement, if not in violation of" the subdivision regulations. (Emphasis omitted.)

[9] With respect to the issue of whether compliance with § 4-14-3 of the subdivision regulations was impossible; see footnote 8 of this opinion; the court articulated that "[t]he evidence in the record does not support a finding of impossibility. . . . [T]he court concluded that the 'impossibility' of getting an ERT evaluation was simply not accurate." (Citations omitted.)

[10] RESC briefed this claim in both its principal appellate brief and its reply brief filed in its appeal, and the commission indicated in its appellate brief filed in RESC's appeal that it was adopting RESC's principal appellate brief. In its respective appeal, however, the commission briefed this claim only in its reply brief. Ordinarily, "we consider an argument inadequately briefed when it is delineated only in the reply brief." *Hurley* v. *Heart Physicians*,

the commission (a) to request an ERT evaluation in connection with certain applications and (b) to give the Eastern Connecticut Environmental Review Team (ECERT) an opportunity to conduct the ERT evaluation, with no attendant mandate that the ERT evaluation must be completed, and (2) the commission complied with § 4-14-3 by requesting an ERT evaluation from RC&D[11] in relation to the 2018 application, which RC&D declined to perform. The plaintiff argues that the court correctly determined that § 4-14-3 required the performance of an ERT evaluation vis-à-vis the 2018 application and, therefore, the commission committed error in granting the 2018 application without an ERT evaluation. We agree with the defendants.[12]

P.C., 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010). Under the unique circumstances of the present case, where (1) RESC has properly briefed this claim in its appeal and (2) RESC and the commission are appealing from the same judgment and seeking the same relief, such that resolving RESC's appeal in its favor necessarily affords the commission the relief that it requests in its appeal, we adjudicate both appeals on the basis of this claim notwithstanding the commission's failure to brief the claim properly in its appeal.

[11] Although § 4-14-3 of the subdivision regulations refers to ERT evaluations performed by ECERT, the record reflects that the commission contacted RC&D to request an ERT evaluation. The defendants represent that "ECERT is a volunteer program of a nongovernmental, not-for-profit entity known as [RC&D] . . . ." The plaintiff represents that "RC&D is the entity with which [ECERT] is affiliated." Thus, we discern no apparent dispute that, in submitting a request for an ERT evaluation to RC&D, the commission requested an ERT evaluation as contemplated by § 4-14-3.

[12] In their respective appeals, the defendants further claim that the court improperly (1) determined that the commission illegally waived § 4-14-3 of the subdivision regulations and (2) rejected the defendants' arguments regarding whether compliance with § 4-14-3 was impossible. In light of our resolution of the defendants' dispositive claim, we need not address the merits of these other claims.

In addition, in its appeal, RESC asserts "[i]n the alternative" that the 2018 application did not trigger the requirements of § 4-14-3 of the subdivision regulations, and, therefore, the court improperly concluded that § 4-14-3 applied to the 2018 application. The commission adopts this claim in its appellate brief filed in RESC's appeal, as well as in its reply brief filed in its appeal, but it failed to brief this claim in its principal appellate brief filed in its appeal. See footnote 10 of this opinion. We decline to address the merits of this claim; instead, for purposes of our analysis of the defendants'

We begin by "set[ting] forth the deferential standard of review that applies to the administrative decisions made by zoning entities. In traditional zoning appeals, the scope of judicial review depends on whether the zoning commission has acted in its legislative or administrative capacity. . . . In considering . . . an application for subdivision approval, a commission acts in an administrative capacity. . . . Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The [Appellate Court and the] trial court . . . decide whether the board correctly interpreted the section [of the relevant regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal. . . .

"[U]pon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons . . . . We, in turn, review the action of the trial court. . . . The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision . . . . Courts are not to substitute their judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing." (Citations omitted; internal quotation marks omitted.) *Kerlin* v. *Planning & Zoning Commission*, 222 Conn. App. 141, 158–59, 304 A.3d 148 (2023).

dispositive claim, we assume arguendo that the court correctly concluded that § 4-14-3 applied to the 2018 application.

The defendants' claim requires us to interpret the subdivision regulations. "Because the interpretation of the regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Ordinarily, [appellate courts afford] deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law." (Internal quotation marks omitted.) Id., 162–63. "If a board's time-tested interpretation of a regulation is reasonable, however, that interpretation should be accorded great weight by the courts."[13] (Internal quotation marks omitted.) *Cunningham* v. *Planning & Zoning Commission*, 90 Conn. App. 273, 283, 876 A.2d 1257, cert. denied, 276 Conn. 915, 888 A.2d 83 (2005).

"Our Supreme Court has observed that regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . .

[13] No special deference to the commission is warranted in this case because § 4-14-3 of the subdivision regulations has not previously been subjected to judicial scrutiny and there is no indication in the record that the commission has applied a time-tested interpretation of the provision. See, e.g., *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 715, 960 A.2d 1018 (2008) (declining to defer to zoning board's construction of zoning regulation when regulation had not previously been subjected to judicial scrutiny and board did not indicate that it had applied time-tested interpretation of regulation).

and the words employed therein are to be given their commonly approved meaning. . . . 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. . . .

"Regulations must be viewed to form a cohesive body of law, and they must be construed as a whole and in such a way as to reconcile all their provisions as far as possible. . . . This is true because particular words or sections of the regulations, considered separately, may be lacking in precision of meaning to afford a standard sufficient to sustain them. . . . When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results. . . . [W]e consider the statute as a whole with a view toward reconciling its parts in order to obtain a sensible and rational overall interpretation. . . . Stated otherwise, whether the board properly interpreted and applied the relevant regulations depends upon whether it read the particular regulations in the context of all of the regulations, their evident purpose and policy, and recognized principles of zoning in general." (Citations omitted; internal quotation marks omitted.) *Kerlin* v. *Planning & Zoning Commission*, supra, 222 Conn. App. 163–64.

We first examine the text of § 4-14-3 of the East Lyme Subdivision Regulations, titled "Environmental Review Team (ERT) Evaluation," which provides: "Subdivisions of 20 lots or more where more than 50% of the parcel(s) to be subdivided consist of environmentally sensitive resources such as wetlands, steep slopes (> 25%), watercourses, flood hazard areas or ridge lines, *shall be subject to an evaluation by the Eastern Connecticut Environmental Review Team.*[14] This requirement does not preclude the Commission from requesting an Environmental Review Team Evaluation for applications which do not meet the above parameters but for which concerns about environmental impacts of the development and their proper mitigation exist." (Emphasis added; footnote added.)

The parties advance conflicting interpretations of the phrase "subject to" as used in § 4-14-3 of the subdivision regulations, which is not defined therein. The plaintiff proposes that we construe "subject to" narrowly, reading § 4-14-3 to provide that an ERT evaluation "must occur for a subdivision application that meets the relevant criteria to be approved." The defendants maintain that the meaning of "subject to" is broader, contending that " 'subject to' refers to being exposed to or the potential for an [ERT] evaluation by . . . ECERT but not that such an evaluation must be conducted by . . . ECERT even if it declines to do so," such that "the commission did subject the [2018] application to an [ERT] evaluation by submitting it to . . . ECERT (and following up to urge . . . ECERT to conduct the evaluation) but . . . ECERT declined . . . to conduct the evaluation."

We turn to dictionary definitions for guidance in interpreting undefined terms in regulations. See, e.g., *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 45, 19

[14] We assume that § 4-14-3 of the subdivision regulations applies to the 2018 application. See footnote 12 of this opinion.

A.3d 622 (2011). Merriam-Webster's Online Dictionary defines "subject to" to mean (1) "affected by or possibly affected by (something)," (2) "likely to do, have, or suffer from (something)" or (3) "dependent on something else to happen or be true." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/subject%20to (last visited April 22, 2024). Black's Law Dictionary defines "[s]ubject to" to mean "[l]iable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for." Black's Law Dictionary (6th Ed. 1990) p. 1425; see also Black's Law Dictionary (11th Ed. 2019) p. 1723 (defining "subject" to mean, inter alia, "[d]ependent on or exposed to (some contingency); esp., being under discretionary authority," with sample sentence reading, "funding is subject to the board's approval"). These assorted definitions can support either a broad or limited reading of the phrase "subject to" as used in § 4-14-3 of the subdivision regulations.

In accordance with the directive in § 1-2z to consider the statutory text in relation to other statutes, in interpreting § 4-14-3 of the subdivision regulations, we consider the provision in relation to the two additional provisions found in § 4-14 of the East Lyme Subdivision Regulations, which is titled "Applicable Commission/Agency Reviews." Section 4-14-1 of the East Lyme Subdivision Regulations, titled "Inland Wetlands Agency," provides: "If an application involves land regulated as an inland wetland or watercourse under the provisions of Chapter 440 of the Connecticut General Statutes, the applicant shall submit an application to the Inland Wetlands Agency no later than the day the application is filed for subdivision or re-subdivision. The Planning Commission shall not render a decision until the Inland Wetlands Agency has submitted a report with its final decision to the Planning Commission. In making its

decision, the Planning Commission shall give due consideration to the report of the Inland Wetlands Agency."

Section 4-14-2 of the East Lyme Subdivision Regulations, titled "Regional Planning Commission," provides: "Whenever a subdivision of land is planned, the area of which abuts or includes land in the Town of East Lyme and an adjacent municipality, the Commission of each municipality shall, before approving the plan, submit it to the Regional Planning Commission. Within thirty (30) days after receiving the submitted subdivision plans, the Regional Planning Commission shall report its findings on the inter-municipal aspects of the proposed subdivision to the municipalities. Failure to submit such report back to the municipalities within thirty (30) days after transmittal shall be presumed to indicate that the Regional Planning Commission does not disapprove the proposed subdivision. The report of the Regional Planning Commission shall be advisory only."

Sections 4-14-1 and 4-14-2 of the subdivision regulations set forth substantively distinct requirements for the reviews specified therein relative to § 4-14-3 of the subdivision regulations. In addition to mandating the submission of an application or subdivision plans to the Inland Wetlands Agency (IWA) or the Regional Planning Commission (RPC) for review, §§ 4-14-1 and 4-14-2 expressly (1) indicate that the IWA or the RPC must submit reports of their reviews to the commission, (2) provide specific directions on how the commission is (a) to proceed if a report from the RPC is not received within a prescribed time period or (b) to forgo proceeding until a report from the IWA is received, and (3) assign the weight that the commission must give to such reports. In stark contrast, § 4-14-3 does not (1) indicate that a report with respect to an ERT evaluation must be submitted to the commission, (2) restrict the commission's ability to act on an application if an ERT

evaluation is not performed and an attendant report is not submitted, or (3) assign the weight that the commission must afford to such a report. These differences inform our interpretation of § 4-14-3 and indicate that an ERT evaluation is not a mandatory review that must be completed to satisfy § 4-14-3. Moreover, this interpretation aligns with the broader dictionary definitions of the phrase "subject to" as used in § 4-14-3. See Merriam-Webster Online Dictionary, supra (definitions of "subject to" include "*possibly* affected by (something)," and "*likely* to do, have, or suffer from (something)" (emphasis added)); Black's Law Dictionary (11th Ed. 2019) p. 1723 (definitions of "subject" include "[d]ependent on *or exposed* to (some contingency)" (emphasis added)).

Additionally, we are mindful that § 4-14-3 of the subdivision regulations, as a municipal legislative enactment, is entitled to a presumption of validity. See *Pollio* v. *Planning Commission*, 232 Conn. 44, 49, 652 A.2d 1026 (1995) ("a presumption of validity is accorded to municipal ordinances"); see also *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 529, 686 A.2d 481 (1996) ("a zoning regulation is entitled to a presumption of validity"). Construing § 4-14-3 of the subdivision regulations to mandate the completion of an ERT evaluation would render the provision invalid as an impermissible delegation of authority by the commission to ECERT. "The regulation and approval of subdivisions fall within the purview of the town planning commission in accordance with the provisions of General Statutes §§ 8-18 through 8-30a . . . ." (Footnote omitted.) *Thoma* v. *Planning & Zoning Commission*, 31 Conn. App. 643, 647–48, 626 A.2d 809 (1993), aff'd, 229 Conn. 325, 640 A.2d 1006 (1994). In *Thoma*, this court concluded that a zoning regulation constituted an impermissible delegation of authority by the town of Canterbury's planning and zoning commission to the town's inland wetlands

agency when the regulation, which prohibited the planning and zoning commission from approving an application for a subdivision of land containing inland wetlands if the inland wetlands agency failed to find that such a subdivision would not adversely affect any inland wetlands area, conflicted with what is now General Statutes § 8-26 (e), which requires that a planning commission give "due consideration" to the report of the inland wetlands agency. *Thoma* v. *Planning & Zoning Commission*, supra, 644, 651. As this court summarized, "[u]ltimate authority over approval of a subdivision rests with the [planning and zoning] commission, and any regulation that abrogates this authority is invalid." Id., 651.

