MILFORD REDEVELOPMENT & HOUSING PARTNERSHIP *v.* LISA GLICKLIN (AC 46290)

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

Syllabus

The plaintiff public housing authority appealed from the judgment of the trial court for the defendant in its summary process action. It claimed, inter alia, that the court improperly raised, sua sponte, the unpleaded special defense of cure to defeat its action. *Held*:

The trial court had subject matter jurisdiction to hear the plaintiff's summary process action, as, contrary to the defendant's claim, the plaintiff's pretermination notice to her was not jurisdictionally or legally defective.

The trial court improperly considered the special defense of cure in rendering judgment for the defendant, as the defendant did not plead that special defense.

The trial court applied an incorrect legal standard by improperly placing the burden of proof on the plaintiff with respect to the defendant's unpleaded special defense.

Argued May 29—officially released October 15, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, and tried to the court, *Spader*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Reversed*; *new trial.*

Christine M. Gonillo, for the appellant (plaintiff).

Tyrese M. Ford, with whom was *Shelley A. White*, for the appellee (defendant).

Opinion

ALVORD, J. In this summary process action, the plaintiff, Milford Redevelopment & Housing Partnership, appeals from the judgment of the trial court rendered in favor of the defendant, Lisa Glicklin. The plaintiff initiated this summary process action against the defendant claiming that the defendant repeatedly violated the plaintiff's smoke-free housing policy. In rendering judgment for the defendant, the trial court rejected the plaintiff's claim on the basis that the plaintiff failed to prove that the defendant had not cured the violation of the plaintiff's policy. On appeal, the plaintiff raises interrelated claims. First, it claims that the court improperly raised sua sponte the unpleaded special defense of cure to defeat its summary process action. Second, it claims that, even if it was proper for the court to raise the special defense of cure sua sponte, the court improperly placed the burden on the plaintiff to prove that the defendant did not cure her violations.

The defendant, in addition to disputing the plaintiff's claims, argues that the trial court lacked subject matter jurisdiction over the action because of alleged inadequacies in the pretermination notice[1] provided to the defendant. For the reasons that follow, we reject the defendant's jurisdictional argument and agree with the plaintiff that the court improperly rendered judgment in favor of the defendant.[2] Accordingly, we reverse the judgment of the court.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The defendant has been a tenant of 100 Viscount Drive, Apartment C12, in Milford (property) for more than ten years. The

[1] Federal regulations refer to the notice as a "termination notice." See 24 C.F.R. § 274.4 (2021). We, however, "use the term 'pretermination [notice]' in this opinion to reflect the fact that the federal notice precedes a notice to quit, which is the sole mechanism to terminate a tenancy under Connecticut law." *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 47 n.1, 209 A.3d 616 (2019). Both the plaintiff and the defendant also have used the term "pretermination notice" throughout the trial and appellate court proceedings.

[2] The defendant also contends, as an alternative ground for affirming the judgment of the trial court, that the plaintiff waived its right to evict the defendant by renewing her lease in the intervening time between the issuance of the pretermination notice and the service of the notice to quit. We decline to review the defendant's proposed alternative ground for affirming the judgment because the record is inadequate for review. First, although the defendant raised as a special defense that the plaintiff "accepted rent or otherwise waived the Notice to Quit after I received it," the trial court did not address this special defense. "It is well known that [o]nly in [the] most exceptional circumstances can and will this court consider [an alternative ground for affirmance] . . . that has not been raised and *decided* in the trial court." (Emphasis in original; internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 635 n.7, 289 A.3d 609 (2023). The defendant has presented no argument that this case presents an exceptional circumstance to warrant our review. Second, the record lacks the requisite factual findings necessary for us to decide this claim. See *Hartford* v. *McKeever*, 314 Conn. 255, 274, 101 A.3d 229 (2014) (Appellate Court was not required to review alternative ground for affirmance "when the record was inadequate for review of the claim because the trial court had not made the requisite factual findings").

plaintiff, which is a public housing authority (PHA), owns and operates the property in accordance with federal regulations. The plaintiff, as mandated by title 24 of the Code of Federal Regulations, § 965.653,[3] requires its tenants to sign a smoke-free housing policy (no-smoking policy), which provides, inter alia, "Smoking outside [the plaintiff's] building is limited to specific area(s) that are defined on a property-by-property basis. Each resident will be given a site map that indicates the specific locations." The no-smoking policy further provides: "Failure of any Tenant to follow the [no-smoking] policy will be considered a lease violation and will subject the resident to all lease enforcement procedures under the [plaintiff's] Admissions and Continued Occupancy Policy (ACOP), which include termination of lease." The property has a designated smoking area that is located twenty-five feet from the entrance to the building.

On July 26, 2021, the defendant signed a copy of the no-smoking policy and attested: "I have read and

[3] Title 24 of the 2021 edition of the Code of Federal Regulations, § 965.653, provides: "(a) In general. PHAs must design and implement a policy prohibiting the use of prohibited tobacco products in all public housing living units and interior areas (including but not limited to hallways, rental and administrative offices, community centers, day care centers, laundry centers, and similar structures), as well as in outdoor areas within 25 feet from public housing and administrative office buildings (collectively, 'restricted areas') in which public housing is located.

"(b) Designated smoking areas. PHAs may limit smoking to designated smoking areas on the grounds of the public housing or administrative office buildings in order to accommodate residents who smoke. These areas must be outside of any restricted areas, as defined in paragraph (a) of this section, and may include partially enclosed structures. Alternatively, PHAs may choose to create additional smoke-free areas outside the restricted areas or to make their entire grounds smoke-free.

"(c) Prohibited tobacco products. A PHA's smoke-free policy must, at a minimum, ban the use of all prohibited tobacco products. Prohibited tobacco products are defined as:

"(1) Items that involve the ignition and burning of tobacco leaves, such as (but not limited to) cigarettes, cigars, and pipes.

"(2) To the extent not covered by paragraph (c) (1) of this section, waterpipes (hookahs)."

understand the above smoking policy, and I agree to comply fully with the provisions. I understand that failure to comply may constitute cause for termination of my lease." On October 1, 2021, the defendant entered into a written lease with the plaintiff to renew her use and occupancy of the property. On June 8, 2022, the plaintiff's video surveillance system captured the defendant smoking within twenty-five feet of the building. On June 13, 2022, the plaintiff caused a pretermination notice to be sent to the defendant on the basis that she had "smoked within twenty-five feet of [the building], despite prior warnings and having full knowledge of [the no-smoking policy]." The pretermination notice informed the defendant that she had a right to initiate the plaintiff's federally mandated grievance process by contacting the plaintiff "no later than ten days after you receive this notice, or by June 27, 2022," and provided the ways in which she could contact the plaintiff.[4] Additionally, the pretermination notice included a cure provision, which provided: "If the above violations cannot be or are not remedied within thirty (30) days, then [the plaintiff] may choose to terminate your lease and

[4] Specifically, the pretermination notice stated: "You have a right to use the Tenant Grievance Procedures to address the issues contained in this [pretermination notice]. In order to do this, you MUST do BOTH of the following: i) Contact [the plaintiff] no later than ten days after you receive this Notice, or by June 27, 2022; and ii) Make a specific request to use the tenant grievance procedures. You may contact [the plaintiff] to request to use the tenant grievance procedures in one or more of the following ways: By leaving a message at 203-877-3223 ext. 15 no later than June 27, 2022; By mailing a written request to use the tenant grievance procedures to [the plaintiff's] management office at P.O. Box 291, Milford, CT 06460 postmarked no later than June 27, 2022; or By hand delivery of a written request to use the tenant grievance procedures to [the plaintiff] at 75 DeMaio Drive, Milford CT, and stamped received by [the plaintiff's] personnel no later than end of business on June 27, 2022. Your failure to make such a specific request in a timely fashion may result in a denial of the request. If a grievance hearing is held and is resolved against you, [the plaintiff] may commence an immediate action to recover possession of the premises. A Notice to Quit terminating your tenancy will precede any such action."

evict you. If [the plaintiff] chooses to proceed with lease termination, [the plaintiff] shall have a marshal serve you with a Notice to Quit that will tell you the date [the plaintiff] has terminated your lease and expects you to vacate the property. For purposes of counting your [thirty day] cure period, this [pretermination notice] shall be deemed received by you by June 16, 2022. Therefore, the [thirty day] period runs through and includes July 16, 2022." The defendant did not request to initiate the grievance process. Thereafter, on October 18, 2022, the plaintiff served the defendant with a notice to quit with a quit date of October 23, 2022. The defendant did not vacate the premises in accordance with the notice to quit.

The plaintiff commenced the present summary process action in December, 2022. On December 13, 2022, the defendant appeared as a self-represented party and filed a summary process answer to the complaint on Judicial Form JD-HM-5, titled "Summary Process (Eviction) Answer to Complaint." See Official Court Webforms, Form JD-HM-5, available at https://jud.ct.gov/webforms/forms/hm005.pdf (last visited October 3, 2024). In her answer, the defendant selected, inter alia, a special defense, which stated: "Additional reasons why I should not be evicted" and handwrote "I have lived on [the] premises for [thirteen years] and have complied with all rent payments and I am attempting to quit smoking." She also selected a second special defense: "The landlord accepted rent or otherwise waived the Notice to Quit after I received it." The defendant did not, in her answer, select as a special defense the statement: "I remedied the issue(s) listed in the pre-termination notice delivered to me under Connecticut law."

The matter was tried to the court, *Spader*, *J.*, on January 12, 2023. At trial, the plaintiff presented the testimony of its property manager, Robert Hughes, and offered into evidence (1) a photograph dated June 8,

2022, which depicted the defendant smoking within twenty-five feet of the building; (2) a smoking offense charge slip dated January 27, 2022; and (3) an April 28, 2020 letter advising the defendant that vaping constituted a violation of the no-smoking policy. Hughes testified that the plaintiff is a federally subsidized housing authority and requires all tenants to sign the no-smoking policy upon the renewal of their leases. Specifically, Hughes testified that the plaintiff "was probably the first in the state to have the . . . no-smoking policy. And later on [the United States Department of Housing and Urban Development] came up with their own [no-smoking] policy as well, which layers over [the plaintiff's]." Hughes also testified that the defendant repeatedly had violated the no-smoking policy, and provided as an example that, in January, 2022, he had issued the defendant a smoking offense charge slip for smoking inside of her apartment and subsequently issued her a $25 fine.[5]

The defendant testified that "I would walk to the tree where we would smoke and sometimes, yes, I would inadvertently light a cigarette. I have to be honest about that, but it was not done to be malicious or anything like that. It was just done mindlessly, to be honest with you." The defendant testified that she "messed up by walking in front of the building, in all honesty" and that she also had smoked in lawn chairs but believed that the chairs were located more than twenty-five feet from the building. The defendant further testified that she has attempted to quit smoking and had tried vaping as an alternative and that she did not recall receiving the smoking offense charge slip or paying a fine for the January, 2022 violation.

[5] Hughes also testified that a tenant living in a different PHA property also owned by the plaintiff has commenced an action with the Commissioner of Human Rights and Opportunities, alleging that the plaintiff has failed to enforce its no-smoking policy.

On February 21, 2023, the court issued its memorandum of decision. The court determined that "the plaintiff claimed multiple violations of the no-smoking policy as the basis of its claim of a lease violation. The evidence presented at trial, however, only established violations prior to the pretermination notice. The plaintiff's witness testified as to the first smoking offense ticket in January, 2022, and the 2020 vaping letter. The photo presented into evidence showed the outdoors smoking as time stamped by the plaintiff's surveillance camera as being taken June 8, 2022, a week prior to the letter. The plaintiff did not present evidence of violations after the sending of the letter. [Hughes] advised that he has received complaints about many tenants, not just [the defendant], and he does not have photos but is adamant that she has violated the [no-smoking policy]. While there may have been incidents and that is why the plaintiff proceeded with this case, none were testified to nor was evidence provided therefore.

"While the Appellate Court cases . . . seem to indicate that it is the defendant's obligation to raise her curing the lease violations as a special defense, understanding that the defendant is defending herself in a self-represented capacity, the court must still consider the evidence before it in making its decision. The defendant did not proactively claim that she did not further violate the [no-smoking] policy, only that she was trying to quit smoking and attempting to comply with the [no-smoking] policy. To terminate the defendant's lease, however, the court must find that the defendant, by a fair preponderance of the evidence, did not cure lease violations. The evidence before the court only establishes an initial violation of the [no-smoking] policy but does not establish any violations after the pretermination notice. The court suspects that the defendant may have violated the [no-smoking] policy, but that suspicion is not supported by any evidence presented by the plaintiff.

"Accordingly, the court enters judgment for the defendant and reinstates the defendant's lease with the plaintiff. This is without prejudice for the plaintiff to start a new action with evidence of noncompliance with the lease following an additional pretermination notice." (Emphasis omitted.) This appeal followed.

The defendant, through counsel, filed a motion to dismiss this appeal on the basis that the trial court lacked subject matter jurisdiction over the plaintiff's action because the "[p]laintiff's federally required pretermination notice did not comply with the time frame established by 42 U.S.C. § 1437d (k) (2)[6] and (*l*)[7] for the defendant public housing tenant to request

[6] Title 42 of the United States Code, § 1437d (k), titled "Administrative grievance procedure regulations: grounds of adverse action, hearing, examination of documents, representation, evidence, decision; judicial hearing; eviction and termination procedures," provides in relevant part:

"The Secretary shall by regulation require each public housing agency receiving assistance under this chapter to establish and implement an administrative grievance procedure under which tenants will—

"(1) be advised of the specific grounds of any proposed adverse public housing agency action;

"(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (*l*);

"(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

"(4) be entitled to be represented by another person of their choice at any hearing;

"(5) be entitled to ask questions of witnesses and have others make statements on their behalf; and

"(6) be entitled to receive a written decision by the public housing agency on the proposed action. . . ."

[7] Title 42 of the United States Code, § 1437d (*l*), provides in relevant part: "Each public housing agency shall utilize leases which . . .

"(4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than—

"(A) a reasonable period of time, but not to exceed 30 days—(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or (ii) in the event of any drug-related or violent criminal activity or any felony conviction;

"(B) 14 days in the case of nonpayment of rent; and

"(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply . . . ."

an administrative grievance hearing to challenge the proposed termination of her lease." (Footnotes added.) On June 28, 2023, this court denied the defendant's motion to dismiss without prejudice to the parties addressing the jurisdictional issue raised by the defendant in their appellate briefs. Additional facts will be set forth as necessary.