Pursuant to the plaintiff's proposed construction of § 4-14-3 of the subdivision regulations, the commission would be forbidden from approving an application "subject to" an ERT evaluation if, for any reason, the ERT evaluation could not be performed. Under this paradigm, ECERT effectively would be capable of vetoing, through inaction, any such application, thereby enabling a nongovernmental entity to strip the commission of its "[u]ltimate authority over approval of a subdivision . . . ." *Thoma* v. *Planning & Zoning Commission*, supra, 31 Conn. App. 651; cf. East Lyme Subdivision Regs., § 4-14-1 (prohibiting commission from acting on application for subdivision of land regulated as inland wetland or watercourse until IWA submits report[15] and directing commission to give "due consideration" to

[15] If the IWA fails to act on the application, the applicant may seek recourse by filing an application with the Commissioner of Energy and Environmental Protection. See General Statutes § 22a-42a (c) (1) ("[i]f the inland wetlands agency, or its agent, fails to act on any application within [enumerated time periods], the applicant may file such application with the Commissioner of Energy and Environmental Protection who shall review and act on such application in accordance with this section"). We are unaware of any authority providing an applicant with a similar remedy if an ERT evaluation is not, or cannot be, completed.

such report); East Lyme Subdivision Regs., § 4-14-2 (RPC's failure to submit report specified in provision by specified deadline creates presumption that RPC does not disapprove of proposed subdivision and RPC's report, if filed, is advisory only). We decline to construe § 4-14-3 in a manner that undermines the presumption of validity attached to it.

In sum, we interpret § 4-14-3 of the subdivision regulations to require the commission to request an ERT evaluation in connection with certain applications, such as the 2018 application, and to give ECERT a reasonable opportunity to perform the ERT evaluation, but the provision does not further mandate that the ERT evaluation must be completed. Applying this interpretation here, we conclude that the commission complied with § 4-14-3 as there is no dispute that (1) the commission requested an ERT evaluation vis-à-vis the 2018 application and (2) RC&D, after having received the request and exchanged correspondence with the commission, did not perform the ERT evaluation and indicated that it had no intention of doing ERT evaluations for development applications until it established a new protocol for such evaluations at some unspecified future date. Accordingly, we further conclude that the court incorrectly determined that the commission committed error, as a matter of law, in granting the 2018 application notwithstanding that an ERT evaluation had not been completed, and, therefore, the court improperly sustained the plaintiff's appeal on the basis of his claim premised on § 4-14-3.

The judgment is reversed only as to the determination to sustain the plaintiff's appeal on the basis that § 4-14-3 of the East Lyme Subdivision Regulations required the completion of an Environmental Review Team evaluation in connection with RESC's application and the conclusion that the commission illegally waived § 4-14-3 in granting the application without such an evaluation

having been performed, and the case is remanded to the trial court with direction to render judgment denying the plaintiff's appeal with respect to that issue; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

C. W. *v.* KEITH J. WARZECHA*
(AC 45775)

Suarez, Clark and Prescott, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court for the plaintiff on her claim for negligent infliction of emotional distress. Between 2012 and 2015, the plaintiff periodically operated her business that transported special needs children to and from school from her home. Between 2012 and 2015, the defendant, who resided in a nearby home, became concerned that the plaintiff was operating a commercial transportation business from her home after he observed an increase in the number of cars and the amount of traffic in the neighborhood that was associated with the plaintiff's business. In 2015, the defendant complained to his town's zoning department and discovered that the plaintiff did not have a permit to operate her business from her home. After meeting with one or more zoning department officials, the defendant began to document his complaints with photos, digital recordings, and a detailed written timeline of the comings and goings of the plaintiff, her family, and others based upon his personal surveillance of the plaintiff's property. The defendant continuously recorded the plaintiff's residence and took photos of the plaintiff's property from his vehicle using a zoom lens. Although the defendant stopped taking photos of the plaintiff's property in approximately January or February, 2016, he continued to conduct video surveillance of the plaintiff's home until the time of trial and would regularly review the digital recordings. The defendant

* The record reflects that, after the trial court rendered its decision in the present case, the plaintiff, C. W., sought a civil protective order against the defendant, Keith J. Warzecha. 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.

submitted his documentation, including his digital recordings, photos, and a surveillance report of what he believed to be the plaintiff's alleged zoning violation, to the town's zoning department. In November, 2015, a zoning enforcement officer issued a cease and desist order to the plaintiff, claiming that the operation of her business violated the town's zoning regulations. In response, the plaintiff contacted the local police department and complained to the defendant's supervisors at his place of employment about his surveillance of her property. The plaintiff also occasionally walked by the defendant's home and raised her middle finger toward his cameras, which she knew were recording her. The plaintiff subsequently commenced the present action, alleging that, over a two year period between October, 2015, and November, 2017, the defendant invaded her privacy by visually surveilling, photographing, and video recording her residence; following her in his car; photographing her minor son at her home and while he was at a neighbor's house; using a zoom lens to photograph through the plaintiff's front door as a visitor entered; spying on her from neighboring properties; peering into her home as she watched television; and driving slowly past her home. In one count of her complaint, the plaintiff alleged negligent infliction of emotional distress and that the defendant knew or should have known that his conduct was likely to cause her to suffer emotional distress so severe that it could cause physical illness. At trial, the plaintiff testified about each of the allegations in her complaint and characterized the impact of the defendant's conduct on her life as "devastating." At the close of the plaintiff's case-in-chief, the defendant's counsel stated that he had an oral motion for a directed verdict. The court reserved judgment on the motion and, at the conclusion of evidence, the court ordered the parties to submit posttrial briefs. In the defendant's posttrial brief, he argued, for the first time, that the court should grant the defendant's "motion for dismissal" pursuant to the rule of practice (§ 15-8). Thereafter, the trial court issued a memorandum of decision, in which it found for the plaintiff on her claim for negligent infliction of emotional distress, stating that the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress, that her distress was foreseeable, that the defendant was, in fact, aware that his conduct angered, annoyed, and distressed the plaintiff, that the plaintiff had established that the distress she experienced was severe enough that it might result in illness or bodily harm, that such distress was caused by the defendant, and that the defendant's conduct created such a level of fear and anxiety that the plaintiff refused to open her windows or curtains or let her children play outside alone, that she lost her sense of privacy, and that she became more socially isolated because no one wanted to visit her at her home. The court awarded the plaintiff $10,000 in compensatory damages but did not address the defendant's motion for dismissal in its memorandum of decision. *Held*:

1. This court declined to review the defendant's claim that the trial court abused its discretion by asking him questions during the trial, sua sponte, that went beyond the scope of what was permissible: at trial, the defendant's counsel did not object contemporaneously to the court's questioning of the defendant, nor did the defendant raise any claim of error related to the court's questions in his posttrial brief, and, therefore, his claim was unpreserved; moreover, even if the defendant had preserved his claim, he did not provide any applicable legal authority or meaningful analysis in his appellate brief to support his claim of error, and, therefore, this court would still decline to review such claim because it was inadequately briefed.
2. The defendant's claim that the evidence presented at trial did not support a finding of negligent infliction of emotional distress was unavailing, this court having found, on the basis of its careful review of the record and viewed in the manner most favorable to sustaining the judgment, that there was sufficient evidence in the record to support the trial court's judgment for the plaintiff with respect to each of the essential elements for a cause of action sounding in negligent infliction of emotional distress:

a. The defendant could not prevail on his arguments that no reasonable fact finder could find that his documentation of activity open to public view created an unreasonable risk of causing the plaintiff severe emotional distress and that, because the plaintiff introduced no evidence that she knew of the full extent of the defendant's documentation prior to trial, that the documentation in the emails from the defendant to the town could not support this element of her claim: this court's review of the trial court's memorandum of decision reflected that the trial court did not refer to the emails from the defendant to the town in concluding that he had created an unreasonable risk of causing the plaintiff emotional distress but, rather, based its finding on the defendant's conduct as testified to by the plaintiff, which plainly encompassed conduct of which the plaintiff was aware prior to the time of trial; moreover, although the plaintiff, prior to the time of the trial, may not have been aware of the full extent of the defendant's extremely detailed documentation of her daily activities, her testimony supported a finding that the distress she experienced arose from the defendant's surveillance activities that were well-known to her over the course of the two year period, and, in addition to the plaintiff's testimony concerning her emotional reaction to these activities, the trial court readily could have inferred that such distress was reasonable given the pervasive nature and extent of the defendant's surveillance activities.

b. The defendant's argument that the plaintiff introduced no evidence that he knew she was distressed by his documentation of her activity was unavailing: the plaintiff was not required to prove that the defendant had actual knowledge of her distress, only that he should have realized that his conduct involved an unreasonable risk of causing the plaintiff

emotional distress, to satisfy this element of her claim, and, on the basis of the evidence of the surveillance activities of which the plaintiff was aware prior to the trial, the trial court reasonably could have inferred that the nature and extent of those activities were such that the defendant should have realized that his conduct involved an unreasonable risk of causing the plaintiff emotional distress; moreover, even though the plaintiff did not bear the burden of proving that the defendant actually was aware that his activities were causing her emotional distress, the defendant's claim was further undermined by the evidence in the record that supported a finding that, prior to the time of trial, he was in fact aware that the plaintiff had experienced emotional distress because of his surveillance activities, given evidence that the plaintiff raised her middle finger in the direction of the defendant's security cameras on multiple occasions and the defendant's testimony that the plaintiff complained to the police and his employer more than fifteen times within a nine month period about his surveillance of the plaintiff's property, from which the court reasonably could infer that the plaintiff was distressed by the presence of the cameras and which further supported a finding that the defendant was made aware or should have realized that his repeated conduct was actually causing the plaintiff to experience emotional distress but that he continued the surveillance nonetheless.

c. The defendant could not prevail on his argument that the evidence presented at trial did not support a finding that the plaintiff's emotional distress was severe enough to result in illness or bodily harm to her; the plaintiff was not required to show that her emotional distress resulted in bodily injury, but only that such distress might result in illness or bodily harm, and the plaintiff presented sufficient evidence of her distress, including her testimony that she was devastated by the defendant's conduct and that she was afraid to open her windows or her curtains or to let her children play outside alone.

d. The defendant's argument that the evidence at trial did not support a finding that his conduct caused the plaintiff's emotional distress was unavailing, this court having found that, on the basis of the plaintiff's testimony as to the cause of her distress, that it was reasonable for the trial court to conclude that the plaintiff had satisfied the element of causation in her negligent infliction of emotional distress claim.

3. The defendant could not prevail on his claim that this court should rule on his motion to dismiss that was not explicitly addressed by the trial court: because a motion to dismiss is a motion entrusted to the trial court, not a reviewing court, and the defendant did not cite any law to the contrary, this court was unable to grant the defendant any relief with respect to his claim; moreover, even if this court reasonably could construe the defendant's claim as an attempt to challenge the trial court's failure to rule on the motion to dismiss, in light of the trial court's finding for the plaintiff with respect to her claim of negligent infliction of emotional distress, it was reasonable for this court to consider the

trial court's decision not to grant the defendant's motion to dismiss to be the functional equivalent of a denial, which was not reviewable on appeal.

Argued October 16, 2023—officially released April 30, 2024

Procedural History

Action to recover damages for, inter alia, negligent infliction of emotional distress, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Rosen, J.*; judgment in part for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Christopher P. Kriesen, for the appellant (defendant).

Kenneth R. Slater, Jr., with whom, on the brief, was *Daniel J. Krisch*, for the appellee (plaintiff).

Opinion

SUAREZ, J. The defendant, Keith J. Warzecha, appeals from the judgment of the trial court in favor of the plaintiff, C. W., on her claim for negligent infliction of emotional distress. On appeal, the defendant claims that (1) the trial court abused its discretion by asking him questions during the trial, sua sponte, that went beyond the scope of what was permissible, (2) the evidence presented at trial did not support a finding of negligent infliction of emotional distress,[1] and (3)

[1] In his appellate brief, the defendant sets forth his claims of error as follows: (1) "Did the trial court abuse its discretion by sua sponte asking questions of the defendant that went beyond bringing out the facts more clearly for itself and instead developed new evidence beyond what either party had developed and then improperly based its decision in favor of the plaintiff on the third count of her complaint on that evidence"; (2) "[d]id the trial court improperly base its decision in favor of the plaintiff on the third count on findings of fact that were not based upon either the evidence introduced at trial or based upon inferences that could not be reasonably made based upon the evidence introduced at trial"; (3) "[d]id the trial court improperly find, where no reasonable finder of fact could find based on the evidence, in favor of the plaintiff on the third count"; and (4) "[m]ay this court grant the defendant's motion to dismiss when the trial court did not act on it?"

"this court [should] grant [his] motion to dismiss when the trial court did not act on it." We affirm the judgment of the trial court.

The following facts, as found by the court or which are otherwise undisputed, and procedural history are relevant to our resolution of the defendant's claims on appeal. Since January, 2008, the plaintiff has resided with her son and daughter in a home that she owns. The plaintiff owns and operates a business that transports special needs children to and from school. Between 2012 and 2015, the plaintiff periodically operated her business from her home. In 2016, the plaintiff operated her business from a principal location outside of the town in which her home is located and had additional operations in surrounding towns.

At all relevant times, the defendant resided in a home that was located diagonally across the street from the plaintiff's home. The defendant was employed as an agent with the federal Drug Enforcement Administration (DEA). Between 2012 and 2015, the defendant became concerned that the plaintiff was operating a commercial transportation business from her home after he observed an increase in the number of cars and the amount of traffic in the neighborhood that was associated with the plaintiff's business. He noticed that individuals wearing shirts with the logo of the plaintiff's business would park their personal vehicles near the plaintiff's home, drive off in vans associated with the plaintiff's business, and return later in the day to switch vehicles. In 2015, the defendant complained to the zoning department of the town in which he and the plaintiff

The defendant's second and third claims are governed by the same standard of review, and they essentially challenge whether the evidence supported the court's findings of fact with respect to each of the essential elements of a cause of action sounding in negligent infliction of emotional distress. Therefore, we will address these claims together as a singular claim.

resided and discovered that the plaintiff did not have a permit to operate her business from her home.

After meeting with one or more zoning department officials, the defendant began to document his complaints with photographs, digital recordings, and a detailed written timeline of the comings and goings of the plaintiff, her family, and others based upon his personal surveillance of the plaintiff's property.[2] The defendant digitally recorded the plaintiff's residence continuously, twenty-four hours per day, seven days per week. The defendant would also take photographs of the plaintiff's property from his vehicle using a zoom lens. Although the defendant stopped taking photographs of the plaintiff's property in approximately January or February, 2016, he continued to conduct video surveillance of the plaintiff's home until the time of trial and would regularly review the digital recordings. The defendant did not trespass on the plaintiff's property or enter her home to take his photographs or video recordings, and all of the plaintiff's activity that he documented occurred in areas open to public view.

The defendant submitted his documentation, including his digital recordings, photographs, and a surveillance report of what he believed to be the plaintiff's alleged zoning violation, to the town's zoning department. On November 18, 2015, a zoning enforcement officer issued a cease and desist order to the plaintiff, claiming that the operation of her business violated the town's zoning regulations. In response, the plaintiff

[2] The court noted in its memorandum of decision that the defendant's timeline of the plaintiff's activities on her property "reflects a near obsessive interest in the plaintiff's daily activities. The defendant apparently watched (or [video recorded]) the activities at the plaintiff's home throughout the day, beginning as early as 3 a.m. on some days. Some of the daily logs list a dozen or more separate entries, with a minute by minute description of [the plaintiff's] activity, including such innocuous observations as when the plaintiff stepped outside her home to smoke a cigarette."

contacted the local police department and complained to the defendant's supervisors at the DEA about his surveillance of her property. The plaintiff thereafter installed surveillance cameras outside of her home that recorded twenty-four hours per day, seven days per week, and captured images of the defendant's home. As animosity escalated between the parties, the plaintiff would occasionally walk by the defendant's home and raise her middle finger toward his cameras, which she knew were recording her.

The plaintiff commenced the present action by writ of summons and complaint on April 29, 2018. In her three count complaint, the plaintiff alleged that over a two year period between October, 2015, and November, 2017, the defendant invaded her privacy by visually surveilling, photographing, and video recording her residence; following her in his car; photographing her minor child at her home and while he was at a neighbor's house; using a zoom lens to photograph through the plaintiff's front door as a visitor entered; spying on her from neighboring properties; peering into her home as she watched television; and driving slowly past her home. In count one, the plaintiff sought compensatory and punitive damages for invasion of privacy and alleged that the defendant's conduct caused her fear, anxiety, and severe emotional distress. In count two, sounding in intentional infliction of emotional distress, the plaintiff alleged that such conduct was extreme and outrageous, malicious, and intended to cause the plaintiff to suffer emotional distress. In count three, the plaintiff alleged negligent infliction of emotional distress and that the defendant knew or should have known that his conduct was likely to cause the plaintiff to suffer emotional distress so severe that it could cause physical illness. On January 11, 2021, the defendant filed an answer to the complaint, denying the plaintiff's material allegations.

On May 4, 2022, the court, *Rosen, J.*, held a bench trial that was conducted remotely. The court heard testimony from the plaintiff, her son, her friend, and the defendant. On August 18, 2022, the court issued a memorandum of decision in which it found in favor of the plaintiff on count three of her complaint for negligent infliction of emotional distress.[3] The court reasoned that "[t]he defendant's conduct over a two year period of, inter alia, photographing and [video recording] the plaintiff from his car, from across the street, and [from] other vantage points, photographing her children and the comings and goings of invited guests, his use of 24/7 surveillance on her home, driving slowly past her home, and documenting in great detail all of her activities created an unreasonable risk of causing the plaintiff emotional distress. Her distress was foreseeable, given the pervasive nature of the surveillance and monitoring, with 24/7 [video recording] continuing to the present time. Indeed, the defendant was aware that his conduct angered, annoyed, and distressed the plaintiff. For example, he submitted into evidence photographs or stills from [video recordings] showing the plaintiff raising her middle finger at him while being photographed or [video recorded]. She further established that the distress she experienced was severe enough that it might result in illness or bodily harm and was caused by the defendant. She characterized the impact of the defendant's conduct on her life as 'devastating.' His conduct created such a level of fear and anxiety that the plaintiff refused to open her windows or curtains or let her children play outside alone. She lost her sense of privacy and became more socially isolated because no one wanted to visit her at her home." The court awarded the plaintiff $10,000 in compensatory damages. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[3] In its memorandum of decision, the court found in favor of the defendant on counts one and two of the complaint.

I

The defendant claims, for the first time on appeal, that the court abused its discretion by asking him questions during the trial, sua sponte, that went beyond the scope of what was permissible. The plaintiff argues that this court should not review the defendant's claim because he did not preserve it at trial and did not adequately brief it before this court. We agree with the plaintiff.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . [T]o permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Westry* v. *Litchfield Visitation Center*, 216 Conn. App. 869, 878–79, 287 A.3d 188 (2022); see also Practice Book § 60-5 (court shall not be bound to consider claim unless it was distinctly raised at trial).

Furthermore, "[i]t is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129

Conn. App. 157, 163–64, 20 A.3d 702 (2011). "Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Internal quotation marks omitted.) *Gorski* v. *McIsaac*, 156 Conn. App. 195, 209, 112 A.3d 201 (2015).

At trial, the defendant's counsel did not object contemporaneously to the court's questioning of the defendant, nor did he raise any claim of error related to the court's questions in his posttrial brief. Therefore, the defendant's claim is unpreserved. Moreover, even if he had preserved his claim, we would still decline to review it because it is inadequately briefed. The defendant has not provided any applicable legal authority or meaningful analysis in his appellate brief to support his claim of error. The defendant cites only to a comparative study between adversarial and civil law systems to baldly assert that the court abused its discretion by asking him questions. See *Reiner* v. *Reiner*, 214 Conn. App. 63, 85, 279 A.3d 788 (2022) (claim inadequately briefed when party provides almost no meaningful analysis in support of claim and does not include any citations to applicable legal authority).

For these distinct reasons, we decline to review the defendant's first claim of error.

II

The defendant next claims that the evidence presented at trial did not support a finding of negligent infliction of emotional distress. Specifically, the defendant argues that there was no evidence to support the court's findings that (1) his conduct created an unreasonable risk of causing the plaintiff emotional distress, (2) the plaintiff's emotional distress was foreseeable, (3) the plaintiff's emotional distress was severe enough

that it might result in illness or bodily harm, and (4) his conduct caused the plaintiff emotional distress. The plaintiff maintains that there was ample evidence to support the court's findings on each element of the plaintiff's cause of action. We agree with the plaintiff.

"To establish a claim of negligent infliction of emotional distress, a plaintiff must prove the following elements: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." (Internal quotation marks omitted.) *Murphy* v. *Lord Thompson Manor, Inc.*, 105 Conn. App. 546, 552, 938 A.2d 1269, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008).

We review the defendant's claim under the sufficiency of the evidence standard of review. "The standards governing our review of a sufficiency of evidence claim are well established and rigorous. . . . [W]e must determine, in the light most favorable to sustaining the [judgment], whether the totality of the evidence, including reasonable inferences therefrom, supports the [court's judgment] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it. . . .

"We apply this familiar and deferential scope of review, however, in light of the equally familiar principle that the plaintiff must produce sufficient evidence to remove the [court's] function of examining inferences and finding facts from the realm of speculation." (Citations omitted; internal quotation marks omitted.) *Carrol*

v. *Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003). "We continually have held that in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm. . . . This . . . test essentially requires that the fear or distress experienced by the plaintiffs be reasonable in light of the conduct of the defendants. If such a fear were reasonable in light of the defendants' conduct, the defendants should have realized that their conduct created an unreasonable risk of causing distress, and they, therefore, properly would be held liable. Conversely, if the fear were unreasonable in light of the defendants' conduct, the defendants would not have recognized that their conduct could cause this distress and, therefore, they would not be liable." (Citations omitted; internal quotation marks omitted.) Id., 446–47.

A

The defendant first asserts that the evidence presented at trial did not support a finding that his documentation of the plaintiff's daily activities created an unreasonable risk of causing the plaintiff emotional distress. The defendant argues that "no reasonable fact finder could find [that his] documentation of activity open to public view created an unreasonable risk of causing the plaintiff severe emotional distress. She had no testimony to show that documentation of such activity is likely to cause severe emotional distress." Also, he contends that "[t]he plaintiff introduced no evidence that [she] knew of the extent of the defendant's documentation." The defendant urges this court to conclude that any "conduct she learned of after the fact and/or at trial—such as the documentation in the emails from the defendant to the town—cannot support her claim." We are not persuaded.

Initially, we note that the defendant's arguments suggest that the court based its findings on his "documentation" of the plaintiff's activities and occurrences at her home. In this subsection of his claim, he appears to use the word "documentation" to refer to "the documentation in the emails from the defendant to the town . . . ." Our review of the court's memorandum of decision, however, reflects that the court did not refer to these emails in concluding that the defendant had created an unreasonable risk of causing the plaintiff emotional distress. The court, in broad terms, based its finding on "[t]he defendant's conduct over a two year period of, inter alia, photographing and [video recording] the plaintiff from his car, from across the street, and [from] other vantage points, photographing her children and the comings and goings of invited guests, his use of 24/7 surveillance on her home, driving slowly past her home, and documenting in great detail all of her activities . . . ." This evidence plainly encompassed conduct of which the plaintiff was aware prior to the time of trial.

Moreover, although the plaintiff, prior to the time of the trial, may not have been aware of the full extent of the defendant's extremely detailed documentation of her daily activities, her testimony supports a finding that the distress she experienced arose from the defendant's surveillance activities that were well-known to her over the course of a two year period. In addition to the plaintiff's testimony concerning her emotional reaction to these activities, the court readily could infer that such distress was reasonable given the pervasive nature and extent of the defendant's surveillance activities.

At trial, the plaintiff testified to the following conduct by the defendant. On October 9, 2015, the defendant used what the plaintiff described to be a large lensed camera to take photographs of her friends that visited her home. On October 20, 2015, the defendant parked

his motor vehicle in a wooded area adjacent to her house and took photographs of her residence. On October 26, 2015, the defendant attempted to follow the plaintiff to her office. On November 25, 2015, the defendant photographed the plaintiff's son while he was visiting a neighbor's home.[4] On December 4, 2015, the defendant used a camera with a zoom lens to photograph a visitor who was entering the plaintiff's home. On December 9, 2015, the defendant was watching the plaintiff's house from a wooded area across from her property. By December 27, 2015, the defendant had been warned by the local police to leave the plaintiff alone as he had scared her family and friends. On March 31, 2016, the defendant placed a "spy camera" in the woods across the street from the plaintiff's front porch. On one occasion, the defendant used a camcorder on a tripod to record the plaintiff and her friend stretching for Pilates outside of her home. On August 1, 2016, the defendant spied on the plaintiff from her neighbor's backyard and the plaintiff called the police to report the defendant. On November 10, 2017, the defendant drove slowly past the plaintiff's house, parked his vehicle across from her home, and thereafter followed her when she went to the grocery store. On November 30, 2017, the defendant parked at the bottom of the plaintiff's driveway and watched the plaintiff's residence.

On the basis of our review of the record, we conclude that there was sufficient evidence for the court to find that the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress.

B

The defendant next argues that the evidence presented at trial could not support a finding that the plaintiff's distress was foreseeable. Specifically, the defendant claims that the plaintiff "introduced no evidence

[4] The plaintiff's son also testified that the defendant had photographed him while he was visiting a neighbor's home.

that the defendant knew she was distressed due to his documentation of her activity."[5] We disagree.