I

As a preliminary matter, we address whether the trial court had subject matter jurisdiction over the plaintiff's summary process action. The defendant argues that the court lacked subject matter jurisdiction because the pretermination notice sent to her was inadequate in two respects. First, she argues that the pretermination notice was defective in that it failed to provide the proper time frame for her to initiate the grievance process. Second, she argues that it "fail[ed] to provide . . . sufficient factual information for [the defendant] to defend against the claimed violation of [the no-smoking policy]." We reject the defendant's claims that the pretermination notice was insufficient and, therefore, conclude that the court had subject matter jurisdiction over the summary process action.

The following legal principles are relevant to our resolution of this claim. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Gibson* v. *Jefferson Woods Community, Inc.*, 206 Conn. App. 303, 306, 260 A.3d 1244, cert. denied, 339 Conn. 911, 261 A.3d 747 (2021). A claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings, including on appeal. See, e.g.,

Mention v. *Kensington Square Apartments*, 214 Conn. App. 720, 727, 280 A.3d 1195 (2022). Thus, a challenge to a court's subject matter jurisdiction is a threshold matter that we must resolve prior to addressing the claims on appeal. See *Housing Authority* v. *Martin*, 95 Conn. App. 802, 808, 898 A.2d 245, cert. denied, 280 Conn. 904, 907 A.2d 90 (2006).

"There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction. General Statutes § 51-164s. The jurisdiction of the Superior Court in summary process actions, however, is subject to [certain] condition[s] precedent. . . . [B]efore a landlord may pursue its statutory remedy of summary process . . . the landlord must prove its compliance with all the applicable preconditions set by state and federal law for the termination of a lease." (Citation omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 56, 209 A.3d 616 (2019). "When a defendant is a tenant of federally subsidized housing, federal law must be followed in addition to state law. . . . Under federal law, 42 U.S.C. § 1437d (*l*) and 24 C.F.R. § 966.4 (*l*) (3),[8] a landlord is required to issue a pretermination notice before commencing a summary process action." (Citation omitted;

[8] Title 24 of the 2021 edition of the Code of Federal Regulations, § 966.4, provides in relevant part: "A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter. . . . (*l*) Termination of tenancy and eviction . . . (3) Lease termination notice. (i) The PHA must give written notice of lease termination of: (A) 14 days in the case of failure to pay rent; (B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days): (1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or (2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or (3) If any member of the household has been convicted of a felony; (C) 30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter period shall apply. . . ."

footnote added.) *Housing Authority* v. *Martin*, supra, 95 Conn. App. 808.

A

We begin with the defendant's argument that the pretermination notice was jurisdictionally defective because it failed to provide her with the legally required amount of time to invoke the grievance process. The defendant argues that 42 U.S.C. § 1437d (k) (2) and (*l*) clearly and unambiguously required that she be given thirty days to start the grievance process. Thus, according to the defendant, because the pretermination notice that she received notified her that she had ten days to do so, it was legally insufficient. The plaintiff argues that 42 U.S.C. § 1437d (k) (2) and (*l*) do not apply to the initiation of the grievance process and that it provided the defendant with a pretermination notice that complied with federal law because it informed the defendant that she had a reasonable period of time, ten days, to invoke the grievance process. We reject the defendant's claim that the pretermination notice was jurisdictionally defective.[9]

The defendant's argument rests on 42 U.S.C. § 1437d (k), which provides in relevant part: "The Secretary [of Housing and Urban Development] shall by regulation require each [PHA] receiving assistance under this chapter to establish and implement an administrative grievance procedure under which tenants will—(1) be advised of the specific grounds of any proposed adverse public housing agency action; (2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (*l*); (3) have an opportunity to examine any documents

[9] The defendant does not argue on appeal that the court lacked subject matter jurisdiction on the basis that the pretermination notice did not comply with state law. Accordingly, our analysis in this subsection is limited to whether the pretermination notice complied with federal law.

or records or regulations related to the proposed action; (4) be entitled to be represented by another person of their choice at any hearing; (5) be entitled to ask questions of witnesses and have others make statements on their behalf; and (6) be entitled to receive a written decision by the public housing agency on the proposed action. . . .'' In other words, § 1437d (k) instructs the Secretary of Housing and Urban Development to develop regulations setting forth the requirements, standards and criteria for grievance procedures established and implemented by PHAs.

Title 42 of the United States Code, § 1437d (*l*), in turn, provides in relevant part: ''Each public housing agency shall utilize leases which . . . (4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than (A) a reasonable period of time, but not to exceed 30 days—(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened . . . and (C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply . . . .''

We now turn to the defendant's specific claim on appeal: that the plaintiff's pretermination notice is jurisdictionally defective in that it provides her with a ten day period to invoke the grievance process rather than the thirty day period to which she claims she is entitled pursuant to 42 U.S.C. § 1437d (k) (2) and (*l*).[10] The defendant's claim rests on a flawed premise. Section 1437d (k) does not mandate that the amount of time afforded a tenant to invoke the grievance process must be identified in the pretermination notice. Rather, it

[10] In resolving the defendant's claim, our inquiry is limited to whether the *pretermination notice* is jurisdictionally defective in this respect. The question of whether the *grievance* procedure, as established and implemented by the plaintiff, complies with federal law is not before this court.

sets forth the substantive requirements of what processes must be afforded to the tenant before eviction.

In support of her construction, the defendant relies on *Housing Authority* v. *Love*, 375 Ill. App. 3d 508, 509–10, 874 N.E.2d 893 (2007), in which the Appellate Court of Illinois considered whether a PHA's grievance procedure, which required that any grievance be made within ten days after the grievable event, violated 42 U.S.C. § 1437d (k) (2). In that case, the PHA "served upon [the tenant] a 30-day notice of termination of the lease" on September 13, 2006, and the tenant "hand-delivered a grievance to [the PHA], contesting the termination of the lease" on September 27, 2006. Id., 509. Because "the deadline for submitting a grievance was September 23, 2006," the PHA considered the grievance untimely and never responded to it. Id. In the ensuing eviction action, the tenant moved for judgment in her favor "on the ground that [the PHA] had failed to provide her the grievance procedure required by federal law. [The tenant] argued that under the applicable federal statute, her grievance was timely because she submitted it within the 30-day period in the notice of termination. See 42 U.S.C. §§ 1437d (k) (2), (*l*) (4) (C) (2000). The [trial] court disagreed with [the tenant's] interpretation of the statute and held the grievance to be untimely because [she] had failed to submit it within 10 days, the deadline to which the parties agreed in the lease." Id., 509–10.

The tenant appealed from the judgment for the PHA; id., 510; "arguing that [the PHA] failed to provide her the grievance procedure required by federal statutory law." Id., 509. The Illinois Appellate Court agreed with the tenant, concluding that, because she submitted her grievance within thirty days after receiving the termination notice, it was timely. Id., 512. Accordingly, the court held that the tenant had invoked the grievance

proceeding notwithstanding the ten day limitation provided for in the parties' lease. Id.

In the present case, however, the defendant never sought to invoke the grievance process. Moreover, on appeal, she does not claim that that the plaintiff's procedure violates the federal statute by failing to afford her "an opportunity for a hearing before an impartial party upon timely request within" thirty days.[11] Instead, she claims that, "[b]ecause . . . [the plaintiff's] pretermination notice failed to provide the proper time frame for [her] to initiate [the plaintiff's] administrative grievance process," the court lacked subject matter jurisdiction. Given the differences between the claim raised by the defendant in the present case and the claim addressed by the court in *Love*, her reliance on that case is misplaced. The court in *Love* considered whether the grievance procedure itself denied the tenant "an opportunity for a hearing before an impartial party upon timely request," and not whether 42 U.S.C. § 1437d (k) (2) required that the pretermination notice specify the time frame for invoking the grievance process. Accordingly, *Love* is distinguishable from the present case.

Furthermore, the statutory time requirement set forth in 42 U.S.C. § 1437d (k) (2) and (*l*), on which the defendant relies, applies to the period of time within which the defendant must have an opportunity for a hearing before an impartial party—not to the time for initiation of the grievance process. As the defendant acknowledges in her appellate brief, such a hearing only occurs if the issue leading to the pretermination notice is not resolved earlier in the grievance process during informal negotiations. Significantly, although § 1437d (k) provides a number of rights a tenant has in connection

[11] We note that, although the parties' lease reflects that the plaintiff provided the defendant with a copy of its "Grievance Policy and Procedure," that document does not appear in the record.

with such a formal hearing, it does not require that any of those rights be included in the pretermination notice.

The required contents of the pretermination notice are instead established by the regulations. Title 24 of the 2021 edition of the Code of Federal Regulations, § 247.4 (a), provides: "The landlord's determination to terminate the tenancy shall be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section." Nothing therein requires the pretermination notice to identify timelines related to initiating the grievance procedure.

Additionally, 24 C.F.R. § 966.4 (*l*) (3) (ii) provides that "[t]he notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right (pursuant to § 966.4 (m)) to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure."[12]

[12] The defendant does not claim that the pretermination notice was inadequate because it did not expressly tell her that she had the right to request a hearing as opposed to referring the defendant to the grievance procedure, which she acknowledged receiving when she renewed her lease in 2021. See footnote 11 of this opinion.

Although the regulations require that the pretermination notice inform the tenant of the right to request a hearing in accordance with the PHA's grievance procedure, they do not require that the notice specify the time frame for invoking the grievance process. In the present case, the defendant does not claim that she was unaware of the plaintiff's grievance procedure, that the procedure did not comply with federal law, or that she was unaware of her right to request a hearing before an impartial party. Instead, her argument is focused on a purported deficiency in the pretermination notice based on a requirement that does not exist. Accordingly, we reject the defendant's jurisdictional argument.

B

The defendant also raises, for the first time in her appellate brief, an argument that the plaintiff "fail[ed] to provide a pretermination notice with sufficient factual information for [the defendant] to defend against the claimed violation of [the policy, which] deprived the trial court of subject matter jurisdiction over [the plaintiff's] action." The defendant cites to 42 U.S.C. § 1437d (k) and (*l*) and General Statutes § 47a-15 for the proposition that the plaintiff was required to serve the defendant with "a valid pretermination notice informing [her] of the basis for the proposed termination of her lease . . . ." The plaintiff responds that the pretermination notice it provided to the defendant contained "sufficient information to enable [her] to remedy or cure the violation . . . ." We agree with the plaintiff.

Although the defendant raises this argument for the first time in her appellate brief, we nevertheless address it on appeal. See *Mention* v. *Kensington Square Apartments*, supra, 214 Conn. App. 727 (claim that court lacks subject matter jurisdiction can be raised at any

time during proceedings, including on appeal). The following legal principles are, thus, necessary for our resolution of this claim. With respect to federal law, "[s]ervice of a valid pretermination notice is a condition precedent to a summary process action. See [24 C.F.R.] § 247.4 [2018].[13] In any subsequent summary process action, the landlord can rely only on grounds that were set forth in that notice, unless the landlord had no knowledge of an additional ground at the time the pretermination notice was served. . . . With respect to the statement of such grounds in the pretermination notice, the regulations mandate that the notice must, among other things, state the reasons for the landlord's action with *enough specificity so as to enable the tenant to prepare a defense* . . . ." (Citation omitted; emphasis in original; footnote altered; internal quotation marks omitted.) *Presidential Village, LLC* v. *Perkins*, supra, 332 Conn. 57.

In Connecticut, "[s]ummary process is a statutory remedy which enables the landlord to recover possession from the tenant upon the termination of a lease. . . . Pursuant to § 47a-15, before a landlord may proceed with a summary process action, except in those situations specifically excluded, the landlord must first deliver a [pretermination] notice to the tenant specifying the alleged violations and offer the tenant a . . . period to remedy. . . . The legislative purpose [of a

[13] "Title 24 of the 2018 edition of the Code of Federal Regulations, § 247.4 (a), provides: 'The landlord's determination to terminate the tenancy shall be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section.' " *Presidential Village, LLC* v. *Perkins*, supra, 332 Conn. 57 n.12.

pretermination or *Kapa*[14] notice] is to discourage summary evictions against first offenders . . . . Section 47a-15 is separate from and preliminary to the maintenance of a summary process action pursuant to . . . [General Statutes] § 47a-23. . . . The Superior Court has jurisdiction to hear a summary process action only if the landlord has previously served the tenant with a notice to quit pursuant to § 47a-23. . . .

"The text of § 47a-15 is clear and unambiguous: Prior to the commencement of a summary process action . . . the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. . . . [I]f substantially the same act or omission for which notice was given recurs within six months, the landlord may terminate the rental agreement in accordance with the provisions of [§§] 47a-23 to 47a-23b, inclusive." (Citations omitted; footnote added; internal quotation marks omitted.) *Housing Authority* v. *Rodriguez*, 178 Conn. App. 120, 126–27, 174 A.3d 844 (2017). "In order to demonstrate its compliance with the notices required for a proper termination, a landlord must show that the notices given to the tenant apprised her of the information a tenant needs to protect herself against premature, discriminatory or arbitrary eviction." *Jefferson Garden Associates* v. *Greene*, 202 Conn. 128, 143, 520 A.2d 173 (1987).

In the present case, the defendant maintains that the plaintiff provided her with an invalid pretermination notice that "failed to specify where [the defendant] smoked and did not indicate when the alleged violation took place." In support of her argument, the defendant relies on a footnote in *Presidential Village, LLC* v. *Perkins*, supra, 332 Conn. 54 n.10, that states: "[I]f the

[14] *Kapa Associates* v. *Flores*, 35 Conn. Supp. 274, 278, 408 A.2d 22 (1979).

lack of specificity in a notice discourages the tenant from taking steps to cure the default, it also could impair the tenant's ability to establish an equitable defense to eviction." The pretermination notice in the present case, however, provided the defendant with the information necessary for her to defend herself against possible eviction. Specifically, it identified the lease provision that the defendant violated, stated that she had smoked within twenty-five feet of the building, and included a copy of the no-smoking policy. Moreover, the pretermination notice included a cure provision that informed the defendant that she had thirty days to remedy the violation. We cannot conclude that the information provided by the plaintiff to the defendant "discourages [her] from taking steps to cure the default" or "impair[s] [her] ability to establish an equitable defense to eviction." Id. Accordingly, the pretermination notice complied with federal and state law, and the court, therefore, had subject matter jurisdiction over this matter.

II

Having concluded that the court had subject matter jurisdiction over this summary process action, we now turn to the plaintiff's claims on appeal. The plaintiff claims that the court (1) improperly rendered judgment for the defendant because she did not assert as a special defense that she cured the no-smoking policy violation, and (2) applied an incorrect legal standard to find that the plaintiff did not prove that the defendant had not cured her violation of the no-smoking policy.[15] We address each claim in turn.