The defendant's argument assigns a higher burden of proof to the plaintiff than that which is required by the law of this state. Our Supreme Court has previously stated that the plaintiff must prove that "the defendant *should have realized* that [his] conduct involved an unreasonable risk of causing emotional distress . . . ." (Emphasis added.) *Carrol* v. *Allstate Ins. Co.*, supra, 262 Conn. 446. The law does not require that the plaintiff prove that the defendant had actual knowledge of her distress, only that he should have realized that his conduct involved an unreasonable risk of causing the plaintiff emotional distress, to satisfy this element of her claim. For this reason, the claim fails.

In part II A of this opinion, we discussed the surveillance activities of which the plaintiff was aware prior to the trial. The court reasonably could have inferred that the nature and extent of these activities were such that the defendant should have realized that his conduct involved an unreasonable risk of causing the plaintiff emotional distress. Moreover, even though the plaintiff did not bear the burden of proving that the defendant actually was aware that his activities were causing her emotional distress, the defendant's claim is further undermined by the evidence in the record that supports a finding that, prior to the time of trial, he was in fact aware that the plaintiff had experienced emotional distress because of his surveillance activities. Specifically, the plaintiff submitted exhibits from the defendant's digital recordings that depicted her raising her middle finger in the direction of his security cameras on multiple occasions, conduct from which the court reasonably

[5] The defendant argues that "[e]xamples of such evidence . . . would include a statement from the plaintiff to the defendant that she was experiencing distress, a cease and desist letter from counsel with such an assertion, or the defendant actually witnessing such distress."

could infer that the plaintiff was distressed by the presence of the cameras. In addition, the defendant testified that the plaintiff complained to the police and his employer "over fifteen times within [a] nine month period" about his surveillance of the plaintiff's property. This evidence further supports a finding that the defendant was made aware or should have realized that his repeated conduct was actually causing the plaintiff to experience emotional distress but that he continued the surveillance nonetheless.

The defendant's claim amounts to a mischaracterization of the plaintiff's burden of proof. Furthermore, on the basis of our review of the record, we conclude that there is ample evidence in the record to support the court's finding that the plaintiff's distress was foreseeable.

C

The defendant further argues that the evidence presented at trial did not support a finding that the plaintiff's emotional distress was severe enough to result in illness or bodily harm to her. Specifically, the defendant claims that the plaintiff "had no expert medical testimony to establish [that] she suffered emotional distress, let alone emotional distress severe enough that it might result in illness or bodily harm. . . . She offered no testimony that might meet her high burden of proof (for example, evidence that she was hospitalized, unable to work, or unable to parent her minor children)." We are not persuaded.

The defendant's argument, like the argument he raised in part II B of this opinion, misconstrues the burden of proof required to prove this element of a negligent infliction of emotional distress claim. Our Supreme Court has stated that, "[t]his court . . . in *Montinieri* v. *Southern New England Telephone Co.*, [175 Conn. 337, 344, 398 A.2d 1180 (1978)], concluded

that there is no logical reason for making a distinction, for purposes of determining liability, between those cases where the emotional distress results in bodily injury and those cases where there is emotional distress only. . . . The only requirement is that the distress *might* result in illness or bodily harm." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, supra, 262 Conn. 448; see also *Perodeau* v. *Hartford*, 259 Conn. 729, 749, 792 A.2d 752 (2002) ("recovery for unintentionally-caused emotional distress does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact" (internal quotation marks omitted)).

The plaintiff in *Carrol* brought an action against his homeowners insurer for, inter alia, negligent infliction of emotional distress in connection with the insurer's course of action in responding to a claim for insurance benefits following a fire at his home. See *Carrol* v. *Allstate Ins. Co.*, supra, 262 Conn. 434–35. Our Supreme Court concluded that there was sufficient evidence that the plaintiff had suffered distress that was severe enough to result in illness or bodily harm to him because the plaintiff testified that "he could not sleep, had frequent nightmares, had a loss of appetite, and experienced depression and a sense of isolation from his community because of the investigation [into the cause of the fire conducted by the insurer]." Id., 448. In the present case, the plaintiff presented similar evidence of distress, as she testified that she was "devastat[ed]" by the defendant's conduct. She stated: "I can't open my windows. I can't open my curtains. My children can't play outside without me being right there. I can't go to the police anymore. . . . I've planted trees. . . . I have no privacy. None. No one wants to come over [to] my house. . . . And it's all in the name of a zoning violation . . . ."

On the basis of our review of the record, we conclude that there is sufficient evidence to support a finding that the plaintiff's emotional distress was severe enough that it might result in illness or bodily harm.

D

The defendant's final argument with respect to this claim is that the evidence presented at trial did not support a finding that the defendant's conduct caused the plaintiff's emotional distress. Echoing an argument discussed in part II C of this opinion, the defendant argues that the plaintiff "had no medical expert testify to establish a causal connection. She offered no testimony that might meet her high burden of proof (for example, evidence that she was hospitalized, unable to work, or unable to parent her minor children)." We are not persuaded.

As previously stated in this opinion, the plaintiff must prove that the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress. In *Carrol*, our Supreme Court found that there was sufficient evidence of causation for a finding of negligent infliction of emotional distress based upon the plaintiff's testimony that the defendant's actions were " 'devastating' and the cause of his emotional turmoil." *Carrol* v. *Allstate Ins. Co.*, supra, 262 Conn. 448. In the present case, the plaintiff similarly testified that the effect of the defendant's conduct was devastating. In its memorandum of decision, the court expressly referred to this testimony. The court stated that "[the plaintiff] characterized the impact of the defendant's conduct on her life as 'devastating.' His conduct created such a level of fear and anxiety that the plaintiff refused to open her windows or curtains or let her children play outside alone." Based on the plaintiff's testimony as to the cause of her distress, it was reasonable for the court to conclude that the plaintiff had satisfied the element

of causation in her negligent infliction of emotional distress claim.

On the basis of our careful review of the record, viewed in the manner most favorable to sustaining the judgment, we conclude that there is sufficient evidence in the record to support the court's judgment in favor of the plaintiff with respect to each of the essential elements for a cause of action sounding in negligent infliction of emotional distress.

III

The defendant's final claim is that "this court [should] grant [his] motion to dismiss when the trial court did not act on it." Specifically, the defendant argues that this court, on appeal, should rule on his motion to dismiss that he represents was raised at the close of the plaintiff's case-in-chief and in his posttrial brief. The plaintiff contends that the court implicitly and correctly denied the defendant's motion by finding for the plaintiff in its final decision. We are not persuaded by the defendant's arguments.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. At the close of the plaintiff's case-in-chief, the defendant's counsel stated: "[B]efore I call [the defendant], I do have an oral motion for a directed verdict, Your Honor. I understand it's a courtside trial, but I think I can still move for a directed verdict." The court then reserved judgment on the defendant's motion for a directed verdict and articulated that "this is a bench trial and we're [going to] discuss at the conclusion of evidence whether the parties wish to have closing arguments or submit posttrial briefs. And you can address the legal issues at that time." At the conclusion of the evidence, the court ordered the parties to submit posttrial briefs. In the defendant's posttrial brief, he argued,

for the first time, that the court should grant the defendant's "motion for dismissal" pursuant to Practice Book § 15-8. The court did not address the defendant's motion in its memorandum of decision but found in favor of the plaintiff with respect to her claim of negligent infliction of emotional distress.[6]

Practice Book § 15-8, titled "Dismissal in Court Cases for Failure To Make Out a Prima Facie Case," provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority *may* grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made." (Emphasis added.) A motion to dismiss is a motion entrusted to the trial court, not a reviewing court, and the defendant does not cite any law to the contrary. Our Supreme Court has explained that "[a] motion for judgment of dismissal must be made by the defendant and decided by the court after the plaintiff has rested his case, but before the defendant produces evidence." *Cormier* v. *Fugere*, 185 Conn. 1, 2, 440 A.2d 820 (1981). Thus, we are unable to grant

[6] While this appeal was pending, the defendant filed a motion for articulation in which he asked the trial court to rule on his motion to dismiss. The defendant, overlooking the fact that his counsel raised what he characterized as "a motion for a directed verdict" at the close of the plaintiff's case-in-chief, represented that the trial court had failed to rule on his motion to dismiss "at trial . . . and after trial." The defendant also stated in his motion for articulation that, "[a]lthough the [trial] court's ruling on the motion to dismiss may appear to be implicit given the trial court's . . . decision [in favor of the plaintiff with respect to count three], any appellate review of the decision requires an articulation." The trial court, thereafter, did not respond to the motion for articulation, and the defendant did not take any further action in this court to compel the trial court to rule on the motion for articulation.

the defendant any relief with respect to his claim that this court should grant the motion to dismiss.

Even if we reasonably may construe the defendant's claim as an attempt to challenge the trial court's failure to rule on the motion to dismiss, the claim is not reviewable on appeal. This court has explained that "[t]he statutory corollary to [Practice Book § 15-8] is General Statutes § 52-210, which provides: If, on the trial of any issue of fact in a civil action, the plaintiff has produced his evidence and rested his cause, the defendant may move for judgment as in case of nonsuit, and the court may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case. We note that [a] motion for judgment of dismissal has replaced the former motion for nonsuit . . . for failure to make out a prima facie case. . . .

"In the context of the former motion for nonsuit for failure to make out a prima facie case, our Supreme Court repeatedly has held, in a body of century-old cases, that the *denial* of such a motion is not reviewable on appeal. For example, in *Bennett* v. *Agricultural Ins. Co.*, [51 Conn. 504, 512 (1884)], in an appeal following a jury trial, the court held that [t]he refusal of the court to grant the motion for nonsuit, being [a] matter committed to the discretion of the court, is not reviewable on application of the defendant. The practice in Connecticut, unlike that of some other states, is regulated by statute. [General Statutes (1875 Rev.) tit. 19, c. XIII, §§ 3, 4.] This statute provides for a nonsuit, not when all the evidence on both sides has been received, but when the plaintiff on his part has submitted his evidence and rested. If the court shall be of [the] opinion that a *prima facie* case is not made out, the court may (not must) grant a nonsuit. If granted the plaintiff has his remedy; if refused the defendant has no remedy on that account, but must go on with the trial and submit the case to the jury, either on the plaintiff's evidence alone,

if he chooses, or upon his own evidence as well . . . . Similarly, in *Rice* [v. *Foley*, 98 Conn. 372, 119 A. 353 (1923)], in an appeal following a trial to the court, the court held that [t]he refusal of the court to grant [a] defendant's motion for a nonsuit is not appealable. [Id.], 373. Our research has not revealed any authority that expressly undermines the reviewability holdings of *Bennett*, *Rice*, and the numerous cases of their ilk." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 614–16, 216 A.3d 667, cert. denied, 333 Conn. 928, 218 A.3d 68 (2019).

In the present case, the court did not expressly rule on the defendant's motion to dismiss that was raised in his posttrial brief, and the court found in favor of the plaintiff with respect to her claim of negligent infliction of emotional distress. In light of that finding, it is reasonable to consider the court's decision not to grant the defendant's motion to dismiss to be the functional equivalent of a denial. Therefore, just as the court concluded in *Moutinho*, we conclude that the court's functional denial of the defendant's motion to dismiss is not reviewable on appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

DALE KUKUCKA *v.* COMMISSIONER OF CORRECTION (AC 46059)

Elgo, Suarez and Clark, Js.

Syllabus

The petitioner, who had been convicted, after a jury trial, of the crimes of strangulation in the first degree, sexual assault in the third degree, and assault in the third degree, sought a writ of habeas corpus, claiming that, pursuant to *State* v. *Dickson* (322 Conn. 410), his due process rights

had been violated and that his trial and appellate counsel had rendered ineffective assistance. On his direct appeal from his underlying conviction, the petitioner had claimed, inter alia, that the trial court had improperly denied his motion to suppress in-court and out-of-court identifications of him made by a witness to the assault. *Dickson*, which was decided by our Supreme Court more than four months after the petitioner had filed his direct appeal, held, inter alia, that, in cases in which identity is an issue, in-court identifications that are not preceeded by a successful identification in a nonsuggestive procedure implicate due process principles. The petitioner's appellate counsel did not raise any claim predicated on *Dickson* in either his principal or reply briefs in the direct appeal. The respondent, the Commissioner of Correction, filed a return to the petition in which he raised a special defense of procedural default because the petitioner had failed to raise the *Dickson* claim on direct appeal. At the habeas trial in the present case, the habeas court heard testimony from the petitioner, his trial counsel, and a legal expert but not from the petitioner's appellate counsel. The court rendered judgment denying the petition for a writ of habeas corpus, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly determined that he failed to satisfy the cause and prejudice test set forth in *Reed* v. *Ross* (468 U.S. 1) to excuse his procedural default for failing to raise the due process claim during his criminal trial; the petitioner was unable to rely on *Dickson* to demonstrate cause and prejudice to overcome the respondent's special defense of procedural default, as our Supreme Court explicitly stated that *Dickson* may not be applied retroactively on collateral review.
2. The habeas court properly denied the petitioner's petition for a writ of habeas corpus: because the *Dickson* decision was released while the petitioner's direct appeal was pending, a *Dickson* claim was neither unknown nor sufficiently novel to excuse the petitioner's procedural default, and, in the absence of evidence to the contrary, this court presumed that the petitioner's appellate counsel made a tactical decision in deciding to forgo a *Dickson* claim during the direct appeal; moreover, although the Supreme Court's decision in *Dickson* contained clear instructions on how to apply the new rule in pending appeals, indicating that the court anticipated the possibility of viable *Dickson* claims arising in cases that were pending on appeal at the time that *Dickson* was released, the petitioner failed to challenge the habeas court's adverse ruling on his claim of ineffective assistance of appellate counsel.