[15] The plaintiff also claims that the defendant could not cure her most recent violation of the no-smoking policy because she had violated it on several occasions. Because we agree with the plaintiff on its claims regarding the court's consideration of an unpleaded special defense, we need not address this additional claim.

A

The plaintiff first claims that the court improperly rendered judgment for the defendant because she did not assert as a special defense that she cured the violation of the no-smoking policy. The defendant responds that she pleaded the special defense of cure because her "answer can easily be construed as pleading the equitable doctrine against forfeiture as a special defense which incorporates cure as one of its elements." We agree with the plaintiff.

Our resolution of this claim "requires us to interpret the defendant's pro se answer. As a consequence, the issue before the court invokes our plenary power to review the legal effect of pleadings." *Vanguard Engineering, Inc.* v. *Anderson*, 83 Conn. App. 62, 65, 848 A.2d 545 (2004). "A defendant's failure to plead a special defense precludes the admission of evidence on the subject. . . . Although our courts are consistently . . . solicitous of the rights of pro se litigants, the rules of practice cannot be ignored to the detriment of other parties. . . . It would be fundamentally unfair to allow any defendant to await the time of trial to introduce an unpleaded defense. Such conduct would result in trial by ambuscade to the detriment of the opposing party." (Citations omitted; internal quotation marks omitted.) *Oakland Heights Mobile Park, Inc.* v. *Simon*, 36 Conn. App. 432, 436–37, 651 A.2d 281 (1994). In a summary process action, "[i]f a tenant claims that a breach can be and has been remedied and is no longer continuing, the tenant should state those claims in a special defense to the summary process action."[16] *Housing Authority* v. *Martin*, supra, 95 Conn. App. 814.

[16] "This is consistent with Practice Book § 10-50, which provides in relevant part: 'No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. . . .' " *Housing Authority* v. *Martin*, supra, 95 Conn. App. 814 n.8.

The defendant did not plead in her answer that she cured the violation within the thirty days prescribed in the pretermination notice. Although we are cognizant that the defendant was self-represented at this time, she filed her answer on Judicial Form JD-HM-5, titled "Summary Process (Eviction) Answer to Complaint," which provides express instructions on how to complete that form. See Official Court Webforms, Form JD-HM-5, available at https://jud.ct.gov/webforms/forms/hm005.pdf (last visited October 3, 2024). Section 2 of the form is dedicated to special defenses and provides a defendant with a number of special defenses, each of which has a box that a defendant can select to indicate that they are asserting that specific defense. Moreover, the form includes a definition of the term "special defenses" that reads: "Facts showing the court that the plaintiff has no legal right to evict you." Included in section 2 in the list of special defenses is the statement: "I remedied the issue(s) listed in the pre-termination notice delivered to me under Connecticut law." The defendant did not select that special defense and, instead, selected the box immediately underneath it, which is accompanied by the special defense: "Additional reasons why I should not be evicted . . . ." The defendant handwrote as an additional reason that she is "attempting to quit smoking." She, therefore, did not plead that she cured the violation.[17]

Having determined that the defendant did not plead the special defense of cure, we must next determine

[17] In her appellate brief, the defendant argues that "[t]he language in [her] [a]nswer can easily be construed as pleading the equitable doctrine against forfeiture as a special defense which incorporates cure as one of its elements." In light of our conclusion that the court erred in rendering judgment on the unpleaded special defense of cure, we recognize that the court did not consider her special defense "I have lived on the premises for [thirteen years] and I have complied with all rent payments and I am attempting to quit smoking." We express no opinion as to the construction of this special defense were it to be pursued on remand.

whether the court improperly rendered judgment on that basis. The court correctly acknowledged in its memorandum of decision that "[t]he defendant did not proactively claim that she did not further violate the policy, only that she was trying to quit smoking and attempting to comply with the policy." The court nevertheless determined that the evidence before it "only establishes an initial violation of the policy but does not establish any violations after the pretermination notice." Accordingly, the court improperly relied on an unpleaded special defense as a basis for rendering judgment in the defendant's favor. See *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 145 Conn. App. 696, 712, 77 A.3d 165 (2013) ("it is improper for a court, sua sponte, to apply an unpleaded special defense to defeat a plaintiff's cause of action"), aff'd, 315 Conn. 596, 109 A.3d 473 (2015); *Oakland Heights Mobile Park, Inc.* v. *Simon*, supra, 36 Conn. App. 436–37 (allowing evidence of unpleaded special defense "result[s] in 'trial by ambuscade' to the detriment of the opposing party").

We, therefore, conclude that, because the defendant did not plead as a special defense that she cured the violation, the court improperly considered it as a basis for rendering judgment in the defendant's favor.

B

The plaintiff next claims that the court applied an incorrect legal standard to find that the plaintiff did not prove that the defendant had not cured her violation of the no-smoking policy. Specifically, the plaintiff argues that "[t]he trial court . . . was not empowered to excuse [the] defendant from raising any special defense available to her or from attempting to credibly prove such defense at trial. In doing so [the court] erroneously placed the burden on the plaintiff to prove otherwise." The defendant responds that the lack of evidence presented at trial to suggest that she continued violating

the no-smoking policy supports the court's judgment in her favor. We agree with the plaintiff.

The following legal principles are relevant to our resolution of this claim. "The plenary standard of review applies to the preliminary issue of whether the court applied the correct legal standard in evaluating [a defendant's] special defense." *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 150, 219 A.3d 400 (2019), aff'd, 337 Conn. 228, 253 A.3d 1 (2020). "The burden of establishing an equitable defense in a summary process action falls on the party asserting that defense." Id., 151.

As set forth in part II A of this opinion, the defendant did not plead as a special defense that she cured the violation. Assuming, arguendo, that the defendant had pleaded as a special defense that she cured the violation, the court nevertheless improperly placed the burden of proof on the plaintiff by requiring the plaintiff to prove that a subsequent violation of the no-smoking policy had occurred after it issued the pretermination notice. The court's memorandum of decision provides that "the plaintiff claimed multiple violations of the no-smoking policy as the basis of its claim of a lease violation. The evidence presented at trial, however, only established violations prior to the pretermination notice. . . . The *plaintiff* did not present evidence of violations after the sending of the letter." (Emphasis added.) This statement is an improper application of our jurisprudence on special defenses. Had the defendant raised as a special defense that she cured the violation, then she, and not the plaintiff, would have borne the burden of proving that defense. See *O & G Industries, Inc.* v. *American Home Assurance Co.*, 204 Conn. App. 614, 625, 254 A.3d 955 (2021) ("defendant must prove the allegations in its special defenses by a fair preponderance of the evidence in a civil trial"). Accordingly, we conclude that the court applied the incorrect legal standard by improperly placing the burden of proof on

the plaintiff with respect to the defendant's unpleaded special defense.

In light of our determinations in part II A and B of this opinion, we conclude that the court improperly rendered judgment in favor of the defendant on the basis of an unpleaded special defense that the court concluded the plaintiff failed to disprove. Consequently, the court never considered the defendant's special defenses as they were pleaded on her summary process answer form.

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

In this opinion the other judges concurred.

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

Elgo, Moll and Prescott, Js.

Syllabus

The plaintiffs appealed from the trial court's judgment dismissing their action for lack of subject matter jurisdiction. The plaintiffs claimed, inter alia, that the court improperly concluded that the individual plaintiffs, who are members of the plaintiff limited liability companies (LLCs), lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs. *Held:*

The trial court improperly concluded that the individual plaintiffs lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs, as that court had properly determined that the complaint sufficiently alleged that it would have been futile for the plaintiffs to demand that the defendant B, the manager of the plaintiff LLCs, cause the plaintiff LLCs to commence the action, the allegations in the complaint satisfied the pleading requirements set forth in the applicable statutes (§§ 34-271a and 34-271c), and there was no requirement in the language of § 34-271a or § 34-271c that the individual plaintiffs receive consent from the plaintiff LLCs to bring a derivative suit.

The trial court properly concluded that the plaintiff LLCs lacked standing to maintain their direct action because the LLCs' operating agreements

established that only the LLCs' manager had the authority to commence litigation, not the LLCs' respective members, and, even if the individual plaintiffs, as members of the LLCs, had received authorization from the LLCs to commence the action, they would not have been empowered, pursuant to the language of the operating agreements of the plaintiff LLCs, to initiate a direct action on behalf of the plaintiff LLCs.

The trial court properly concluded that the individual plaintiffs lacked standing to maintain their direct action, the individual plaintiffs' having alleged injuries that were solely the result of injuries suffered by the plaintiff LLCs. This court declined to review the plaintiffs' claim that the trial court's failure to treat the defendants' motions to dismiss as motions to strike to allow them to replead and expressly allege demand futility was improper, in light of this court's conclusion that the trial court properly inferred demand futility.

Argued May 15—officially released October 15, 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 court, *Jongbloed*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed in part; further proceedings.*

Benjamin Gershberg, with whom, on the brief, was *Ridgely Whitmore Brown*, for the appellants (plaintiffs).

Jack G. Steigelfest, for the appellees (named defendant et al.).

Joseph J. Cherico, with whom were *Richard P. Colbert*, and, on the brief, *Adam M. Swanson*, and *Demery J. Ormrod*, for the appellee (defendant CoreVest American Finance Lender, LLC).

Christina S. Cassidy, with whom, on the brief, was *Ashley A. Noel*, for the appellee (defendant Lawrence Levinson).

Opinion

PRESCOTT, J. The plaintiffs, Eitan Rubin (Rubin), individually, Eitan Rubin by power of attorney and by proxy for George Rohr (Rohr), Reuven Gidanian, and three limited liability company plaintiffs, E.R. Holdings, LLC, L.E. Ventures, LLC, and Whalley Group, LLC (collectively, plaintiff LLCs), appeal from the judgment of dismissal rendered by the trial court in favor of the defendants, Barnett Brodie, CoreVest American Finance Lender, LLC, formerly known as Colony American Finance Lender, LLC (CoreVest), 5 Arch Funding Corporation (5 Arch), Attorney Lawrence Levinson and five business entities that Brodie owns or controls (Brodie defendants).[1] The plaintiffs raise four claims on appeal. First, they claim that the court improperly concluded that the individual plaintiffs, who are members of the plaintiff LLCs, lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs even though it determined that the plaintiffs sufficiently had alleged that it would have been futile for them to demand that the plaintiff LLCs' manager, Brodie, cause the LLCs to bring the action. See General Statutes §§ 34-271a and 34-271c.[2] Second, they claim that the court improperly concluded that the individual

[1] 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.

[2] General Statutes § 34-271a provides: "A member may maintain a derivative action to enforce a right of a limited liability company if: (1) The member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within ninety days; or (2) a demand under subdivision (1) of this section would be futile."

General Statutes § 34-271c provides: "In a derivative action, the complaint must state with particularity: (1) The date and content of plaintiff's demand and the response by the managers or other members to the demand; or (2) why the demand should be excused as futile."

plaintiffs had not "fairly or adequately alleged authorization to bring suit" in the plaintiff LLCs' names and, thus, improperly determined that the plaintiff LLCs lacked standing to maintain a direct action "in their own right." Third, they claim that the court improperly concluded that the individual plaintiffs lacked standing to maintain their direct action because it found the injuries they alleged "resulted solely from the injuries to the [plaintiff] LLC[s]." Finally, they claim that the court improperly declined to treat the defendants' motions to dismiss as motions to strike to allow them to replead.

We agree with the plaintiffs' first claim and conclude specifically that the court improperly determined that the individual plaintiffs lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs in light of the court's conclusion that their complaint sufficiently alleged demand futility. Accordingly, we reverse the trial court's judgment dismissing, for lack of subject matter jurisdiction, the individual plaintiffs' derivative action. We disagree with the plaintiffs' second and third claims and therefore affirm the trial court's judgment dismissing, for lack of subject matter jurisdiction, the plaintiff LLCs' and the individual plaintiffs' direct actions. We decline to review the plaintiffs' fourth claim.

The following facts, as alleged in the complaint, and procedural history are relevant to our resolution of this appeal. The plaintiff LLCs owned land and rental properties (assets) in and around New Haven. The individual plaintiffs, Rubin and Gidanian, along with Rohr, for whom Rubin is alleged to have acted "under power of attorney and [by] proxy" in bringing this action, owned, either collectively or individually, the majority, 70 percent membership interest in the plaintiff LLCs. Specifically, Rubin and Gidanian collectively owned a 70 percent membership interest in E.R. Holdings, LLC, Rubin owned a 70 percent membership interest in L.E.

Ventures, LLC, and Rubin and Rohr collectively owned a 70 percent membership interest in Whalley Group, LLC. Brodie was the managing member of each of the plaintiff LLCs, and he owned the remaining 30 percent membership interest in those entities.

In August, 2020, Brodie began to "convey, mortgage and sell" the assets of the plaintiff LLCs to other "downstream LLCs" that he either owned or controlled. By doing so, the plaintiffs alleged that he exceeded the scope of his statutory authority and his authority under the plaintiff LLCs' respective operating agreements. Moreover, Brodie's ultra vires acts in "purport[ing] to convey, mortgage and sell all the real estate assets owned by each of the LLCs" have allegedly led to their dissolution.

On February 15, 2022, Rubin, Gidanian, and Rubin "under power of attorney and proxy from . . . Rohr" (collectively, individual plaintiffs), "in their individual and representative capacities as well as constituting the 70 [percent] majority voting interest in each of the [plaintiff] LLCs," and the plaintiff LLCs, commenced this civil action. They named as defendants Brodie; five business entities Brodie owns or controls and to which he conveyed the assets of the plaintiff LLCs; CoreVest and 5 Arch, which hold mortgages on several of these assets; and Levinson, who represented Brodie, both individually and in his capacity as managing member of the plaintiff LLCs, "in various legal matters . . . ."

In the first count of the complaint, the plaintiffs sought damages for Brodie's ultra vires actions and breaches of his fiduciary duties in managing the plaintiff LLCs. They alleged that Brodie exceeded the scope of his authority as manager under the LLCs' operating agreements, and that he engaged in self-dealing by causing the dissolution of the plaintiff LLCs by merging them into entities he controlled and by improperly obtaining

mortgages on the assets. This allegedly caused "damages to the [individual plaintiffs] directly and/or . . . to the value of their interests in the [plaintiff] LLCs and the real estate represented to be in those LLCs . . . ."

In the second count of their complaint, the plaintiffs sought to quiet title to certain of the real estate assets that the plaintiff LLCs owned before Brodie conveyed and mortgaged them.[3] They directed this count against the Brodie defendants, CoreVest and 5 Arch.

In the third count of their complaint, the plaintiffs sought to recover damages from all defendants for violating the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., by virtue of their alleged collective involvement in Brodie's sale of "all the properties in the [plaintiff] LLCs to downstream entities . . . ." They claim to have "suffer[ed] an ascertainable loss" related to the lost value of the conveyed real estate and also the "loss of use of such real estate, rentals and the time and inconvenience by the plaintiffs in attempting to secure their rightful property in the [plaintiff] LLCs for their ultimate benefit as 70 [percent] shareholders."

Finally, in the fourth count of their complaint, they alleged legal malpractice by Levinson related to his representation of Brodie, individually and in his capacity as manager of the plaintiff LLCs, with respect to the conveyances. The plaintiffs claim "damages" related thereto.

The defendants responded to the complaint by filing separate motions to dismiss. In their respective motions, the defendants claimed that the court lacked subject matter jurisdiction because the individual plaintiffs

[3] The plaintiffs alleged that Brodie had represented to them that E.R. Holdings, LLC, "[had]" five properties, Whalley Group, LLC, "[had]" nineteen properties, and L.E. Ventures, LLC, "[had]" two properties.

lacked standing to maintain their action. More specifically, each defendant argued that (1) the individual plaintiffs lacked standing to maintain their derivative action to enforce the rights of the plaintiff LLCs because they had not complied with § 34-271c by expressly alleging either that they had demanded that Brodie cause the plaintiff LLCs to bring an action and Brodie refused, or that the making of such demand should be excused because doing so would have been futile, and (2) the individual plaintiffs lacked standing to maintain their direct action because the injuries they alleged were solely the result of injuries the plaintiff LLCs suffered and, thus, the individual plaintiffs were not aggrieved. The Brodie defendants and Levinson also claimed in their motions that the action should be dismissed because the plaintiffs' service of process failed to include necessary addresses and was, therefore, improper, and because the plaintiffs failed to name an indispensable party, Rohr, as a plaintiff to this action.

On August 1, 2022, the plaintiffs filed individual objections to each motion to dismiss and a global memorandum of law in support of those objections. They made three arguments with respect to standing. First, they argued that "[t]he complaint sufficiently alleges facts showing that the three plaintiff LLCs have all suffered an injury in their own right, that there is implied consent to the bringing of the suit by members having more than two-thirds interest in each of the LLCs, and that therefore they have sufficient standing to maintain a cause of action against the defendants, as an alternative to the claim that they are bringing derivatively." Second, they argued that the individual plaintiffs had standing to maintain their derivative action because the complaint sufficiently alleged that any demand on Brodie would have been futile and that any defect with respect to their allegations in that regard could be cured by repleading.

Third, they argued that the individual plaintiffs had "sufficiently alleged facts that show they have suffered an injury that is 'not solely the result of an injury suffered or threatened to be suffered by' the respective plaintiff LLCs, within the meaning of [General Statutes] § 34-271" and, therefore, they had standing to maintain their direct action.

The plaintiffs also refuted the Brodie defendants' and Levinson's claims regarding insufficient service of process and the failure to name an indispensable party by claiming that "the identification of the parties by [power of attorney] and the listing of the address of their attorney is sufficient and any defect in naming the plaintiffs and their addresses is trivial and has no practical effect on the defendants' ability to respond to the complaint. Moreover . . . Rohr is a party to this action and therefore the defendants' claim that the complaint should be dismissed because of failure to name him as an indispensable party should be denied."

The defendants filed replies to the plaintiffs' objections. With respect to standing, all of the defendants advanced three identical and distinct arguments that (1) the individual plaintiffs had not received authorization to bring this action in the name of the plaintiff LLCs and, thus, the plaintiff LLCs lacked standing to maintain their direct action, (2) the individual plaintiffs lacked standing to maintain a derivative action because they had not satisfied the statutory requirements set forth in §§ 34-271a and 34-271c, and (3) the individual plaintiffs lacked standing to maintain a direct action because they alleged to have suffered indirect injuries that were derivative of the direct injuries allegedly suffered by the plaintiff LLCs. The Brodie defendants and Levinson also argued that the plaintiffs' objections were untimely.

On December 23, 2022, the court, *Jongbloed*, *J.*, issued a memorandum of decision granting the defendants' motions to dismiss the plaintiffs' complaint, in its entirety, for lack of subject matter jurisdiction, upon concluding that the plaintiffs lacked standing to maintain their claims. The court expressly identified two bases for dismissing the plaintiffs' action. First, as to "the derivative suit," the court explained that it granted the defendants' motions to dismiss "because the plaintiffs have not fairly or adequately alleged authorization to bring suit." Second, as to the "individual plaintiffs' direct suit," the court explained that it granted the defendants' motions to dismiss "because [the individual plaintiffs'] injuries resulted solely from the injuries to the [plaintiff] LLC[s]."

The court did not address explicitly whether the plaintiff LLCs had standing to maintain their direct action. It did, however, acknowledge that the defendants had presented three distinct challenges to the plaintiffs' standing, which included their claim that "the plaintiffs cannot maintain the action because they have not taken an official act authorizing suit . . . ."[4] Moreover, it incorporated the standards applicable to, and

[4] Specifically, the court stated that "the defendants [moved] to dismiss the complaint in its entirety for lack of subject matter jurisdiction on the grounds that . . . the plaintiffs lack standing to bring a direct suit, and in the alternative, lack standing to bring a derivative suit. Specifically, the defendants argue that the plaintiffs lack standing to bring the action because they have not made a formal demand on the defendants and have failed to allege, with particularity, that such a demand would have been futile. The defendants argue that the plaintiffs have not alleged that they had consent to bring such a suit as required by statute, and by the respective operating agreements of the plaintiff business entities. The defendants assert that futility and consent cannot be inferred from the complaint, but rather must be made out with particularity on the face of the complaint. The defendants also argue that the plaintiffs' direct action is fundamentally flawed because they have not alleged an injury suffered individually as distinct from, and not solely resulting from, the injury suffered by the plaintiff business entities." (Citations omitted.)

addressed the arguments that the defendants advanced in support of, the challenge to the plaintiff LLCs' standing to maintain their direct action into its analysis before concluding that the individual plaintiffs failed to establish that they, "as members of the LLCs, had authority to bring this action on behalf of the LLCs."

After setting forth the standard for deciding a motion to dismiss, the court addressed the plaintiffs' "derivative action" in one section of its memorandum of decision and the plaintiffs' "direct action" in another. In analyzing the viability of the "derivative action," the court addressed "futility" in one subsection and "consent" in another. With respect to "futility," the court recognized that LLC "members are allowed to maintain derivative actions to enforce the right of a limited liability company" if they "satisfy the statutory requirements set forth in . . . § 34-271a . . . [and their] pleadings . . . comply with § 34-271c, which states: 'In a derivative action the complaint must state with particularity: (1) The date and content of plaintiff's demand and the response by the managers or other members to the demand; or (2) *why* the demand should be excused as futile.' " (Emphasis in original.)

Because the complaint did "not explicitly state that demand would have been futile," the court considered whether, "under the [Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq.], futility must be stated on the face of the complaint, or whether it may be inferred from the facts" as pleaded. After observing that no Connecticut appellate decisions had addressed this issue, the court "[a]ppl[ied] the reasoning" of the Superior Court in *Guiza* v. *291-293 Greenwich Avenue, LLC*, Docket No. CV-20-6046647-S, 2020 WL 6121446, *3 (Conn. Super. September 22, 2020), in which "the court found that the plaintiff's allegations satisfied the futility requirement, even where the complaint did not specifically mention

futility."[5] The court reviewed the plaintiffs' allegations in the present case and determined that "the plaintiffs have alleged particularized facts from which the court can infer demand futility" and, thus, found "sufficient allegations to support a finding of futility."

The court then turned to the issue of "consent," however, and concluded that "[t]he plaintiffs' derivative action must fail . . . because they have not received authorization required by statute to bring suit on behalf of the LLCs, or authorization through the respective operating agreements." In doing so, it was persuaded by similar arguments the defendants had made in support of their claim that the plaintiff LLCs did not have standing to maintain a direct action.[6] The court quoted from General Statutes § 34-255f, which, it noted, "states in relevant part that '[i]n a [member/manager]-managed limited liability company . . . (3) [t]he affirmative vote or consent of two-thirds in interest of the members is

[5] In *Guiza*, the plaintiff, Eduardo Guiza, and the defendant Marco Hernandez each owned a 50 percent interest in the defendant 291-293 Greenwich Avenue, LLC. *Guiza* v. *291-293 Greenwich Avenue, LLC*, supra, 2020 WL 6121446, *1. The defendants moved to dismiss three counts of the plaintiff's six count complaint because, they claimed, the injuries the plaintiff alleged in those counts were merely derivative of injuries the defendant LLC sustained and, thus, the plaintiff lacked standing to bring them. Id. The defendants relied upon "the principle of Connecticut jurisprudence that [an LLC's] member may not sue in an individual capacity to recover for an injury the basis of which is a wrong to a limited liability company" to support their claim. (Internal quotation marks omitted.) Id., *3. The court, however, disagreed with the defendants' construction of the plaintiff's allegations and, thus, found that this principle, although correct, was not applicable to its analysis. Id. The court concluded, instead, that CULLCA, and specifically §§ 34-271a and 34-271c, were controlling and found that, even though the complaint did not "have a paragraph that includes the words 'a demand would be futile because . . .' a reading of the complaint makes it clear as to why such a request would be futile and is sufficient to satisfy that requirement in [§ 34-271c]." Id. The court accordingly denied the defendants' motion to dismiss. Id., *4.

[6] The trial court arguably conflated the issue of the individual plaintiffs' standing to maintain a derivative action with the standing of the plaintiff LLCs to maintain a direct action.

required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs,' " and it analyzed and interpreted the plaintiff LLCs' operating agreements. It observed that "[t]he operating agreements of E.R. Holdings [LLC] and L.E. [Ventures, LLC] require 'written approval' to bring suit . . . . Here, there has been no written approval. . . . The operating agreement of the Whalley Group [LLC] vests sole authority in the manager to: 'bring or defend, pay, collect, compromise, arbitrate, resort to legal action or otherwise adjust claims or demands of or against the [c]ompany.' "

The court stated that "it is conceded that no vote was taken, and written consent to bring suit on behalf of the [plaintiff] LLCs was not obtained." It explained that "[t]he plaintiffs ask the court to infer consent from the fact that the lawsuit has been brought by a majority of the [plaintiff] LLC members, but there are no allegations on the face of the complaint, that state consent was sought or received on behalf of the [plaintiff] LLCs. The requirement set forth in the statute and in the operating agreements has not been met and the court will not infer consent." The court thereafter granted in part the motions to dismiss "on this ground."[7]

The court then addressed the individual plaintiffs' "direct action." It recited "settled" precedent that an LLC "member . . . may not sue in an individual capacity to recover for an injury based on a wrong to the

[7] Because the court found that the operating agreement of Whalley Group, LLC, "provides for the matter of authority to bring suit and vests sole authority in Brodie" to do so, it found that CULLCA did not apply to that analysis. It further noted, however, that, "even assuming that Brodie's alleged fraud renders the CULLCA applicable, in the absence of proof that Rubin is acting under power of attorney on behalf of . . . Rohr, Rohr's consent to the suit cannot be inferred. At oral argument, the plaintiffs' attorney conceded Rohr did not want to be a party to the action but had an interest in the suit. . . . The court cannot conclude that Rubin has consent to bring suit on behalf of Whalley Group [LLC]." (Citation omitted.)

limited liability company"; (internal quotation marks omitted); and quoted from § 34-271 (b), which provides: "A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company." It then reviewed the complaint and concluded that "each of the substantive allegations of harm . . . involves injur[ies] to the [plaintiff] LLC[s], rather than to the [individual] plaintiffs themselves." Because it found that "[t]he plaintiffs' complaint is devoid of allegations that the [individual] plaintiffs incurred harm individually," the court determined that the individual plaintiffs did not have standing to maintain their direct action and granted the defendants' motions to dismiss for this reason as well. It further specified that, "[b]ecause the motions to dismiss are granted based on lack of subject matter jurisdiction, the court need not address the claims regarding the failure to join an indispensable party and insufficient process."[8]

The plaintiffs filed a motion to reargue the court's decision on January 12, 2023, the defendants filed objections thereto, and, on March 7, 2023, the court issued an order denying the motion to reargue "for the reasons set forth in the objections and because the court did not overlook any principles of law or misapprehend any facts . . . ." (Citation omitted.) This appeal from the judgment of dismissal followed.[9] Additional facts and procedural history will be set forth as necessary.[10]

[8] The court did, however, address the issue of the timeliness of the plaintiffs' objections. In doing so, it acknowledged that the objections were filed approximately four months after the filing of the first motion to dismiss, without extensions, but it exercised its discretion and considered them, nonetheless. The defendants have not challenged on appeal the propriety of the court having done so.

[9] The plaintiffs also appealed from the court's denial of their motion to reargue the judgment of dismissal. They do not raise, however, any claims of error that are specifically related to that denial.

[10] We note that the dispute underlying the plaintiffs' complaint in this action also gave rise to a binding rabbinical arbitration proceeding in which

Before we address the plaintiffs' specific claims, we set forth our standard of review and general legal principles that are germane to our analysis. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss [is] de novo. . . .

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . .

Brodie sought to buy out the interests of Rubin and Gidanian in E.R. Holdings, LLC. The arbitration hearings occurred prior to the commencement of this action, and the decision of the arbitrators, which ordered that Rubin and Gidanian sell their interests in E.R. Holdings, LLC, to Brodie for $168,425 was issued on March 23, 2022, approximately one month after the plaintiffs initiated this action. 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. The defendants' motions to dismiss this civil action were filed thereafter and the parties agreed that the court should resolve the motions to dismiss prior to hearing the application to confirm. After the court granted the motions to dismiss and the plaintiffs filed this appeal, Brodie attempted to reclaim his application to confirm, and the plaintiffs objected. On November 3, 2023, the clerk issued an order indicating that no hearing would be scheduled at that time because the matter was stayed due to this pending appeal. The Brodie defendants then filed a motion to reargue in which they claimed that the automatic appellate stay did not apply to the application to confirm, the plaintiffs objected, and the court sustained their objection. The Brodie defendants then filed a motion for review of the court's decision in which they asked 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. We granted the motion for review and the relief requested therein and concluded that this appeal does not automatically stay proceedings before the Superior Court on the pending application to confirm the arbitration award. See *Rubin* v. *Brodie*, 225 Conn. App. 108, 314 A.3d 1066 (2024). The trial court, *Ozalis, J.*, granted that application on August 30, 2024.

clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . .

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . If a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citations omitted; internal quotation marks omitted.) *Derblom* v. *Archdiocese of Hartford*, 203 Conn. App. 197, 206–207, 247 A.3d 600 (2021), aff'd, 346 Conn. 333, 289 A.3d 1187 (2023). "In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *Bernblum* v. *Grove Collaborative, LLC*, 211 Conn. App. 742, 755, 274 A.3d 165, cert. denied, 343 Conn. 925, 275 A.3d 626 (2022).