Argued November 13, 2023—officially released April 30, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland and tried to the court, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, was *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Dale Kukucka, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly denied his freestanding due process claim on the basis of procedural default. Specifically, he argues that the court erroneously concluded that the only way he could overcome procedural default was by showing ineffective assistance of appellate counsel, and, in so concluding, it improperly rejected his claim that he satisfied the cause and prejudice test set forth in *Reed* v. *Ross*, 468 U.S. 1, 13–15, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. As a result of crimes that were committed on October 19, 2013, the petitioner was arrested, charged, and, following a jury trial, ultimately convicted of "strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1), and assault in the third degree in violation of General Statutes § 53a-61 (a) (1)."[1] *State* v. *Kukucka*, 181 Conn. App.

[1] "Although the jury also found the defendant guilty of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a) and assault in the second degree in violation of General Statutes § 53a-60a (a) (1), the trial court did not enter judgment on those charges because they arose from

329, 331, 186 A.3d 1171, cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018). On February 17, 2016, the petitioner was sentenced to a total effective sentence of fifteen years of incarceration, execution suspended after ten years, followed by fifteen years of probation. From that judgment of conviction, the petitioner filed a direct appeal with this court on March 28, 2016. In his direct appeal, the petitioner claimed, in part, that the court had improperly "denied his motion to suppress the in-court and out-of-court identifications of him made by a witness to the assault." Id. On August 9, 2016, the Supreme Court decided *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), which held, inter alia, that, "in cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles . . . ." (Footnote omitted.) Id., 415. On November 8, 2016, and July 10, 2017, respectively, the petitioner's appellate counsel filed the principal and reply briefs in his direct appeal. Although counsel alleged due process violations associated with the identification procedure used by the police, they did not raise any claim predicated on *Dickson*. This court ultimately affirmed the petitioner's conviction on April 24, 2018. *State* v. *Kukucka*, supra, 356.

On August 22, 2017, the petitioner filed a petition for a writ of habeas corpus. On February 2, 2021, the petitioner filed the operative amended petition, which asserted three counts. Count one alleged a due process violation under *Dickson*, count two alleged ineffective assistance of trial counsel, and count three alleged ineffective assistance of appellate counsel. On March 3,

the 'same incident' as the strangulation charge. See General Statutes § 53a-64aa (b)." *State* v. *Kukucka*, 181 Conn. App. 329, 331 n.1, 186 A.3d 1171, cert. denied, 329 Conn. 905, 184 A.3d 1216 (2018).

2021, the respondent, the Commissioner of Correction, filed a return in which he claimed that count one of the operative petition was procedurally defaulted because the petitioner failed to raise the *Dickson* claim on direct appeal.[2] The respondent also relied on the fact that *Dickson* did not apply retroactively. In his reply to the return, the petitioner argued that "[a]ppellate counsel's ineffective assistance of counsel . . . as described in count three . . . caused [the] petitioner not to raise this claim in his direct appeal," and that the timing of *Dickson* "caused [the petitioner] to forgo a viable suppression motion and appellate claim pursuant to *Dickson* in all prior litigation relating to the charges and conviction . . . ."

On May 16, 2022, a trial on the petitioner's operative amended petition for a writ of habeas corpus was held. The court heard testimony from the petitioner, the petitioner's criminal trial counsel, and a legal expert. No other witnesses were presented. In its October 7, 2022 memorandum of decision, the court concluded, with respect to the alleged due process violation pursuant to *Dickson*, "the petitioner alleges ineffective assistance of appellate counsel as the cause and prejudice [excusing procedural default], a claim already alleged in count three . . . . The due process claim in count one need not be separately addressed because it is subsumed within the claim in count three." The court then held that the petitioner had failed to prove ineffective assistance of either trial or appellate counsel. Specifically, as to the claim of ineffective assistance of appellate counsel, the court stated that "the petitioner alleges that [appellate counsel] failed to: identify, raise, litigate, and/or brief a due process claim under *State* v. *Dickson*, [supra, 322 Conn. 410]," yet, "[n]either appellate counsel

[2] In his return, the respondent additionally raised the issue of procedural default for failure to raise the *Dickson* claim during trial. However, that argument was abandoned in the respondent's appellate brief.

testified and, therefore, it is unknown how they selected issues to raise on appeal. This court must presume in the absence of evidence to the contrary that counsel were . . . reasonably competent." Accordingly, the court denied the amended petition for a writ of habeas corpus and thereafter granted the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner does not challenge the court's conclusion that he failed to establish ineffective assistance of trial or appellate counsel. Rather, the petitioner claims that the court improperly denied count one of his amended petition because the "court failed to realize that the petitioner had pleaded and argued a second form of cause and prejudice: the unavailability of the legal basis for the claim at the time of [the criminal] trial." Second, as to the failure to raise the *Dickson* claim during the direct appeal, the petitioner argues that, because *Dickson* was decided after the direct appeal was filed for his criminal conviction, and because *Dickson* implicated a due process violation applicable to his case,[3] the timing of the release of the *Dickson* decision independently constituted cause and prejudice sufficient to overcome the defense of procedural default

[3] We do not reach the merits of whether *Dickson* applies to the petitioner's purported due process claim. We do note, however, that *Dickson*'s requirement for a prescreening procedure applies to "in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure . . . ." *State* v. *Dickson*, supra, 322 Conn. 415. We also note that, in resolving the petitioner's direct appeal, in which he claimed a due process violation based on the admission of out-of-court and in-court identification evidence, this court stated that, "[e]ven if we were to assume that the identification procedure was suggestive, we conclude that given the public safety concerns and the immediate need to apprehend the assailant, the [trial] court properly found that the procedure was necessary due to exigent circumstances." *State* v. *Kukucka*, supra, 181 Conn. App. 355. Moreover, after a careful review of the evidence in the record, this court upheld the trial court's determination that the out-of-court identification of the petitioner was reliable on the basis of the numerous instances in which the witness had observed the petitioner on the day of the incident as well as the face-to-face altercation between them. Id., 355–56.

for failing to raise the claim during the direct appeal. We are not persuaded.

As an initial matter, a habeas court's conclusion that a petitioner's claim is barred by the procedural default doctrine involves a question of law over which we exercise plenary review. See *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009); *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810, 218 A.3d 638 (2019).

Under the procedural default doctrine, "a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). "Although ineffective assistance of counsel . . . is the most commonly asserted basis for cause to excuse procedural default . . . it is not the exclusive basis." (Citation omitted.) *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 26, 272 A.3d 169 (2022). "[T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. . . . [T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met." *Reed* v. *Ross*, supra, 468 U.S. 14.

The petitioner is correct insofar that it is possible to show cause independent of an ineffective assistance of counsel claim. As highlighted in *Reed*, when a constitutional issue is not raised by competent counsel because

it is "reasonably unknown" to counsel, as opposed to being an intentional strategic decision to not raise the claim, then cause may exist to excuse the procedural default. Id. The two issues in this case thus may be distilled to whether (1) *Dickson* may be applied retroactively to allow a collateral review of claims where judgment has been rendered and (2) the timing of the *Dickson* decision—which was officially released after the petitioner filed his direct appeal but before any briefs were filed and before oral arguments—satisfies the cause requirement under *Reed* because the due process claim created by *Dickson* was "reasonably unknown" to appellate counsel.

I

The petitioner claims that *Dickson* implicates a due process claim relevant to his conviction, and, because *Dickson*'s holding did not change the state of the law until after his conviction, there is cause and prejudice under *Reed* to excuse the procedural default for failing to raise the due process claim during his criminal trial. We disagree.

In *Reed*, Daniel Ross had been convicted following a jury trial in which the court had charged the jury with instructions that had been in place for more than 100 years, and, on appeal, Ross' attorney did not contest the propriety of those instructions. Id., 5–7. Six years after the conclusion of Ross' direct appeal, the United States Supreme Court, in *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), overturned its long-standing precedent, effectively ruling that the jury instructions that were used during Ross' trial were unconstitutional. See *Reed* v. *Ross*, supra, 468 U.S. 3, 7. "Two years later, *Hankerson* v. *North Carolina*, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), held that *Mullaney* was to have retroactive application." *Reed* v. *Ross*, supra, 3. "Ross challenged the jury instructions

for the first time in 1977, shortly after [the United States Supreme Court] decided *Hankerson*." Id., 7. The court noted that, prior to Ross' direct appeal, only two cases indirectly departed from the well settled legal precedent that the then existing jury instructions were constitutional. Id., 18–19. The court stated that, "[b]ecause these [two] cases provided only indirect support for Ross' claim, and because they were the only cases that would have supported Ross' claim at all, we cannot conclude that they provided a reasonable basis upon which Ross could have realistically appealed his conviction." Id., 19. The court stated that it could "confidently assume" the reason Ross failed to challenge "the constitutionality of [the jury] instructions . . . [on appeal] was because they were sanctioned by a century of North Carolina law and because *Mullaney* was yet six years away." Id., 7. The court held that "Ross' claim was sufficiently novel . . . to excuse his attorney's failure to raise the . . . issue" during his direct appeal and affirmed the decision of the United States Court of Appeals for the Fourth Circuit to retroactively apply *Mullaney* to Ross' claim. Id., 20.

Relying on *Reed*, the petitioner argues that the due process claim on which he relies—that later became available under our Supreme Court's decision in *Dickson*—was not legally available to counsel at the time of his criminal trial. The petitioner argues that, "where a jurisdiction's highest court overrules its own prior precedent on a constitutional matter, there is cause and prejudice to excuse a procedural default." However, in *Reed*, it was not the change in the law contained in *Mullaney*, alone, that permitted Ross to appeal his conviction. It was only after *Hankerson*, in which the United States Supreme Court held that *Mullaney* could be applied retroactively, that Ross was permitted to challenge his conviction.

Our Supreme Court has made it clear that *Dickson* is not to be applied retroactively. The court explicitly stated that "[t]he new rule would not apply . . . on collateral review." *State* v. *Dickson*, supra, 322 Conn. 451 n.34; see also *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 60–61, 272 A.3d 218, cert. granted, 343 Conn. 932, 276 A.3d 975 (2022).[4] Because *Dickson* may not be applied retroactively on collateral review, the petitioner may not challenge his conviction on the basis of the new law contained in the *Dickson* decision. Accordingly, the petitioner is unable to rely on *Dickson* to demonstrate cause and prejudice to overcome the respondent's special defense of procedural default.

II

The petitioner nevertheless claims that, because the *Dickson* decision was released while his direct appeal was pending, cause and prejudice exists to excuse the procedural default for failure to raise the claim during the appeal because the issue was "reasonably unknown" and "sufficiently novel" to competent counsel. We disagree.

It is undisputed that the petitioner's case was pending on appeal at the time that the *Dickson* decision was released. The court recognized that, "in pending *appeals* involving this issue, the suggestive in-court identification has already occurred." (Emphasis in original.) *State* v. *Dickson*, supra, 322 Conn. 452. The court then carefully provided instruction on how to apply the new rule

[4] We note that the petitioner in *Tatum* v. *Commissioner of Correction*, supra, 211 Conn. App. 42, has appealed this court's decision, which is currently pending before our Supreme Court. The certified question in that case is whether the habeas petition in question was properly dismissed on the ground that *Dickson* "did not apply retroactively to the petitioner's case on collateral review?" *Tatum* v. *Commissioner of Correction*, 343 Conn. 932, 276 A.3d 975 (2022).

to pending appeals in which the issue of suggestive in-court identifications has been raised. Id.; see also *State* v. *Collymore*, 334 Conn. 431, 479, 223 A.3d 1 ("[b]ecause . . . it was too late to prescreen first time in-court identifications that already occurred in pending cases, we provided a road map for how pending appeals should be handled"), cert. denied, U.S. , 141 S. Ct. 433, 208 L. Ed. 2d 129 (2020). This clearly indicates that, in its pronouncement that its holding must be applied prospectively, the court anticipated the possibility of viable *Dickson* claims arising in cases that were pending on appeal at the time that *Dickson* was released. Because the *Dickson* decision was released while the petitioner's appeal was pending, a *Dickson* claim was neither unknown nor sufficiently novel to excuse the petitioner's procedural default.