"Our Supreme Court has explained that [d]ifferent rules and procedures will apply, depending on the state of the record at the time the motion [to dismiss] is filed. . . . More specifically, a court may be called on to determine whether subject matter jurisdiction is lacking on the 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." (Citation omitted; internal quotation marks omitted.) *Derblom* v. *Archdiocese of Hartford*, supra, 203 Conn. App. 207. Where, as here, "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." (Internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009).

I

THE INDIVIDUAL PLAINTIFFS' DERIVATIVE ACTION

The plaintiffs first claim that the court improperly concluded that the individual plaintiffs, who are members of the plaintiff LLCs, lacked standing to maintain a derivative action to enforce rights of the plaintiff LLCs, given its determination that the plaintiffs satisfied the requirements of §§ 34-271a and 34-271c by sufficiently alleging that it would have been futile to demand that Brodie, the manager of the plaintiff LLCs, cause the plaintiff LLCs to bring the action against him and other defendants.[11] They argue that the court's further determination that they also were required to allege that they had "received authorization as required by statute . . . or authorization through the [plaintiff LLCs'] respective operating agreements" to bring and maintain a derivative action "inserted a requirement that is nowhere found in the language of [the statutes], has no basis in authority or considered rationale, and would undermine the remedial purposes of [§ 34-271a] to permit members to bring such an action when the demand on the limited liability companies' managers would be futile . . . ." (Internal quotation marks omitted.)

The defendants argue in response that the court properly dismissed the derivative action because the individual plaintiffs lacked standing. Although the assertions they make to support this conclusion in their respective briefs take slightly different approaches to the same

[11] There is no dispute that the plaintiff LLCs were "manager-managed limited liability compan[ies]" as described in § 34-271a. We have confined our focus, therefore, to the rules and authorities that pertain to manager-managed LLCs, unless otherwise stated.

end, the defendants all maintain that the court improperly inferred demand futility from the allegations of the complaint[12] but that it properly concluded, nonetheless, that the individual plaintiffs' failure to plead that they received authorization, or consent, to bring or maintain the derivative action deprived them of standing to do so. We agree with the plaintiffs.

We begin our analysis by setting forth additional legal principles that inform our resolution of this claim. Limited liability companies were created by statute in Connecticut in 1993 when our legislature enacted the Connecticut Limited Liability Company Act (CLLCA), Public Acts 1993, No. 93-267, codified at General Statutes (Rev. to 1995) § 34-100 et seq. *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317, 138 A.3d 312 (2016). CLLCA "establish[ed] the right to form an LLC[13] and all the rights and duties of the LLC, as well as all of the rights and duties of members . . . . It permit[ted] the members to supplement [its] statutory provisions by adopting an operating agreement to govern the LLC's affairs." (Footnote added.) Id. It also recognized "the right of the limited liability company to . . . sue and be sued." (Internal quotation marks omitted.) *Saunders* v. *Briner*, 334 Conn. 135, 158, 221 A.3d 1 (2019). CLLCA did not, however, permit LLC members to bring and maintain derivative actions to enforce the rights of

[12] Although each defendant has addressed this alternative ground for affirmance in their briefing, no defendant properly raised this issue by filing a preliminary statement of issues as required by Practice Book § 63-4 (a) (1) (A). At oral argument before this court, the plaintiffs' counsel confirmed that the plaintiffs are not claiming that the defendants have waived their right to raise this issue by failing to do so. We therefore reach this issue on its merits.

[13] "A limited liability company . . . is a hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation, but treats the entity and its members as a partnership for tax purposes." (Internal quotation marks omitted.) *Scarfo* v. *Snow*, 168 Conn. App. 482, 499, 146 A.3d 1006 (2016).

LLCs, and such a right did not exist at common law. Id., 158, 163–64.

Our legislature repealed CLLCA, effective July 1, 2017; see Public Acts 2016, No. 16-97; and replaced it with CULLCA. See *Fischer* v. *People's United Bank, N.A.*, 216 Conn. App. 426, 433 n.4, 285 A.3d 421 (2022), cert. denied, 346 Conn. 904, 287 A.3d 136 (2023). CULLCA made "many changes to the laws governing limited liability companies . . . ." Conn. Judiciary & Appropriations Committees, Summary of Public Acts 2016, No. 16-97. Among other things, CULLCA established the rights of LLC members to maintain derivative actions to enforce rights of LLCs, and it set the parameters for doing so. See General Statutes §§ 34-271a through 34-271e, inclusive.[14]

Like its predecessor, CULLCA also permits LLC members to supplement its statutory provisions by adopting operating agreements. General Statutes § 34-243d (a) provides in relevant part that an LLC's operating agreement "governs: (1) Relations among the members as members and between the members and the limited liability company; (2) the rights and duties under sections 34-243 to 34-283d, inclusive, of a person in the capacity of manager; (3) the activities and affairs of the company and the conduct of those activities and affairs; and (4) the means and conditions for amending the operating agreement." Section 34-243d (b), in turn, provides: "To the extent the operating agreement does not

[14] Section 34-271a establishes an LLC member's right to maintain a derivative action and sets the parameters for how that right accrues. See footnote 2 of this opinion. General Statutes § 34-271b establishes who is a "[p]roper plaintiff" for purposes of maintaining a derivative action. Section 34-271c sets forth the pleading requirements for maintaining a derivative action. See footnote 2 of this opinion. General Statutes § 34-271d establishes the right of a limited liability company named as or made a party in a derivative proceeding to appoint a special litigation committee to investigate the claims and sets the parameters for exercising that right. Finally, General Statutes § 34-271e governs proceeds and expenses attendant to derivative actions.

provide for a matter described in subsection (a) of this section, the provisions of sections 34-243 to 34-283d, inclusive, govern the matter." In other words, an operating agreement will generally control the rights and obligations of an LLC, its members and/or managers in the first instance, and the provisions of CULLCA will supplement any missing provisions that the operating agreement does not address.

CULLCA does, however, place several restrictions on which of its provisions an operating agreement may vary. See General Statutes § 34-243d (c) and (d). Most notably for purposes of our analysis, "[a]n operating agreement may not . . . (11) unreasonably restrict the right of a member to maintain an action under sections 34-271 to 34-271e,[15] inclusive . . . ." (Footnote added.) General Statutes § 34-243d (c) (11).

With these principles in mind, we consider whether the court properly concluded that the individual plaintiffs, who are members of the plaintiff LLCs, lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs. We first note that all parties agree that to have standing to bring and maintain a derivative action, the individual plaintiffs were required to satisfy the provisions of §§ 34-271a and 34-271c. They therefore agree that, before the individual plaintiffs' rights to bring a derivative action as members of the plaintiff LLCs accrued, the individual plaintiffs had to either demand that Brodie, as the manager of the plaintiff LLCs, cause the plaintiff LLCs to bring an action directly, or establish that such a demand would have been futile. All parties further agree that, for the individual plaintiffs to exercise these rights properly, they were

[15] General Statutes §§ 34-271 through 34-271e comprise part VIII of CULLCA, titled "Actions by Members." These statutes govern the rights of members to maintain direct actions to enforce their own rights, and derivative actions to enforce the rights of a limited liability company. See General Statutes §§ 34-271 through 34-271e.

required to state with particularity in their complaint the date and content of their demand and how Brodie responded to it, or why their failure to make a demand should be excused as futile. The defendants do not agree, however, that the court properly determined that the plaintiffs satisfied these requirements. Nor do they agree that, even if proper, the court's determination should have ended its analysis and caused it to deny the defendants' motions to dismiss the individual plaintiffs' derivative action, as the plaintiffs claim in this appeal. We address each point of contention in turn.

A

It is undisputed that the individual plaintiffs did not demand that Brodie bring an action to enforce the rights of the plaintiff LLCs before they initiated this action. The question we must address, therefore, is whether the allegations in the complaint state "with particularity" why the individual plaintiffs' failure to make such a demand should be excused as futile. General Statutes § 34-271c. The defendants argue that, in order to satisfy the particularity requirement, the plaintiffs had to "explicitly" allege that a demand of Brodie would have been futile, and they did not. They maintain that "[f]utility 'by inference' . . . is not contemplated by [the text of § 34-271c]" but, rather, "the statutory language is clear that futility must be plead[ed], not implied." Essentially, they argue that, to allege demand futility with particularity, plaintiffs must use specific, precise terms that expressly delineate that "demand would be futile because . . . ." (Internal quotation marks omitted.) *Guiza* v. *291-293 Greenwich Avenue, LLC*, supra, 2020 WL 6121446, *3. The defendants further argue that, even if it were proper for a court to infer demand futility where it has not been alleged expressly in a complaint, the plaintiffs' allegations in this case do not support such an inference.

In response, the plaintiffs argue that, although they did not expressly plead that making a demand on Brodie would have been futile, "[p]leadings are to be interpreted to include all that is necessarily implied, and on a motion to dismiss the court should construe the complaint in a manner likely to sustain its jurisdiction . . . ." (Citations omitted.) They argue that the allegations in their complaint "are sufficiently particular to form a basis from which the trial court could have logically inferred futility of demand on . . . Brodie." We agree with the plaintiffs and conclude that the court properly determined that the complaint sufficiently alleged demand futility and that, consequently, the allegations in the complaint satisfied the pleading requirements set forth in § 34-271c.

The resolution of these arguments requires that we interpret both § 34-271c and the allegations of the complaint. "To the extent that our review requires us to construe statutory provisions, this presents a legal question over which our review . . . is plenary." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 277, 186 A.3d 708 (2018). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . It is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Citation omitted; internal quotation marks omitted.) *Townsend* v. *Commissioner of Correction*, 226 Conn. App. 313, 331–32, 317 A.3d 1147 (2024).

"The interpretation of pleadings is [also] a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is [also] plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. *Rather*, [*t*]*he modern trend*, *which is followed in Connecticut*, *is to construe pleadings broadly and realistically*, *rather than narrowly and technically*. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis in original; internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 242, 291 A.3d 1051 (2023). Indeed, it is a "well settled principle that our courts do not interpret pleadings so to require the use of talismanic words and phrases." (Internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 130, 287 A.3d 1027 (2023).

Section 34-271c establishes the pleading requirements for a derivative action by an LLC's member. It provides that "the complaint must state *with particularity*: (1) The date and content of plaintiff's demand and the response by the managers or other members to the demand; or (2) why the demand should be excused as futile." (Emphasis added.) General Statutes § 34-271c. The term "particularity," however, is not defined in § 34-271c, or in the definitions that CULLCA sets forth in General Statutes § 34-243a. "In the absence of a statutory definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the

dictionary definition of the term." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 837, 905 A.2d 70 (2006); see also General Statutes § 1-1 (a).

"Particularity" is commonly defined in terms of being "detailed" or "exact," as opposed to general or "universal." See Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) p. 903 (defining particularity as "the quality or state of being particular as distinguished from universal . . . attentiveness to detail: EXACTNESS . . . the quality or state of being fastidious in behavior or expression"); see also Webster's Third New International Dictionary (2002) p. 1647 (defining particularity as "the quality or fact of being particular as opposed to universal . . . attentiveness to detail: precise carefulness (as of description, statement, investigation) . . . preciseness in behavior or expression: FASTIDIOUSNESS"); Random House Webster's Unabridged Dictionary (2d Ed. 1987) p. 1415 (defining particularity as the "quality or state of being particular . . . detailed, minute or circumstantial character, as of description or statement . . . attention to details; special care . . . fastidiousness").

In light of these definitions, and given the fact that there is no language included within § 34-271c that calls for the use of specific words or terminology, we conclude that a sufficiently detailed recitation of facts that support an inference that making a demand would have been futile and that the failure to do so should be excused will satisfy the particularity requirement in § 34-271c. Although plaintiffs may, in drafting their complaints, choose to expressly reference the terms "demand" and/or "demand futility," and explicitly delineate why they claim that a "demand should be excused as futile," the text of § 34-271c does not command that

level of specificity.[16] See, e.g., *High Watch Recovery Center, Inc.* v. *Dept. of Public Health*, 347 Conn. 317, 333–34, 297 A.3d 531 (2023) ("[i]n the absence of express language in [a statute] mandating that [a] request . . . take a particular form or include certain talismanic language, we will not read any such requirement into the statute").

Indeed, there is no way to conclude, without certain talismanic language upon which to rely, that § 34-271c requires plaintiffs to expressly reference the terms "demand" or "demand futility" without creating a tension between the statute and the rules by which our courts must abide when interpreting pleadings. Because we presume that the legislature was aware when it established the parameters for pleading a derivative action in § 34-271c that courts construe pleadings broadly and realistically, to contain all that they fairly mean; see *State* v. *Dabkowski*, 199 Conn. 193, 201, 506 A.2d 118 (1986) ("[w]hen the legislature acts, it is presumed to know the state of the law"); we expect that it would have used express terminology if it intended to restrict or alter this rule of construction. Thus, whether the allegations in a complaint expressly reference demand futility or not, they must be construed to allege demand futility if a sufficiently detailed recitation of facts makes it reasonable to do so. If, however, there is not a sufficiently detailed recitation of facts to support such an inference, the complaint should not be so construed, even if it includes explicit references to the terms "demand" or "futility." See *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 218 Conn. App. 242; see also *Gazo* v. *Stamford*, 255 Conn. 245, 263, 765 A.2d 505 (2001) ("we look beyond the language used in the complaint to determine what the plaintiff really seeks").

[16] Although the defendants place great emphasis on the particularity requirement and argue that § 34-271c is "plain and unambiguous" in this regard, they do not offer a definition of particularity to support their claim that the allegations in the complaint fall short of this requirement.

We now address, therefore, whether the allegations in the plaintiffs' complaint support the inference of demand futility. The complaint names Brodie as "the primary defendant," and five business entities that he owns or controls, two finance lenders and a lawyer with whom he had business dealings, as his codefendants. The plaintiffs allege that Brodie acted "ultra vires, beyond the scope of his authority under statutes and under the provisions of the [LLCs'] operating agreements" when he conveyed, mortgaged and/or sold the plaintiff LLCs' real estate assets to some of the codefendants with assistance from the others. They allege that Brodie engaged in self-dealing, and that his and the codefendants' collective actions forced the plaintiff LLCs into dissolution. In addition, they allege that, after Brodie "illegally" merged the plaintiff LLCs into the LLCs he owns or manages, he then attempted to "buy out" the plaintiffs' "interests at a lower price because they no longer owned real estate." They also allege that "Brodie has hidden and despite demand, not disclosed" to them books and records of both the plaintiff LLCs and the Brodie defendant LLCs. These allegations give rise to the plaintiffs' claims that Brodie breached his fiduciary duties to them and that all the defendants violated CUTPA, for which they seek a punitive damages award. They also form the basis for the plaintiffs' efforts to quiet title to the real estate assets they allege were wrongfully conveyed, and their claim that Levinson, Brodie's lawyer, committed legal malpractice related to the conveyances.