Notwithstanding the clear instructions provided by our Supreme Court in *Dickson* regarding pending appeals, the petitioner relies on *United States* v. *Garcia*, 811 Fed. Appx. 472 (10th Cir. 2020), stating in his reply brief that the case stands for the premise that "a change in the law that occurs during a proceeding excuses default at that same proceeding."[5] Such a broad reading

[5] The petitioner also cites a case from the United States District Court for the District of Columbia for the same premise. That decision is not binding on this court, and we find it unpersuasive because the change in law in that case was followed by a subsequent United States Supreme Court decision holding that the change was retroactive.

The petitioner in *Sorto* v. *United States*, Docket No. 08-167-4 (RJL) (D. D.C. February 24, 2022), appealed from his judgment of conviction rendered in a consolidated appeal with his codefendants, with briefs filed on May 16, 2014, and March 3, 2015. The subsequent decision affirming the convictions was issued on November 24, 2015. See *United States* v. *Cordova*, 806 F.3d 1085 (D.C. Cir. 2015) and related filings. On June 26, 2015, nearly five months before Melvin Sorto's direct appeal was affirmed, the United States Supreme Court decided *Johnson* v. *United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which adopted a new constitutional rule relevant to Sorto's conviction and appeal. Id.; *Sorto* v. *United States*, supra. The District Court ultimately found cause to excuse Sorto's procedural default. Id.

In the present case, the petitioner asserts that "*Johnson* constituted cause for the procedural default" for Sorto "not rais[ing] a *Johnson* issue on direct

cannot reasonably be taken from the *Garcia* decision. In *Garcia*, a change in law took place "only eighteen days before [the] court issued its decision in [Pedro Garcia's] direct appeal . . . ." *United States* v. *Garcia*, supra, 479. However, the court clearly stated that "the source of the constitutional principle relevant to [Garcia's argument] is not found in [that case] but in [a more recent case], which was decided *well after Garcia's direct appeal was final.* Indeed, given that it is [the more recent case] that cements the viability of Garcia's legal theory . . . there is cause to excuse Garcia from not raising this claim at trial or on direct appeal." (Citation omitted; emphasis added.) Id., 480.

This is clearly in contrast with the present case. In *Dickson*, our Supreme Court accounted for how potential *Dickson* claims can be viably raised in pending appeals. Moreover, *Dickson* was decided after the direct appeal was filed, but three months *before* the petitioner's first brief was filed, eleven months before the petitioner's reply brief was filed, fourteen months before oral arguments, and more than one and one-half years before the petitioner's direct appeal was affirmed. For that reason, the assertion that the constitutional issue contained in *Dickson* was "reasonably unknown" and "sufficiently novel" to competent counsel during the petitioner's direct appeal is untenable. Even if we were

appeal . . . ." The petitioner fails to acknowledge, however, that "Sorto's argument was based on *two* Supreme Court decisions." (Emphasis added.) *Sorto* v. *United States*, supra, United States District Court, Docket No. 08-167-4. The second case, *Welch* v. *United States*, 578 U.S. 120, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016), was decided on April 18, 2016, almost five months *after* Sorto's conviction was affirmed on direct appeal. "[I]n *Welch* v. *United States*, the Supreme Court held . . . that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." (Internal quotation marks omitted.) *Sorto* v. *United States*, supra. It was only after *Welch* was decided that *Johnson* was applied retroactively on collateral review of Sorto's conviction. Thus, *Johnson* on its own did not establish an independent basis to excuse Sorto's procedural default. *Sorto* is therefore inapposite to the present case.

to assume that the petitioner's appellate counsel would have considered a *Dickson* claim strategically advantageous, he had ample time to raise it between August 9, 2016, when the *Dickson* decision was released, and April 24, 2018, when the petitioner's direct appeal was affirmed. See *State* v. *Dickson*, supra, 322 Conn. 410; *State* v. *Kukucka*, supra, 181 Conn. App. 329.

Mindful of the clear instructions contained in the *Dickson* decision indicating that such claims could be raised and litigated in those cases in which appeals were pending, it bears repeating that the petitioner does not challenge the habeas court's adverse ruling on his claim of ineffective assistance of appellate counsel. In the absence of evidence to the contrary, this court must presume that appellate counsel made a tactical decision in deciding to forgo a *Dickson* claim during the direct appeal. "[C]ounsel may not make a tactical decision to forgo a procedural opportunity . . . to raise an issue on appeal . . . and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy . . . . Procedural defaults of this nature are, therefore, 'inexcusable' . . . and cannot qualify as 'cause' for purposes of . . . habeas corpus review." (Citation omitted.) *Reed* v. *Ross*, supra, 468 U.S. 14. We therefore conclude that the court properly denied the petitioner's petition for a writ of habeas corpus.

The judgment is affirmed.

In this decision the other judges concurred.

MARCUS T. HARVIN *v.* YALE NEW HAVEN HEALTH SERVICES CORPORATION ET AL.
(AC 46339)

Alvord, Westbrook and Pellegrino, Js.

Syllabus

The plaintiff, who previously had been convicted of various crimes in connection with a drunk driving incident, sought to recover damages from,

inter alia, the defendant hospital, L Co., for its alleged negligence in disclosing the plaintiff's confidential health information during his criminal prosecution. The plaintiff claimed that L Co. unlawfully disclosed his health information by providing certain unspecified confidential health records to members of the Office of the Chief State's Attorney and, at his criminal trial, through the testimony of two of L Co.'s agents, a physician and a nurse who were employed by L Co. and who had treated the plaintiff following the incident. L Co. filed a motion to strike, which the trial court granted in part, striking all counts of the complaint against L Co. except those sounding in negligence per se and negligent infliction of emotional distress. Thereafter, L Co. filed a motion for summary judgment, arguing that it was entitled to summary judgment because, inter alia, any disclosure of the plaintiff's protected health information by L Co. or its agents was made in response to a valid subpoena and a court order. The trial court denied the motion, stating that L Co. did not provide an evidentiary foundation as to what information had been delivered, and in what manner, in response to the subpoena and court order. Thereafter, L Co. filed a motion to dismiss, arguing that the trial court lacked subject matter jurisdiction because L Co. had absolute immunity under the litigation privilege, as any alleged disclosures were made pursuant to a subpoena and a court order. The trial court denied the motion, determining that it lacked a sufficient evidentiary basis on which to determine whether the litigation privilege applied, and L Co. appealed to this court. *Held*:

1. The motion to dismiss should have been granted with respect to the remaining counts of the complaint to the extent that they were premised on the disclosure of the plaintiff's health information by L Co.'s agents during their testimony at the plaintiff's criminal trial, and, accordingly, this court reversed that portion of the trial court's judgment denying L Co.'s motion to dismiss: the plaintiff's attorney conceded at oral argument before this court that the litigation privilege applied with respect to the allegations in the complaint that were premised on the testimony provided by L Co.'s agents at the plaintiff's criminal trial, and, in doing so, he effectively acknowledged that any disclosures by the witnesses of the plaintiff's health information were relevant to the criminal prosecution; moreover, this court viewed that concession as effectively waiving or abandoning any and all arguments that the litigation privilege did not bar the plaintiff's action with respect to the witnesses' testimony.
2. The trial court's denial of the motion to dismiss with respect to the remaining counts of the complaint to the extent that they were premised on L Co.'s alleged disclosure of confidential health records to the state's attorney's office was not improper, and, accordingly, this court affirmed that portion of the trial court's judgment, without prejudice to L Co. renewing its claim regarding the applicability of the litigation privilege: the trial court lacked a sufficient evidentiary basis to determine whether the litigation privilege applied, as the allegations of the complaint, read

broadly and in the light most favorable to the plaintiff, indicated that L Co. could have potentially disclosed confidential information in excess of that required under the subpoena, and L Co. did not negate that possibility simply by providing evidence demonstrating that it produced sealed medical records in compliance with the subpoena and the accompanying court order; moreover, L Co. never requested an evidentiary hearing, and it was within the discretion of the trial court to leave the jurisdictional issue for resolution following additional discovery or a trial on the merits rather than to resolve the matter by ordering an evidentiary hearing sua sponte.

Argued January 8—officially released April 30, 2024

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the defendants' motion to strike as to certain counts; thereafter, the court, *Noble*, *J.*, granted the defendants' motion for summary judgment only with respect to the remaining counts against the named defendant, and rendered judgment thereon; subsequently, the court, *Connors*, *J.*, denied the motion to dismiss filed by the defendant Lawrence + Memorial Hospital, and the defendant Lawrence + Memorial Hospital appealed to this court. *Reversed in part*; *judgment directed.*

Michael G. Rigg, with whom, on the brief, was *Adam Maiocco*, for the appellant (defendant Lawrence + Memorial Hospital).

Alexander T. Taubes, for the appellee (plaintiff).

Opinion

WESTBROOK, J. In this civil action, the plaintiff, Marcus T. Harvin, a former inmate, asserts claims of, inter alia, negligence per se and negligent infliction of emotional distress against the defendant Lawrence +

Memorial Hospital[1] on the basis of its allegedly unlawful disclosure of his confidential health information during his criminal prosecution.[2] The plaintiff alleges that the defendant unlawfully disclosed his confidential health information in two ways. First, he alleges that the defendant unlawfully provided certain unspecified confidential health records, including a psychiatric evaluation, to members of the Office of the Chief State's Attorney. Second, he alleges that two of the defendant's agents disclosed confidential health information during their testimony at his criminal trial. The defendant appeals from the judgment of the trial court denying its motion to dismiss the action for lack of subject matter jurisdiction on the theory that the defendant is entitled to absolute immunity from suit under the litigation privilege because any and all disclosures of the plaintiff's confidential health information, whether by itself or its agents, occurred in the course of the criminal litigation and in response to a valid subpoena and court order.[3]

[1] Yale New Haven Health Services Corporation (Yale New Haven) also was named as a defendant in the underlying action. The court rendered summary judgment on all counts brought against Yale New Haven, and the plaintiff did not appeal that ruling. Yale New Haven has not participated in the present appeal. Accordingly, in this opinion, we refer to Lawrence + Memorial Hospital as the defendant and to Yale New Haven by name.

[2] According to the plaintiff, the alleged disclosure violated General Statutes (Rev. to 2015) § 52-146d, General Statutes §§ 52-146e (a) and 52-146o (a), and 45 C.F.R. § 164.512 (e) (2015), a federal regulation promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq.

[3] Although the denial of a motion to dismiss ordinarily is an interlocutory ruling and, thus, not immediately appealable; see, e.g., *Harger* v. *Odlum*, 153 Conn. App. 764, 768, 107 A.3d 430 (2014); "[t]he doctrine of absolute immunity, known also as the litigation privilege . . . protects *against suit* as well as liability—in effect, against having to litigate at all." (Citations omitted; emphasis added; internal quotation marks omitted.) *Carter* v. *Bowler*, 211 Conn. App. 119, 122, 271 A.3d 1080 (2022). To vindicate the right of immunity from suit—as distinguished from a right to immunity from liability—the denial of a motion to dismiss that raises a colorable claim of absolute immunity is immediately appealable under the second prong of the test set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). See *Smith* v. *Supple*, 346 Conn. 928, 941, 293 A.3d 851 (2023); *Chadha* v.

The defendant specifically claims that the court improperly determined that it lacked a sufficient evidentiary basis on which to determine if the litigation privilege applied under the circumstances of this case.

At oral argument before this court, the plaintiff's attorney conceded, and we agree, that the litigation privilege does bar those portions of the underlying action premised on the testimony provided by the defendant's agents at the plaintiff's criminal trial. We disagree, however, that the defendant demonstrated on this record that it is entitled to litigation privilege with respect to the allegations of unlawful disclosure of confidential health information to members of the Office of the Chief State's Attorney. Accordingly, for the reasons that follow, we reverse in part and affirm in part the judgment of the trial court and remand the case with direction to grant the motion to dismiss to the extent that the remaining counts are premised on the testimony given by the defendant's agents at the plaintiff's criminal trial.

The following facts, as alleged in the complaint or otherwise undisputed in the record,[4] and procedural

Charlotte Hungerford Hospital, 272 Conn. 776, 785, 865 A.2d 1163 (2005). Because there is no dispute that the underlying motion to dismiss raises a colorable claim of absolute immunity, we have jurisdiction over the present appeal.

[4] In reviewing a trial court's ruling on a motion to dismiss, "we take the facts to be those alleged in the complaint, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Rioux* v. *Barry*, 283 Conn. 338, 341, 927 A.2d 304 (2007). Nevertheless, given that the present motion to dismiss was filed after several years of litigation, which consisted of the adjudication of several dispositive motions, including two motions for summary judgment, we properly may rely on the record as a whole in setting forth the operative facts. See *Conboy* v. *State*, 292 Conn. 642, 650–51, 974 A.2d 669 (2009) (explaining that, "depending on the state of the record at the time the motion [to dismiss] is filed," court properly may decide motion on basis of "(1) the complaint alone; (2) the complaint *supplemented by undisputed facts evidenced in the record*; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts" (emphasis added; internal quotation marks omitted)).

history are relevant to our review of the defendant's claim. In 2014, the plaintiff was arrested in connection with a drunk driving incident that resulted in serious injuries, and, following a criminal trial, he was convicted of multiple offenses.[5] He received a total effective sentence of twenty-three years of incarceration, execution suspended after fourteen and one-half years, followed by five years of probation with special conditions. *State* v. *Marcus H.*, 190 Conn. App. 332, 337, 210

[5] The following facts underlying the plaintiff's criminal conviction are not in dispute and were set forth by the trial court in its decision granting in part and denying in part the defendant's and Yale New Haven's joint motion for summary judgment. "On May 25, 2014, an officer of the Ledyard Police Department responded to a call of a stopped vehicle on [Route] 12 with an adult asleep behind the wheel with two children in the backseat of the car. The investigating police officer found the vehicle stopped with the engine running and two small children in the rear seat. The present plaintiff was asleep behind the wheel. He was awakened and informed that the officer intended to perform a field sobriety test as a consequence of the smell of alcoholic beverage coming from the car, an observation of bloodshot eyes and slow slurred speech. The plaintiff . . . identified himself as Donte Harvin, his brother. When the police officer returned to his vehicle to process the information he was provided by the plaintiff, the plaintiff's vehicle sped off at a high rate of speed. Ultimately, the vehicle driven by the plaintiff was found upside down in the swimming pool of a residence on Baldwin Hill [Road in] Ledyard . . . . The plaintiff and the two children in the backseat, ages two and four, his children, were entrapped in the vehicle due to extensive damage. Further investigation found that the vehicle had left the road, hit a utility pole, ran through a [Department of Transportation] traffic control box, over a metal beam guardrail and then came to rest in the pool. The plaintiff's two year old child suffered a partially severed right forearm that was connected by only a small amount of skin. The plaintiff was taken to [the defendant] where blood and urine samples were collected and medical treatment [was] rendered.

"Following an arrest . . . and subsequent trial, the plaintiff was found guilty on March 3, 2016, of assault in the second degree with a motor vehicle in violation of [General Statutes] § 53a-60d; two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1); two counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63; interfering with an officer in violation of General Statutes [Supp. 2014] § 53a-167a; reckless driving in violation of General Statutes [Rev. to 2013] § 14-222; illegal operation of a motor vehicle while under the influence of alcohol and/or drugs in violation of General Statutes [Rev. to 2013] § 14-227a; and increasing the speed of a motor vehicle in an attempt to escape from a

A.3d 607, cert. denied, 332 Conn. 910, 211 A.3d 71, cert. denied, U.S. , 140 S. Ct. 540, 205 L. Ed. 2d 343 (2019).

As part of the criminal proceedings, the state served the defendant with a subpoena duces tecum that sought the plaintiff's medical records pertaining to his treatment at the defendant's hospital following his arrest on May 25, 2014. The subpoena was accompanied by a court order pursuant to General Statutes § 54-2a (a) directing the defendant to comply with the subpoena. On August 14, 2015, the defendant, through its agents, provided to the prosecuting attorney, Sarah Bowman, certain sealed medical records. That same day, Attorney Bowman appeared before the trial court, which issued an order unsealing these records as to Attorney Bowman and defense counsel. During the subsequent criminal trial, Laura Arre, a registered nurse, and Bernard Ferguson, a physician, each of whom worked for the defendant in the hospital's emergency department, appeared and provided testimony regarding the plaintiff's diagnosis, medical treatment and related medical records.

In July, 2017, following his criminal conviction, the plaintiff, acting as a self-represented litigant, brought the underlying civil action.[6] The operative amended complaint was filed on December 15, 2017, and contained ten counts, all premised on the allegedly illegal and unauthorized disclosure of his confidential medical information by the defendant, Yale New Haven, and/or their respective agents. Counts one, three, five, seven and nine were brought against the defendant and

police officer in violation of General Statutes § 14-223 (b)." *Harvin* v. *Yale New Haven Health Services Corp.*, Superior Court, judicial district of Hartford, Docket No. CV-17-5045594-S (November 4, 2019).

[6] The plaintiff is now represented by counsel, who filed an appearance in June, 2022, just prior to the filing of the motion to dismiss underlying this appeal.

sounded in, respectively, negligence per se, negligence, negligent supervision and training, negligent infliction of emotional distress, and invasion of privacy. Counts two, four, six, eight and ten alleged the same causes of action but against Yale New Haven on the theory that it was liable as the parent corporation of the defendant.

On November 5, 2018, the court, *Budzik*, *J.*, granted in part a joint motion to strike filed by the defendant and Yale New Haven and struck all counts of the complaint except one, two, seven and eight sounding in negligence per se and negligent infliction of emotional distress. The plaintiff did not replead, and the court subsequently rendered judgment against the plaintiff on the stricken counts.

The defendant and Yale New Haven next filed a joint motion for summary judgment on the remaining four counts. Yale New Haven argued that it was entitled to judgment as a matter of law because it had not become the parent corporation of the defendant until September 8, 2016, which was after the alleged disclosures of information complained of by the plaintiff.[7] Accordingly, it had no proper role in this matter. The defendant argued that it was entitled to summary judgment because any disclosure of the plaintiff's protected health information by the defendant or its agents was done in response to a valid subpoena and court order, none of the statutes, regulations, or policies cited in support of the negligence per se counts was applicable in this matter, and there was no evidence that the disclosure of protected health information caused the plaintiff any emotional distress.

On November 4, 2019, the court, *Noble*, *J.*, rendered summary judgment in favor of Yale New Haven as to

[7] The plaintiff alleged that his medical records were unlawfully disclosed on August 14, 2015, and that the testimony disclosing his private medical information occurred on February 25 and 29, 2016.

the remaining counts against it but denied summary judgment regarding the two remaining counts against the defendant. In so doing, the court explained, in relevant part, that "there was *no evidentiary foundation provided by the* [*defendant*] *as to what was delivered or how it was delivered, in response to the subpoena duces tecum and court order*. While the plaintiff offered a purported transcript of a hearing on August 14, 2015 . . . in which medical records from [the defendant] were said to have been 'just picked up' by the prosecutor, no direct evidentiary nexus is offered by the [defendant] between those records 'just picked up' by the prosecutor and the records subpoenaed. . . . As an example of the lack of evidentiary proof for the defendant['s] assertions, the [defendant] refer[s] the court to Exhibit C, the court order and subpoena, in order to advance the proposition that, '[p]ursuant [to] the order and subpoena, [the defendant] sent seventy-nine pages of sealed medical records to the Criminal Clerk's Office at the New London Superior Court.' . . . Despite having carefully reviewed the defendant['s] Exhibit C, the court is unable to find any reference to what was delivered, how it was delivered or . . . of how many pages it consisted. The court therefore cannot make a finding of no genuine issue of material fact as to the adequacy of compliance with any state or federal confidentiality provisions. Because the propriety of the testimony of both [Arre] and [Ferguson] flows . . . from the propriety of [the defendant's] initial disclosure of medical records, the court is also unable to find a lack of a genuine issue of material fact." (Citation omitted; emphasis altered.)

In short, the court was unable to determine from the evidence provided in support of summary judgment exactly what was in the sealed medical records that the defendant produced in response to the subpoena and that were later unsealed by the court and whether

the allegations in the complaint of improperly disclosed health information were limited to only those documents provided to Attorney Bowman and subsequently unsealed by the court as evidenced in the transcript provided. The court thereafter denied the defendant's motion to reargue the motion for summary judgment.[8] In 2020 and 2021, the defendant filed several additional potentially dispositive pretrial motions, to no avail.[9]

On August 22, 2022, the defendant filed the motion to dismiss that is the subject of the present appeal. According to the defendant, "witnesses who provide testimony and disclosures in a formal judicial proceeding enjoy absolute immunity under the litigation privilege. A witness, and by extension his/her employer, who produces records pursuant to a subpoena and court order enjoys absolute immunity from suit and liability. Moreover, because [Arre's] and [Ferguson's] testimony during the plaintiff's criminal trial fit[s] squarely within the litigation privilege, [the defendant] has absolute immunity from suit and the case must be dismissed in its

[8] As noted by the plaintiff, the defendant has raised no claim on appeal challenging the basis of Judge Noble's summary judgment ruling.

[9] Following the denial of the motion for summary judgment as to the two remaining counts against it, the defendant, on September 30, 2020, filed a motion to dismiss the action for lack of subject matter jurisdiction on the theory that the action was unripe for adjudication. According to the defendant, the action necessarily implied that the plaintiff's criminal conviction was somehow invalid and, therefore, unless and until the underlying conviction was invalidated, the action was not ripe. The court, *Schuman, J.*, noting that the motion was governed by *Taylor* v. *Wallace*, 184 Conn. App. 43, 51, 194 A.3d 343 (2018), denied the motion to dismiss because it construed the present action as alleging that the plaintiff had suffered compensatory damage from the alleged disclosure of his confidential medical information at his criminal trial as opposed to raising any challenge to his ultimate conviction.

On June 21, 2021, the defendant filed its second motion for summary judgment in which it argued, among other things, that this matter involved complex issues that required the plaintiff to present expert testimony and that the plaintiff had missed his deadline to disclose an expert. The court, *Hon. Jane S. Scholl*, judge trial referee, denied the motion for summary judgment on April 28, 2022.

entirety for lack of subject matter jurisdiction." The plaintiff filed an opposition arguing that the motion to dismiss was nothing more than a last-minute attempt to delay trial and that the litigation privilege is inapplicable in actions alleging the unauthorized disclosure of confidential medical records. According to the plaintiff, in *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540, 550, 175 A.3d 1 (2018), our Supreme Court recognized a common-law cause of action against medical providers for the unlawful disclosure of medical information and it "cannot be the law" that the litigation privilege would bar such an action simply because the unauthorized disclosure had occurred in the context of a judicial proceeding. Neither party requested an evidentiary hearing on the motion to dismiss.

The court, *Connors, J.*, issued a decision on January 17, 2023, denying the motion to dismiss. The court, after setting forth relevant legal principles, concluded: "Even assuming that the litigation privilege applies to the types of claims that the plaintiff alleges . . . the court has no basis to conclude that the litigation privilege applies in the present matter. In particular, although [any] testimony at the plaintiff's criminal trial would generally be subject to the litigation privilege . . . the defendant failed to submit any evidentiary foundation to show that Arre['s] and Ferguson's testimonies were sufficiently relevant to the issues involved in the plaintiff's criminal trial so as to qualify for the litigation privilege. . . .

"The defendant similarly failed to provide any evidentiary foundation to show that the alleged production of the plaintiff's health records to members of the Office of the State's Attorney was relevant to the issues involved in the plaintiff's criminal trial or made in response to a subpoena. The defendant merely refers to a memorandum of decision where the court, *Noble, J.*, took judicial notice of a court order and a subpoena duces tecum. . . . The court also noted, however, that

there was no evidentiary foundation provided by [the defendant] as to what was delivered or how it was delivered, in response to the subpoena duces tecum and court order. . . . In this motion to dismiss, the defendant has again provided no evidence to show that its production of the plaintiff's medical records was in response to said subpoena, and the same cannot be inferred from the complaint. Thus, the court has no basis to conclude that the litigation privilege applies to the alleged production of the plaintiff's health records." (Citations omitted; internal quotation marks omitted.) On the basis of that reasoning, the court denied the defendant's motion to dismiss. The defendant filed a timely motion to reargue, which the court denied. This appeal followed.

The defendant claims on appeal that the trial court improperly determined that it lacked a sufficient evidentiary basis on which to determine if the litigation privilege applied in this case. Given that the plaintiff now concedes that the litigation privilege bars his action, at least to the extent that it is premised on the testimony provided by the defendant's agents at his criminal trial, we agree that the motion to dismiss should be granted in part with respect to both remaining counts of the complaint. We nevertheless agree with the trial court's conclusion that it lacked a sufficient evidentiary basis on which to grant the motion to dismiss with respect to the allegations of unlawful disclosure of confidential medical records to members of the state's attorney's office.

We begin our analysis by setting forth our standard of review and other governing legal principles. In an appeal from a court's denial of a motion to dismiss, "[w]e review the trial court's ultimate legal conclusion and its resulting denial of dismissal de novo. . . . In conducting this review, we [generally] take the facts to be those alleged in the complaint, construing them in

a manner most favorable to the pleader. . . . We are mindful that the doctrine of absolute immunity, also referred to as the litigation privilege, implicates the court's subject matter jurisdiction . . . and that every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Deutsche Bank AG* v. *Vik*, 214 Conn. App. 487, 496, 281 A.3d 12, cert. granted, 345 Conn. 964, 285 A.3d 388 (2022). Whether absolute immunity is applicable under the facts of a particular case presents "a question of law over which our review is plenary." *Simms* v. *Seaman*, 308 Conn. 523, 530, 69 A.3d 880 (2013).