The defendants posit that "[a] plaintiff may not bootstrap allegations of futility merely by alleging that the directors participated in the challenged transaction or that they would be reluctant to sue themselves." (Internal quotation marks omitted.) The plaintiffs' allegations, however, describe far more than Brodie's mere participation in a "challenged transaction" or a situation

involving a likely "reluctance" to sue himself. Rather, their allegations describe, with great detail and specificity, a series of bad acts by not only Brodie but his business associates as well. They raise questions about integrity that could tarnish reputations and negatively impact future business dealings. Moreover, they expose the defendants to the possibility of having to pay a punitive damages award. Perhaps most notably, they also describe a prior instance where the plaintiffs made a demand of Brodie, for financial documents related to the plaintiff LLCs, which he refused. There is little reason to expect that Brodie, who had already refused a seemingly more benign demand by the plaintiffs, would have been any more receptive to a demand that he effectively encourage such damning allegations by causing the plaintiff LLCs to bring an action against him and others with whom he does business. It was therefore reasonable for the court to derive from these allegations that it would have been futile for the plaintiffs to demand that Brodie do so. See, e.g., *Guiza* v. *291-293 Greenwich Avenue, LLC*, supra, 2020 WL 6121446, *3 (inferring futility from allegations that established that "any demand which the plaintiff would make would be a demand to the company allegedly controlled by [the individual defendant] that [the individual defendant] cause the company to sue [the individual defendant] for conversion, misappropriation and statutory theft"); see also *Gazo* v. *Stamford*, supra, 255 Conn. 266 ("[i]t is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom" (internal quotation marks omitted)). Accordingly, we conclude that the court properly determined that the plaintiffs complied with the requirements of §§ 34-271a and 34-271c by alleging in their complaint a sufficiently detailed recitation of facts that supported an inference by the court that it would have been futile to demand that Brodie bring an action in the name of the plaintiff LLCs.

B

We now address whether the court improperly determined that the individual plaintiffs lacked standing to bring derivative claims despite its subsidiary conclusion that the plaintiffs had sufficiently alleged demand futility. The plaintiffs argue that the terms of §§ 34-271a and 34-271c exclusively govern the analysis and that the court's determination that they complied with those terms is dispositive. They argue that the court improperly imposed a requirement, not contained in the relevant statutes, that the individual plaintiffs receive "authorization" or "consent" from "the plaintiff business entities to bring a [derivative] suit," and improperly concluded they lacked standing to maintain their derivative action upon finding that they had not done so.

In response, the defendants argue that the court was required to consider §§ 34-271a and 34-271c in conjunction with the terms of the LLCs' operating agreements, and the provisions of § 34-255f, to assess the individual plaintiffs' standing to bring and maintain their derivative action, and that the court properly concluded, upon doing so, that the individual plaintiffs lacked standing because, despite demand being futile, they had "not received authorization as required by statute to bring suit on behalf of the [plaintiff] LLCs, or authorization through the respective operating agreements."[17] We agree with the plaintiffs.

[17] In their respective motions to dismiss and their replies to the plaintiffs' objections thereto, the defendants argued to the trial court that the individual plaintiffs lacked standing to maintain their derivative action solely on account of their alleged failure to comply with the requirements set forth in §§ 34-271a and 34-271c. In other words, they argued that the provisions of §§ 34-271a and 34-271c exclusively governed the analysis of the individual plaintiffs' standing to maintain their derivative action. It was their challenge to the plaintiff LLCs' standing to maintain their *direct action* that was predicated on an argument that the individual plaintiffs, as members of the plaintiff LLCs, had not established that they were authorized to bring the action in accordance with the operating agreements and/or statutory authority. Although we recognize that, generally, " '[t]he theory upon which a case is tried in the trial court cannot be changed on review, and an issue not

As we stated previously in this opinion, §§ 34-271a and 34-271c collectively establish the right of a member or members of an LLC to bring and maintain a derivative action to enforce the rights of the LLC, as well as the parameters for doing so. This right did not previously exist under CLLCA, the predecessor to CULLCA, or at common law. See *Saunders* v. *Briner*, supra, 334 Conn. 154–55. To the extent that these statutes are remedial in nature, they should be construed liberally in favor of those whom the law is intended to protect, i.e., individual members of an LLC seeking to maintain a derivative action to enforce the rights of the LLC where the LLC's manager has refused, or will likely refuse, to do so. See *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 338 Conn. 803, 815, 259 A.3d 1157 (2021); see also *Zoning Commission* v. *Fairfield Resources Management, Inc.*, 41 Conn. App. 89, 113, 674 A.2d 1335 (1996) (approving definition of "remedial statute as one designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and [are] generally to be liberally construed" (internal quotation marks omitted)).

There is no language in the text of either § 34-271a or § 34-271c that requires a member of an LLC to secure "authorization" or "consent" from anyone before his or her right to bring a derivative action accrues. See footnote 2 of this opinion. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Internal

presented to or considered by the trial court cannot be raised for the first time on review' "; *J. M.* v. *E. M.*, 216 Conn. App. 814, 823, 286 A.3d 929(2022); " 'the issue of standing is not subject to waiver and may be raised at any time.' " *Bernblum* v. *Grove Collaborative, LLC*, supra, 211 Conn. App. 755. Moreover, we further recognize that the defendants' departure from what they argued in the trial court appears to be responsive to the manner in which the court addressed the standing issues in its decision.

quotation marks omitted.) *Costanzo* v. *Plainfield*, 344 Conn. 86, 108, 277 A.3d 772 (2022). "[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *Demarco* v. *Charter Oak Temple Restoration Assn., Inc.*, 226 Conn. App. 335, 342, 317 A.3d 1137, cert. denied, 349 Conn. 923, A.3d (2024).

Although the legislature did not include an "authorization" or "consent" requirement when it drafted the CULLCA provisions that govern the right of LLC members to bring and maintain a derivative action, it did expressly reference elsewhere in the same statutory scheme the need for "consent" as a predicate to various acts taken by the LLC in pursuit of its activities or affairs. Section 34-255f, which establishes the parameters for the "[m]anagement of a limited liability company," expressly provides that, in member-managed limited liability companies, "[m]atters in the ordinary course of the activities of the company shall be decided by the affirmative vote *or consent of a majority in interest of the members*." (Emphasis added.) General Statutes § 34-255f (b) (2). Likewise, in both member-managed and manager-managed limited liability companies, "[t]he affirmative vote or *consent of two-thirds in interest of the members* is required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs; or (B) approve a transaction under the Connecticut Entity Transactions Act," and "[t]he affirmative vote or *consent of all of the members* is required to amend the operating agreement or to amend the certificate of organization." (Emphasis added.) General Statutes § 34-255f (b) (3) and (4), and (c) (3) and (4). We discern from this linguistic distinction that, if the legislature intended to require individual plaintiffs

to receive "authorization" or "consent" from anyone, including "the plaintiff business entities," before their right to bring and maintain a derivative action accrues, as the court found, it would have conveyed that intent expressly when it drafted §§ 34-271a and 34-271c, but it did not.

" '[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature.' . . .

"This rule of statutory construction has been applied vigorously in instances in which the legislature has repeatedly employed a term in other statutes, but did not use it in the provision to be construed. As our Supreme Court stated in *Viera* v. *Cohen*, 283 Conn. 412, 431, 927 A.2d 843 (2007), 'we underscore that the legislature frequently has used the term withdrawal. . . . Typically, the omission of a word otherwise used in the statutes suggests that the legislature intended a different meaning for the alternate term.' . . . 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.' " (Citation omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 688, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018). We find it significant, therefore, that the legislature did not choose to use the terms "authorization" or "consent" in §§ 34-271a and 34-271c.

Moreover, reading into the statutes such a requirement would lead to bizarre results that cannot be

deemed workable under a statutory construction analysis. See *Townsend* v. *Commissioner of Correction*, supra, 226 Conn. App. 331. An LLC member has the right to bring and maintain a derivative action to account for and respond to those instances in which the individuals who have the power to cause the LLC to bring an action in the name of the LLC in the first instance will not do so because of their improper self-interests. *See Scarfo* v. *Snow*, 168 Conn. App. 482, 502, 146 A.3d 1006 (2016) (derivative actions are "designed to facilitate holding wrongdoing directors and majority shareholders to account and also to enforce corporate claims against third persons" (internal quotation marks omitted)). Requiring a member to secure consent or authorization to bring and maintain a derivative action from such individuals, after those individuals either refused the member's demand to do so, or where making such a demand would be futile, would nullify the member's right and render the very purpose of a derivative action meaningless. See *State* v. *Webber*, 225 Conn. App. 16, 34, 315 A.3d 320 ("[i]t is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions" (internal quotation marks omitted)), cert. denied, 349 Conn. 915, 315 A.3d 301 (2024).

The defendants seek to circumvent the legislature's silence by relying on the operating agreements for the plaintiff LLCs and § 34-255f (c) (3) as support for the consent requirement that the court read into § 34-271a. They argue, correctly, that "an LLC's operating agreement provides the rules applicable to an LLC and that the [CULLCA] statutes fill in where the operating agreement is silent." See General Statutes § 34-243d (a) and (b). They therefore posit that, because "[t]he LLC plaintiffs' operating agreements provide a procedure for initiating suit on the LLC [p]laintiffs' behalf," which, in the case of E.R. Holdings, LLC, and L.E. Ventures, LLC,

includes a consent or preapproval requirement, and because "[t]here is no indication, from the text of the respective operating agreements, that this procedure is limited to direct actions," the procedure set forth in the operating agreements must apply to derivative actions by members as well. They further posit that, "if this court concludes that CULLCA, and not the . . . [plaintiff LLCs'] operating agreements, governs authorization to bring suit," the individual plaintiffs were required to comply with the consent requirement set forth in § 34-255f (c) (3) before their right to maintain their derivative action accrued.

Although we agree with the defendants that the respective operating agreements establish parameters for bringing an action in the name of the plaintiff LLCs, we do not agree that those parameters apply to the LLC members' rights in this case to bring and "maintain a derivative action to enforce the rights of a limited liability company" pursuant to § 34-271a. Nor do we agree with the defendants that the "consent requirement" set forth in § 34-255f (c) (3) informs that right if the operating agreements do not.

"To the extent that we are called on to interpret the . . . operating agreements, our standard of review is . . . well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary] . . . and we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Fischer* v. *People's United Bank, N.A.*, 216 Conn. App. 426, 438, 285 A.3d 421 (2022), cert. denied, 346 Conn. 904, 287 A.3d 136 (2023). Here, the

individual plaintiffs challenge the court's interpretation of the relevant operating agreements as it relates to the court's ultimate conclusion that they were required to secure authorization or consent from the "plaintiff business entities" to maintain their derivative action. Thus, our review is plenary. *Fischer* v. *People's United Bank, N.A.*, supra, 438.

We begin by observing that none of the operating agreements references derivative actions by its members. In other words, the operating agreements do not expressly "provide for" derivative actions by members; General Statutes § 34-243d (b); and, thus, the provisions of § 34-271a should exclusively govern the analysis. See General Statutes § 34-243d (b) (provisions of CULLCA apply where operating agreement does not provide matter, or matters, pertaining to relations among members and between members and limited liability company, and activities and affairs of company and conduct thereof); see also *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 836, 43 A.3d 607 (2012) ("if the operating agreement is silent as to the applicability of the statute, the statute controls").

Moreover, the operating agreements of E.R. Holdings, LLC, and L.E. Ventures, LLC, each establish that their manager, Brodie, is "solely responsible for the management of the [c]ompany's business" and that his "rights and powers . . . include the right and power to manage all day to day activities of the [c]ompany," subject to certain specified restrictions. His "rights and powers" include, among other things, "*commenc*[*ing*] *or defend*[*ing*] *against litigation* with respect to the [c]ompany or any assets of the [c]ompany as deemed advisable" but only if *he* first secures "written approval (which may include an email) of the aggregate members holding [s]eventy percent (70%) of the equity interest in the [c]ompany . . . ." (Emphasis added.) Both agreements are clear that "no [m]ember shall have the right . . . [t]o take

part in the control of the [c]ompany business or to sign for or to bind the [c]ompany, such power being vested in the [m]anager." These provisions, as the Brodie defendants aptly recognize in their brief, "empower *the* [*m*]*anager* to bring suit only with written approval of 70 [percent] of the equity interest in the [c]ompany, but nowhere do those provisions empower anyone other than *the* [*m*]*anager* to bring suit in the [c]ompany's name, ever. To the contrary, *they prohibit other members from undertaking such activity*."[18] (Emphasis added.)

Whalley Group, LLC's operating agreement vests broader rights and powers in its manager, Brodie, by giving him the "exclusive control of the business of the [c]ompany." That operating agreement, unlike the operating agreements of E.R. Holdings, LLC, and L.E. Ventures, LLC, places no restrictions or contingencies on Brodie's ability to exercise his power to "bring or defend, pay, collect, compromise, arbitrate, *resort to legal action*, or otherwise adjust claims or demands of or against the [c]ompany . . . ." (Emphasis added.) Like the members of E.R. Holdings, LLC, and L.E. Ventures, LLC, Whalley Group, LLC's members "are not agents of the [c]ompany and do not have the authority to act for, or bind, the [c]ompany in any matter." As such, only Brodie has the power to act for and bind Whalley Group, LLC, by resorting to legal action, and its members, similarly, are prohibited from undertaking such activity.

We reiterate, however, that § 34-271a expressly authorizes an LLC's member to "maintain a derivative

[18] We recognize that the Brodie defendants offer this interpretation as part of their argument that the plaintiff LLCs lack standing to maintain their direct action because the individual plaintiffs, as members of the LLCs, were not authorized to and, in fact, could not be authorized to, bring an action in the plaintiff LLCs' names. We agree with this interpretation and find that it applies to our analysis of the individual plaintiffs' standing to maintain their derivative action, as well.

action to enforce the [rights of the LLC]" if the LLC's manager refuses the member's demand to do so, or if making such a demand of the manager would be futile. The operating agreements' prohibitions on members other than Brodie commencing litigation or resorting to legal action pertaining to the plaintiff LLCs, therefore, directly contradict, and cannot be reconciled with, § 34-271a. Indeed, the right that § 34-271a affords an LLC's *member* to maintain a derivative action to enforce the rights of an LLC would be completely eviscerated if the procedures set forth in the operating agreements applied to derivative actions, because the member's right would then belong exclusively to the LLC's manager, who either already refused, or would likely refuse, the member's demand to cause the LLC to bring the action in the first instance. This unworkable construct runs afoul of the admonition set forth in § 34-243d (c) (11) that an operating agreement may not "unreasonably restrict the right of a member to maintain" a derivative action by leaving the LLC's members with no rights in this regard while, at the same time, insulating their manager from claims of wrongdoing. *See Scarfo* v. *Snow*, supra, 168 Conn. App. 502.

We conclude, therefore, that the procedures that the operating agreements of E.R. Holdings, LLC, L.E. Ventures, LLC, and Whalley Group, LLC, mandate for Brodie, their manager, to bring and maintain legal actions with respect to the plaintiff LLCs should not have informed the court's analysis of the individual plaintiffs' standing to maintain their derivative action.[19]

[19] We note that the court relied on the fact that "[t]he operating agreements of E.R. Holdings [LLC] and L.E. [Ventures, LLC] require 'written approval' to bring suit" and its finding that "there [had] been no written approval" in accordance with that requirement in support of its conclusion that the individual plaintiffs lacked standing to maintain their derivative action. Although our broad conclusion that the court should not have relied on the operating agreements to assess the individual plaintiffs' standing to maintain their derivative action necessarily addresses this finding and conclusion, we observe, nonetheless, that, even if the procedures set forth in the operating agreements were somehow germane to the question of the individual plain-

Similarly, the provision of § 34-255f (c) (3), which requires "[t]he affirmative vote or consent of two-thirds in interest of the members . . . to . . . [u]ndertake an act outside the ordinary course of the company's activities and affairs," should not have had any bearing on the court's analysis of the individual plaintiffs' standing to bring and maintain their derivative action. Sections 34-271a and 34-271c specifically pertain to "[d]erivative action[s]" by an LLC's members and, thus, the terms of those statutes take precedence over § 34-255f (c) (3)'s general reference to "act[s] outside the ordinary course of the company's activities and affairs," which, the defendants argue, includes bringing a legal action. See *FuelCell Energy, Inc.* v. *Groton*, 350 Conn. 6–7, A.3d (2024) ("[w]e adhere to the principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling . . . in the absence of express contrary legislative intent . . . and the principle that the legislature is always presumed to have created a harmonious and consistent body of law" (citations omitted; internal quotation marks omitted)).

As we stated previously in this opinion, there is no consent requirement in either § 34-271a or § 34-271c. All that an LLC's member must do to exercise his or her right to bring a derivative action in the name of the LLC is either to make an unheeded demand of the LLC's manager to file an action, or to establish that making such a demand would have been futile. General Statutes § 34-271a. If the member satisfies either one of those

tiffs' standing to maintain their derivative action, the obligation set forth in the operating agreements to secure written authorization before the right to initiate an action accrued rested with the LLCs' manager, not the LLCs' members. As we stated previously in this opinion, the operating agreements vest exclusive authority to commence legal action in the LLCs' manager, and they prohibit the members from doing so.

requirements, all the member must do to properly exercise the right to maintain a derivative action is "state with particularity" what the demand was, when it was made, and how the manager responded or why the failure to make a demand should be excused as futile. General Statutes § 34-271c. Because the individual plaintiffs satisfied those requirements here, they had standing to maintain their derivative action. Accordingly, the court had subject matter jurisdiction over that action and it should not have dismissed that portion of the plaintiffs' complaint. We conclude, therefore, that the court improperly granted the defendants' motions to dismiss the individual plaintiffs' derivative actions.

II

THE PLAINTIFF LLCS' DIRECT ACTION

The plaintiffs next claim that the court improperly found that the plaintiffs had not "fairly or adequately alleged authorization to bring suit" and, thus, improperly concluded that the plaintiff LLCs lacked standing to maintain a direct action. In advancing this claim, the plaintiffs acknowledge that the court did not make an explicit determination with respect to their claim that they were properly authorized to bring the action in the plaintiff LLCs' names, but they argue that "such a finding is necessarily implied by the trial court's finding with respect to authorization in its ruling on the derivative claims and by the judgment." They further argue, as a matter of substance, that there was before the court "clear evidence that a vote was taken by the [plaintiff] LLCs to authorize suit," that the court's "finding that no written authorization was made for the plaintiff LLCs [to bring and maintain their action] was clearly erroneous," and that, consequently, they established the plaintiff LLCs' standing.

The Brodie defendants agree with the plaintiffs that the "memorandum of decision does not explicitly address

any direct claims by the three [plaintiff] LLCs, yet dismisses the entire action." They posit, however, that "[t]he logical conclusion is that the trial court concluded that the action does not allege any direct claims by the three [plaintiff] LLCs." They further argue that, if we conclude that the complaint alleges direct actions by the plaintiff LLCs, we "should nevertheless conclude that the plaintiffs failed to establish standing to do so." CoreVest credits the court for properly "conclud[ing] that the plaintiffs failed to establish standing to maintain a direct action because they had not adequately alleged authorization to bring suit," and Levinson agrees that the court properly concluded that the plaintiffs failed to establish their standing to bring a direct action "because they failed to plead or show that they obtained authorization from the [plaintiff LLCs] . . . ."

We conclude that the complaint reasonably may be construed to allege direct claims by the plaintiff LLCs and that the court implicitly addressed and disposed of those claims. We further conclude that, in doing so, the court properly determined that the plaintiff LLCs did not have standing to maintain their direct actions.

We begin, as we must, by construing the allegations of the complaint reasonably and in a manner most favorable to the plaintiffs. See *Conboy* v. *State*, supra, 292 Conn. 651. Further, because our doing so presents a question of law, we exercise plenary review. *Stewart* v. *Old Republic National Title Ins. Co.*, supra, 218 Conn. App. 242.

Each of the plaintiff LLCs is a plaintiff named in this action. Moreover, the plaintiff LLCs are parties to each count of the complaint and they are necessarily included within the numerous broad references made to "the plaintiffs" throughout the complaint.[20] Finally,

[20] The defendants could have filed a request to revise the complaint that sought to have the plaintiffs articulate with more precision which plaintiffs were making which claims and/or the nature of those claims, but they did not. Such a revision would have aided the court in ascertaining the precise

and significantly, all of the injuries the plaintiffs allege to have sustained are, or derive from, alleged acts that left the plaintiff LLCs without any assets and rendered them valueless.[21] In the first count of the complaint, for example, the plaintiffs allege that Brodie's alleged breach of his fiduciary duty to them caused damages "to the Rubin investors directly and/or . . . to the value of their interests in the three LLCs," and they seek to recoup the value of the LLCs' real estate assets accordingly. Likewise, in the second count, they seek to quiet title to the real estate assets allegedly belonging to the plaintiff LLCs. In the third count, they claim damages for alleged CUTPA violations related to the value of the plaintiff LLCs' real estate assets, as well as for loss of use, rentals and the inconvenience of their attempts to resecure "their rightful property in the LLCs . . . ." Finally, in the fourth count, they allege an obligation by the "LLCs themselves" to pay back certain sums occasioned by Levinson's alleged legal malpractice. For these reasons, the complaint is reasonably construed, in part, to state direct claims by the plaintiff LLCs to recover damages for injuries they allegedly sustained at the hands of the defendants. See, e.g., *Bernblum* v. *Grove Collaborative, LLC*, supra, 211 Conn. App. 756 (confirming that limited liability company has power to sue in its own name).

We next construe the court's memorandum of decision to determine whether the court considered and resolved the plaintiff LLCs' direct claims. It is well settled that "a judicial opinion must be read as a whole,

nature of the various claims and in determining the standing questions related thereto.

[21] The crux of the plaintiffs' claims is set forth in paragraph 3 of their complaint, which alleges that the plaintiff LLCs "have been dissolved by the act of the primary defendant . . . Brodie . . . because he has, ultra vires, beyond the scope of his authority under the statutes and under the provisions of the operating agreements, purported to convey, mortgage, and sell all the real estate and assets owned by each of the LLCs." This paragraph is incorporated by reference into each of the complaint's four counts.

without particular portions read in isolation, to discern the parameters of its holding. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Citations omitted; internal quotation marks omitted.) *Iadanza* v. *Toor*, 226 Conn. App. 736, 749–50, A.3d (2024).

Although the court expressly referenced only its dismissals of the "derivative suit" and "the individual plaintiffs' direct suit" in its memorandum of decision, it plainly acknowledged that the defendants had raised three distinct challenges to standing, which included their claim that the plaintiff LLCs lacked standing to maintain their direct action "because they have not taken an official act authorizing suit . . . . " Moreover, even though the court addressed this claim within the "derivative action" section of its discussion, it addressed the concepts of demand futility, which the defendants raised in relation to their challenge to the individual plaintiffs' standing to maintain their derivative action, and "consent" or authorization, which the defendants raised in relation to their challenge to the plaintiff LLCs' standing to maintain their direct action, separately. Finally, it dismissed the entire action on the basis of lack of subject matter jurisdiction. To do so, the court would have had to dispose of the three distinct challenges to standing it recognized and conclude, in doing so, that the plaintiff LLCs lacked standing to maintain their direct action. We therefore address the plaintiffs'

challenge to the propriety of the court's conclusion in this regard.

The plaintiffs argue that they established the plaintiff LLCs' standing to maintain their direct action because they attached to their complaint "clear evidence that a vote was taken by the LLCs to authorize suit." We disagree.

At the outset, we observe that the court predicated its conclusion regarding the plaintiff LLCs' standing on its determination that "[t]he operating agreements of E.R. Holdings, [LLC] and L.E. [Ventures, LLC] clearly delineate the need to seek written consent to authorize suit which was not established here," and, similarly, that the plaintiffs had not established consent to bring suit in the name of Whalley Group, LLC, in accordance with § 34-255f. Although we agree with the court that consent or authorization is a necessary prerequisite to bringing a direct action in the name of the plaintiff LLCs, at least insofar as E.R. Holdings, LLC, and L.E. Ventures, LLC, are concerned, we part ways with the court to the extent that its determination suggests that the individual plaintiffs would have had the right to initiate an action in the name of the plaintiff LLCs if they had received that consent and that, consequently, the plaintiff LLCs would have had standing to maintain it. Even so, we agree with the court's conclusion that the plaintiff LLCs did not have standing to maintain their direct action. See *Tracey* v. *Miami Beach Assn.*, 216 Conn. App. 379, 396 n.19, 288 A.3d 629 (2022) ("it is axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)), cert. denied, 346 Conn. 919, 291 A.3d 1040 (2023).

Our resolution of this issue is dependent upon the interpretation of the operating agreements of E.R. Holdings, LLC, L.E. Ventures, LLC, and Whalley Group, LLC,

that we articulated in part I B of this opinion. See General Statutes § 34-243d (a) (providing that operating agreements govern, among other things, relations between members and limited liability company, rights and duties of manager and activities and affairs of company and conduct thereof). As we explained, all three operating agreements establish that the respective LLC members do not have the authority to bring or maintain any action by, or in the name of, the plaintiff LLCs. Only the LLCs' manager, Brodie, has the power to act for, and bind each LLC, and only Brodie can "commence . . . litigation" in the name of E.R. Holdings, LLC, and L.E. Ventures, LLC, and "resort to legal action" in the name of Whalley Group, LLC. To exercise his power to do so under the operating agreements of E.R. Holdings, LLC, and L.E. Ventures, LLC, it is Brodie who requires "written approval (which may include an email) of the aggregate members holding [s]eventy percent (70%) of the equity interest in the [c]ompany," whereas his power to do so under Whalley Group, LLC's operating agreement is unrestricted. As such, even if the individual plaintiffs, as members of the LLCs, had received authorization, they would not have been empowered to initiate a direct action in the name of the plaintiff LLCs. Because the individual plaintiffs, and not Brodie, initiated the direct action by the plaintiff LLCs, the plaintiff LLCs lacked standing to maintain it. We therefore affirm the judgment in this regard.

III

THE INDIVIDUAL PLAINTIFFS' DIRECT ACTION

The plaintiffs next claim that the court improperly concluded that the individual plaintiffs lacked standing to maintain their direct action because they had not alleged "direct harm to themselves which is not solely the result of the harm done upon the LLCs." They argue that individual members "can maintain an action even

if it is related to an injury suffered by the LLC and even if [it] results from the same *actions*, provided that it is not solely the result of an *injury* to the LLC." (Emphasis in original.) They maintain that they "adequately plead[ed] injuries suffered by them directly that were 'not solely' injuries suffered by the plaintiff LLCs." The defendants argue, in response, that the direct claims brought by the individual plaintiffs belong to the plaintiff LLCs, and the individual plaintiffs had no standing to pursue them. They argue that "the substantive allegations of harm contained in the plaintiffs' complaint [involved] injur[ies] to the [plaintiff LLCs]" and the individual plaintiffs merely allege derivative injuries they have no standing to assert. We agree with the defendants.

We are guided by the same standards and legal principles regarding standing, CULLCA, statutory interpretation and construction of pleadings upon which we relied in the preceding parts of this opinion. We further observe the well settled common-law rules that, generally, "a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [If], for example, the harms asserted to have been suffered directly by a plaintiff *are in reality derivative of injuries to a third party*, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them. . . .

"The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. In order for a plaintiff to have standing, it must be a proper party to request adjudication of the issues. . . .

"It is axiomatic that [a] limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name . . . or may be a party to an action brought in its name by a member or manager. . . . *A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company.*" (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bernblum* v. *Grove Collaborative, LLC*, supra, 211 Conn. App. 756–57; see also, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017) (member of limited liability company cannot recover for injury allegedly suffered by member's company and, accordingly, lacks standing to bring claim in individual capacity).

The legislature enacted § 34-271[22] as part of CULLCA, against this common-law backdrop. See *Considine* v. *Waterbury*, supra, 279 Conn. 844 ("the legislature is presumed to be aware of prior judicial decisions involving common-law rules" (internal quotation marks omitted)). Section 34-271 establishes that an LLC member may maintain a direct action "against another member, a manager or the limited liability company to enforce *the member's rights* and otherwise protect *the member's interests*" if the member "plead[s] and prove[s] an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the

[22] General Statutes § 34-271 provides: "(a) Subject to subsection (b) of this section, a member may maintain a direct action against another member, a manager or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or sections 34-243 to 34-283d, inclusive, or arising independently of the membership relationship.