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10-30] may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of

the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . [If] the jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 615–16, 109 A.3d 903 (2015); see also *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175 ("[i]n some cases . . . it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear"), cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989).

"Generally speaking, it often will be prudent to defer action on a motion to dismiss raising issues that are interrelated or inextricably intertwined with the merits of a dispute . . . ." *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 770, 286 A.3d 467 (2022). Although our Supreme Court has left to the discretion of the trial court whether to hold an immediate evidentiary hearing or to defer ruling on a motion to dismiss until after a full trial on the merits, "[w]hether the court properly exercises that discretion in a given case . . . is not beyond our review." Id. "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . In determining whether there has been an abuse of discretion, *much depends upon the circumstances of each case*." (Emphasis added; internal quotation marks omitted.) Id.

Turning to the substance of the motion to dismiss, "Connecticut has long recognized the litigation privilege." *Simms* v. *Seaman*, supra, 308 Conn. 536. The origin of the privilege is a long-standing common-law tradition protecting "communications uttered or published in the course of judicial proceedings . . . so long as they are in some way pertinent to the subject of the controversy" and barring the recovery of damages on the basis of defamatory statements. (Internal quotation marks omitted.) Id., 537. As our Supreme Court has recognized, however, "[i]n recent decades, Connecticut attorneys have tested the limits of the [litigation] privilege with respect to alleged misconduct other than defamatory statements during judicial proceedings, with mixed results." Id., 540.

"The purpose of affording absolute immunity to those who provide information in connection with judicial

and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; internal quotation marks omitted.) *Rioux* v. *Barry*, 283 Conn. 338, 343–44, 927 A.2d 304 (2007).

As acknowledged in *Dorfman* v. *Smith*, 342 Conn. 582, 592, 271 A.3d 53 (2022), courts in this state have "recognized that absolute immunity extends to an array of retaliatory civil actions beyond claims of defamation . . . ." By way of examples, our Supreme Court has "concluded that absolute immunity bars claims of intentional interference with contractual or beneficial relations arising from statements made during a civil action. . . . [It has] also precluded claims of intentional infliction of emotional distress arising from statements made during judicial proceedings on the basis of absolute immunity. . . . Finally, [it has] . . . applied absolute immunity to bar retaliatory claims of fraud against attorneys for their actions during litigation. . . . In reviewing these cases, it becomes clear that, in expanding the doctrine of absolute immunity to bar claims beyond defamation, [our Supreme Court] has sought to ensure that the conduct that absolute immunity is intended to

protect, namely, participation and candor in judicial proceedings, remains protected regardless of the particular tort alleged in response to the words used during participation in the judicial process. Indeed . . . [c]ommentators have observed that, because the privilege protects the communication, the nature of the theory [on which the challenge is based] is irrelevant." (Citations omitted; internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 726–27, 161 A.3d 630 (2017).

Our Supreme Court in *Dorfman* recently "identified the following factors as relevant to any determination of whether policy considerations support applying absolute immunity to any particular cause of action: (1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding in a similar way to how conduct constituting abuse of process and vexatious litigation subverts that underlying purpose; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as the privilege bars a defamation action; and (3) whether the alleged conduct may be adequately addressed by other available remedies. . . . Assisting in our evaluation of these factors, to the extent applicable, we have considered as persuasive whether federal courts have protected the alleged conduct pursuant to the litigation privilege. . . . These factors and considerations, however, are simply instructive, and courts must focus on the issues relevant to the competing interests in each case in light of the particular context of the case. . . . We are not required to rely exclusively or entirely on these factors, but, instead, they are useful when undertaking a careful balancing of all competing public policies implicated by the specific claim at issue and determining whether affording parties this common-law immunity from this common-law action is warranted." (Citations omitted; footnotes omitted; internal quotation marks omitted.)

Dorfman v. *Smith*, supra, 342 Conn. 592–94. With these principles in mind, we turn to the claims on appeal.

I

We begin with a brief discussion of what is no longer at issue in the present case. As previously indicated, the plaintiff's attorney conceded at oral argument before this court that the litigation privilege applies with respect to those allegations in the complaint that the defendant may be found liable on the basis of the testimony provided by its agents at the plaintiff's criminal trial. Although we generally are not bound by the concessions of the parties regarding matters implicating subject matter jurisdiction, we nonetheless view the concession of the plaintiff's attorney at oral argument before this court as having effectively waived or abandoned any and all arguments that the litigation privilege does not bar the plaintiff's action with respect to the witnesses' testimony.

Our Supreme Court consistently has held that "communications made during and relevant to a judicial proceeding are afforded immunity because [w]itnesses and parties to judicial proceedings must be permitted to speak freely, without subjecting their statements and intentions to later scrutiny by an indignant jury, if the judicial process is to function." (Internal quotation marks omitted.) Id., 601. As the trial court acknowledged in its decision, there is no doubt that the testimony provided by Arre and Ferguson at the plaintiff's criminal trial ordinarily would be subject to the litigation privilege so long as their testimonies were sufficiently relevant to the issues involved in the plaintiff's criminal trial. The plaintiff, by conceding before this court that the litigation privilege applies with respect to the witnesses' testimony, effectively acknowledges that any disclosures by the witnesses of the plaintiff's

health information were relevant to the criminal prosecution. The witnesses clearly fall within the class of persons that the litigation privilege is intended to protect from retaliatory lawsuits. Our review of the witnesses' testimony demonstrates there is nothing on which to conclude that their testimony would fall outside our Supreme Court's broad application of the litigation privilege to witness testimony.

Accordingly, in exercising de novo review over the motion to dismiss, we conclude that the motion to dismiss should be granted with respect to all remaining counts of the complaint to the extent that they are premised on the disclosure of the plaintiff's health information by the defendant's agents during their testimony at his criminal trial. See *Paragon Construction Co.* v. *Dept. of Public Works*, 130 Conn. App. 211, 221 n.10, 23 A.3d 732 (2011) (appellate courts may order dismissal of only portions of counts of complaint). We therefore reverse that portion of the trial court's judgment denying the defendant's motion to dismiss.

II

We now turn to the remainder of the defendant's claim, namely, that, to the extent the plaintiff's negligence per se and negligent infliction of emotional distress counts are founded on allegations that the defendant unlawfully disclosed confidential health records to the state's attorney's office, the court improperly denied the motion to dismiss on the ground that it lacked a sufficient evidentiary basis to determine if the litigation privilege applied. We are not persuaded.

Unlike with statements made by witnesses during testimony, our jurisprudence regarding the application of the litigation privilege in the context of the disclosure of documents is not as well developed. Nevertheless, our Supreme Court has stated that "[t]he privilege extends to pleadings *and other papers made a part of*

a judicial or quasi-judicial proceeding, as long as the statements relate sufficiently to issues involved in a proposed or ongoing judicial proceeding . . . with the test for relevancy described as generous . . . . This is true even if the communications are false, extreme, outrageous, or malicious." (Citations omitted; emphasis added; internal quotation marks omitted.) *Dorfman* v. *Smith*, supra, 342 Conn. 601–602. Moreover, in *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727, 729, this court concluded that the defendants, who had produced documents and provided testimony specifically in response to a duly issued subpoena, were protected by the doctrine of absolute immunity as applied to the litigation privilege. In reaching that conclusion, the court noted that "the defendants are not alleged to have acted outside of the subpoena or to have done anything more than answer questions and produce documents that were asked or requested of them during the hearing." Id., 727.

The plaintiff nonetheless argues that the litigation privilege should not be applied by courts in lawsuits alleging the unlawful disclosure of confidential medical records because its application would somehow contravene our Supreme Court's decision in *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 327 Conn. 550–51, in which the court recognized that Connecticut's common law included a cause of action against medical providers for the unlawful disclosure of medical information. We are not convinced that anything in the *Byrne* decision precludes application of the litigation privilege in the present case, most certainly not in the blanket manner suggested by the plaintiff.

In *Byrne*, the plaintiff had initiated a civil action against the defendant health care provider asserting various causes of action, including counts sounding in

negligence and negligent infliction of emotional distress. Id., 543–44. The plaintiff alleged that the defendant had breached her right to confidentiality in certain protected health information by disclosing the information in response to a subpoena without her consent. Id., 542–43. The trial court granted summary judgment in favor of the defendant on the negligence and negligent infliction of emotional distress counts, determining that "no courts in Connecticut, to date, recognized or adopted a common-law privilege for communications between a patient and physicians." (Internal quotation marks omitted.) Id., 548. The plaintiff appealed. Id., 549. After transferring the appeal to its docket; id., 541 n.2; our Supreme Court recognized a common-law cause of action for breach of the duty of confidentiality in the physician-patient relationship by the disclosure of medical information, *unless the disclosure was otherwise allowed by law*. Id., 572–73. It reversed the trial court's summary judgment, agreeing with the plaintiff that the defendant health care provider owed the plaintiff a common-law duty of confidentiality and that a common-law action was not barred or preempted by General Statutes § 52-146o or the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq., and its implementing regulations. Id., 542, 550. The issue of immunity from suit under the litigation privilege was not presented to, considered by, or addressed by our Supreme Court in *Byrne*. Consequently, we agree with the defendant that the plaintiff's reliance on *Byrne* is entirely misplaced.

The defendant, in its most recent motion to dismiss, seeks to use the litigation privilege to bar the present action premised on the negligent disclosure of confidential medical information. It has, however, failed to present the court with evidentiary support for its varying arguments as to why this matter should not proceed to trial. Unlike in *Bruno*, in which there was no indication

that the defendants had done anything other than comply with a valid subpoena issued as part of judicial proceedings; see *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727–28; here, the allegations of the complaint, read broadly and in the light most favorable to the plaintiff, indicate that the defendant could have potentially disclosed confidential information in excess of that required under the subpoena. The burden certainly will be on the plaintiff at trial to produce evidence in support of such an allegation. The defendant, simply by virtue of evidence demonstrating that it produced sealed medical records in compliance with the subpoena and accompanying court order, does not, however, negate the possibility that the defendant also disclosed other records to the state's attorney.

As the plaintiff notes in his appellate brief, despite six years of litigation, the defendant has not filed an answer to the complaint admitting or denying his allegations, which, in the context of a motion to dismiss, we must accept as true. Furthermore, there has never been an evidentiary hearing in this matter. We, like the trial court, cannot, on the basis of the scant factual record developed thus far, conclude that the plaintiff's claims should be barred by absolute immunity under the litigation privilege. Accordingly, we reject the defendant's claim that the court improperly denied its motion to dismiss on the basis of evidentiary insufficiency.

Although the policy considerations that underlie the litigation privilege could, under the right circumstances, support its application to lawsuits alleging the unlawful disclosure of confidential medical information, including by the production of documents in response to a subpoena duces tecum and court order, we leave that issue to be decided in the first instance by the trial court in this matter on a more complete record and in accordance with the guidance provided by our Supreme Court in *Dorfman* v. *Smith*, supra, 342 Conn. 592–94.

Finally, although we conclude that a determination regarding the applicability of the litigation privilege can be made only after developing the necessary record, including precisely what documents and information were disclosed, what evidence the plaintiff has that the defendant exceeded its obligations under the subpeona, and how, to whom and when documents were disclosed, we are not persuaded that the court abused its discretion by not conducting, *sua sponte*, an evidentiary hearing to resolve these factual issues. Whether the litigation privilege applies in the present case largely turns on whether the defendant disclosed records that were not covered by the subpoena and court orders, which is an issue that is clearly intertwined with the merits of the action. See *Conboy* v. *State*, 292 Conn. 642, 653–54, 974 A.2d 669 (2009). Furthermore, the defendant never requested an evidentiary hearing, despite the court having indicated, when it denied the defendant's summary judgment motion, that issues of material fact existed regarding the facts surrounding the disclosure of documents in this matter. It was well within the discretion of the court not to resolve a jurisdictional issue by ordering an evidentiary hearing but to leave the matter for resolution following additional discovery or a trial on the merits. See id. The defendant is not precluded from renewing its claim—either at trial or in a renewed motion to dismiss based on a more fulsome record—that liability, if it exists on these facts, should be barred by the litigation privilege.[10]

The judgment is reversed with respect to the two remaining counts to the extent that they are premised

[10] We are cognizant that, at this stage of the proceedings, the defendant effectively has lost its right to protection against suit. The applicability of the litigation privilege, however, was raised late in these proceedings, the defendant failed to provide the court with an adequate record for review of its claims, and it did not request an evidentiary hearing prior to the court ruling on the motion to dismiss. The trial court, however, may yet conclude that the privilege is applicable and thus provide relief by barring liability against the defendant.

on the testimony given by the defendant's agents at the plaintiff's criminal trial and the case is remanded with direction to grant the motion to dismiss in part; the judgment is affirmed in all other respects without prejudice to the defendant renewing its claim regarding the applicability of the litigation privilege.

In this opinion the other judges concurred.