"(b) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company."

limited liability company." (Emphasis added.) General Statutes § 34-271 (a) and (b).[23]

The crux of the plaintiffs' claims is that the primary defendant, Brodie, with assistance from his codefendant business associates, conveyed and sold all of the real estate assets belonging to the plaintiff LLCs, that these actions forced the plaintiff LLCs into dissolution, and that the plaintiffs were injured as a result. The plaintiff LLCs owned the real estate assets that were alleged to have been wrongfully conveyed, however, and the plaintiff LLCs would have been the direct beneficiaries of any appreciation in value or income that those assets generated. Although the individual plaintiffs allege that they were damaged "directly" as a result of the defendants' alleged misdeeds, any benefits they had and would have received had the real estate assets not been conveyed and if the plaintiff LLCs were not dissolved, would have flowed to them only through the plaintiff LLCs. As such, if there were injuries to the individual plaintiffs, those injuries were sustained by the plaintiff LLCs in the first instance and by the individual plaintiffs in the second. In other words, their alleged

[23] We note that the plaintiffs contend that the common-law rule that preceded the enactment of § 34-271, which they claim required an LLC member to demonstrate "a specific, personal, and legal interest separate from that of the LLC" to have standing to bring and maintain a direct action; (internal quotation marks omitted); is more restrictive than the rule prescribed in § 34-271, which was enacted as part of CULLCA. They claim that the use of the phrase "not solely the result of" in § 34-271 (b) "changes the threshold requirement for a cause of action on behalf of an individual member from one requiring the LLC's member's injury to be wholly 'separate' from the LLC's injury, to one that can be suffered by the LLC as well, provided that the member suffers the injury in some individual capacity." This backdrop forms the basis for the argument they make on appeal that individual members "can maintain an action even if it is related to an injury suffered by the LLC and even if [it] results from the same *actions*, provided that it is not solely the result of an *injury* to the LLC." (Emphasis in original.) Because we conclude that the injuries that the individual plaintiffs have alleged in this action *are* "solely the result of [injuries] to the LLC[s]," we do not address the propriety of this proffered distinction.

injuries were "solely the result of [injuries] suffered . . . by" the plaintiff LLCs, and the individual plaintiffs, therefore, lacked standing to maintain their direct action. General Statutes § 34-271 (b); see also, e.g., *Scarfo* v. *Snow*, supra, 168 Conn. App. 504 (LLC member may not bring action in individual capacity to recover for injuries that are result of injuries company has suffered); *Padawer* v. *Yur*, 142 Conn. App. 812, 817, 66 A.3d 931 (same), cert. denied, 310 Conn. 927, 78 A.3d 146 (2013); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 216, 55 A.3d 583 (2012) (same), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013); *Wasko* v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978 (same), cert. denied, 289 Conn. 922, 958 A.2d 155 (2008).

IV

The plaintiffs' final claim is that the court's failure to treat the defendants' motions to dismiss as motions to strike to allow them to cure "any pleading defect by repleading" was improper. We decline to review this claim.

The sole basis the plaintiffs offer to support this claim is their assertion that, "[i]f the court wished the plaintiffs to say the magic words that 'demand would be futile because Brodie is a defendant,' then it should treat any such pleading defect as it would a motion to strike and allow the plaintiffs the opportunity to replead." In fact, we have concluded that those "magic words" were not necessary and that the court properly inferred demand futility from the detailed recitation of facts that the plaintiffs alleged. Consequently, we need not consider this claim.

In sum, we conclude that the court properly determined that the plaintiff LLCs and the individual plaintiffs lacked standing to maintain their direct actions and, accordingly, properly dismissed those actions for lack of subject matter jurisdiction. We therefore affirm

the judgment in those regards. We further conclude, however, that the court improperly determined that the individual plaintiffs lacked standing to maintain a derivative action to enforce the rights of the plaintiff LLCs when their complaint sufficiently alleged demand futility, and we therefore reverse the judgment insofar as the court dismissed the individual plaintiffs' derivative action for lack of subject matter jurisdiction and remand the case for further proceedings.[24]

The judgment is reversed with respect to the dismissal of the individual plaintiffs' derivative action for lack of subject matter jurisdiction and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[24] In accordance with this remand, we direct the trial court to address the additional claims that the Brodie defendants and Levinson made in support of dismissal regarding the failure to join Rohr as an indispensable party and insufficient service of process. Although we acknowledge that the Brodie defendants have advanced the arguments in their brief to this court that (1) Rohr is not a party to this action and that the plaintiffs had not established their authority to act on his behalf by proxy, and (2) this court should dismiss all or some of the plaintiffs' action due to insufficiency of process insofar as it failed to include Rubin's address, the court made no express findings with respect to these issues. As such, the court's statements regarding the absence of proof that Rubin was acting under power of attorney for Rohr and the assertion by the plaintiffs' counsel that Rohr did not want to be a party to this action, which were made in the context of its assessment of the plaintiffs' authority to maintain their actions, are of no import; see footnote 7 of this opinion; and we cannot find facts in the first instance. See *In re Oreoluwa O.*, 321 Conn. 523, 540–41 n.9, 139 A.3d 674 (2016) ("[I]t is elementary that neither [the Supreme Court] nor the Appellate Court can find facts in the first instance. . . . [A]n appellate court cannot find facts or draw conclusions from primary facts found, but may only *review* such findings to see whether they might be legally, logically and reasonably found . . . ." (Emphasis in original; internal quotation marks omitted.)).

ROBERT J. SICIGNANO, JR. *v.* BARBARA PEARCE ET AL.
(AC 46370)

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

Syllabus

The plaintiff attorney, who represented a will beneficiary in a probate matter, appealed from the judgment of the trial court dismissing his complaint against the defendants, a residuary beneficiary of the will, and its chief executive officer, who had sent a private email to other attorneys involved in the litigation that the plaintiff claimed was defamatory. The plaintiff claimed that the court improperly granted the defendants' special motions to dismiss under the anti-SLAPP statute (§ 52-196a) after determining that his complaint was based on the defendants' exercise of their constitutional right to petition the government on a matter of public concern. *Held*:

The trial court properly concluded that the email was a protected communication made "in connection with" an issue under review by a judicial body pursuant to § 52-196a (a) (3) (A) that related to substantive issues in the litigation and was directed to persons having some interest in that litigation.

The trial court correctly determined that § 52-196a (a) (3) (A) did not require that the email occur during an official proceeding to constitute protected communication.

The trial court properly concluded that the email's content was a matter of public concern that related to economic or community well-being pursuant to § 52-196a (a) (1) (B).

This court declined to review the plaintiff's unpreserved claim that the trial court incorrectly determined that he had failed to demonstrate probable cause to believe he would prevail on the merits of his complaint.

The trial court did not violate the separation of powers doctrine or the ex post facto clause of the United States constitution when it considered California law in interpreting and applying § 52-196a.

Argued May 20—officially released October 15, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Stewart*, *J.*, granted the defendants' special motions to dismiss and rendered judgment thereon,

from which the plaintiff appealed to this court. *Affirmed.*

John Kardaras, for the appellant (plaintiff).

Todd R. Michaelis, with whom were *Eric J. Herst* and, on the brief, *Stephen J. Conover*, for the appellee (named defendant).

Michelle M. Seery, with whom was *Michael T. McCormack*, for the appellee (defendant Connecticut Hospice, Inc.).

Opinion

BRIGHT, C. J. The plaintiff, Robert J. Sicignano, Jr., appeals from the judgment of the trial court dismissing his complaint against the defendants, Barbara Pearce and Connecticut Hospice, Inc. (Connecticut Hospice), pursuant to Connecticut's anti-SLAPP[1] statute, General Statutes § 52-196a. On appeal, the plaintiff claims that the trial court erred by: (1) "concluding [that] the plaintiff's claims against the defendants fall within the ambit of protected constitutional conduct as defined by . . . § 52-196a"; (2) "adopting language in the California anti-SLAPP statute and California case law not contained in the Connecticut anti-SLAPP statute in violation of the separation of powers under the constitution"; and (3) "adopting definitions of language in the Connecticut anti-SLAPP statute based upon California case law [interpreting] the California statute in violation of the rule against ex post facto legislation as applied to the

[1] "SLAPP is an acronym for strategic lawsuit against public participation, the distinctive elements of [which] are (1) a civil complaint (2) filed against a nongovernment individual (3) because of their communications to government bodies (4) that involves a substantive issue of some public concern. . . . The purpose of a SLAPP suit is to punish and intimidate citizens who petition state agencies and have the ultimate effect of chilling any such action." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

courts through the due process clause."[2] We affirm the judgment of the trial court.[3]

The following facts, either as set forth by the court in its memorandum of decision[4] or as undisputed in the record, and procedural history are relevant to our resolution of this appeal.[5] "The plaintiff, who is both a Connecticut attorney and a licensed certified public

[2] Although styled as distinct constitutional claims in the plaintiff's principal appellate brief, which is not a model of clarity, the plaintiff's separation of powers and ex post facto claims essentially challenge the court's construction and application of § 52-196a, which we address in part I of this opinion. Nevertheless, insofar as these claims are distinct from the statutory construction claim, we briefly address the alleged constitutional violations together in part II of this opinion.

[3] The plaintiff argues that the judgment of dismissal also is "reversible under the plain error doctrine" pursuant to Practice Book § 60-5, due to the court's failure to apply the correct law. Given that the plaintiff's claims challenging the court's construction of § 52-196a are preserved, we have no reason to resort to the plain error doctrine, which "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, *although unpreserved*, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Emphasis added; internal quotation marks omitted.) *State* v. *Taveras*, 219 Conn. App. 252, 269, 295 A.3d 421, cert. denied, 348 Conn. 903, 301 A.3d 527 (2023).

[4] The court noted that it considered the plaintiff's complaint, including the exhibits appended thereto, the plaintiff's affidavit and accompanying exhibits in opposition to the defendants' motion to dismiss, and Connecticut Hospice's affidavits in support of its motion to dismiss. See General Statutes § 52-196a (e) (2).

[5] Pearce notes in her appellate brief that the plaintiff's "statement of facts contains a voluminous number of 'facts' which are not supported by citations to the record in violation of [Practice Book §] 67-4 (d), and this failure is grounds for [the] Appellate Court to refuse to consider [this] appeal." Connecticut Hospice similarly argues that the plaintiff "misrepresents as fact that [he] is a party to" the settlement agreement and "asserts as facts other matters that are not contained in the record" while "omit[ting] mention of other facts that he did allege in his complaint . . . ." (Internal quotation marks omitted.) We acknowledge that there are some facts alleged in the plaintiff's principal brief on appeal that are not supported by references to the record and for which our own review of the record has not uncovered any such support. Putting the accuracy of the plaintiff's recitation of the facts and the defendants' characterization thereof aside, our review is based on the pleadings and exhibits in the record.

accountant, was counsel to the executrix in the matter of *In re Estate of Spirito* while it was pending in the Wallingford Probate Court. The executrix, a grandniece of the decedent, was one of four specific beneficiaries of the will. Connecticut Hospice, a charitable corporation, was the sole residuary beneficiary of the will. At all times relevant for this [appeal], Pearce, a Connecticut licensed attorney, was the chief executive officer of Connecticut Hospice. During the pendency of the probate proceedings, Connecticut Hospice was represented by Attorney Andrew Knott and Attorney Gregory Pepe.

"The original will provided that each of the four beneficiaries would receive $50,000 and that Connecticut Hospice would receive the residue of the estate. While the matter was pending before the Probate Court, the executrix found an unsigned codicil that the decedent mailed to his previous counsel. That unsigned codicil increased the bequests to each of the beneficiaries from $50,000 to $100,000, thereby decreasing the share of the estate that would go to Connecticut Hospice. After much back and forth in 2018 and 2019, the individual beneficiaries moved to compel a settlement they claimed they had reached regarding the codicil. This resulted in a hearing in the Probate Court pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 626 A.2d 729 (1993). [The plaintiff alleges that], [a]t that hearing[6]

[6] In its memorandum of decision, the trial court indicated that Pearce made this statement at the hearing held pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 626 A.2d 729 (1993). The plaintiff's principal brief on appeal, however, states that this statement was made "on September 24, 2019, prior to the start of [the] hearing before the Probate Court . . . ." Consequently, the plaintiff argues, for the first time in his reply brief, that the court incorrectly stated that fact: "Obviously [Pearce] did not threaten the plaintiff and counsel *during* the hearing in the presence of the probate judge." (Emphasis added.) Nevertheless, the plaintiff's complaint suggests otherwise, as it alleges that, "[o]n September 24, 2019, a hearing was held before the Probate Court, *which hearing became quite contentious when* [*Pearce*] *stated* that she

. . . Pearce stated that she wanted to 'extract a pound of flesh.'

"After that hearing, the parties executed a document entitled Settlement Agreement, Mutual Distribution Agreement and Release [(settlement agreement)]. The Probate Court approved that agreement on October 31, 2019. The [settlement] agreement provided for distributions of an additional $23,000 to each of the individual beneficiaries and an interim distribution of $800,000 to Connecticut Hospice. It also included a nondisparagement clause that prevented the 'parties' to the agreement from making '[any negative or] disparaging oral or written statements about the other parties to this Settlement Agreement [to any parties who are not a party to the Settlement Agreement' and from making 'any false or misleading statements about any other party or their career, reputation, business finances, salaries, or clients].' The . . . agreement [identified the parties as] Connecticut Hospice and the individual beneficiaries.[7] Pearce signed the [settlement] agreement, but only in her capacity as chief executive officer of Connecticut Hospice. The plaintiff did not sign the [settlement] agreement.

"Connecticut Hospice's counsel [Pepe] executed and filed a waiver of notice and hearing for final distribution

wanted to 'extract a pound of flesh.' " (Emphasis added.) It appears that the trial court reasonably read the plaintiff's complaint as alleging that the threat was made at, or at least in relation to, that hearing, and there is no evidence in the record to support a contrary conclusion. Regardless, any uncertainty as to when the statement was made does not alter our resolution of this appeal, as we conclude that the plaintiff inadequately briefed, and thus abandoned, any claim on appeal that Pearce's alleged statement on September 24, 2019, does not fall within the scope of conduct protected under the anti-SLAPP statute. See part I A of this opinion.

[7] We find no support in the record for the plaintiff's argument that the phrase "any other party" in the nondisparagement clause "was understood to include counsel to the parties," including himself as counsel to one of the individual beneficiaries. The agreement expressly and unambiguously identifies the only parties to the agreement as Connecticut Hospice, the fiduciary, and four specific beneficiaries under the Spirito will.

in January, 2020. The next month, Connecticut Hospice's other counsel, [Knott], filed a petition to remove the fiduciary. That petition was denied by the Probate Court at a hearing on March 3, 2020.

"[The plaintiff alleges that], '[a]t subsequent hearings,' Connecticut Hospice's counsel 'began knowingly and/or recklessly making false claims before the Probate Court concerning allegations of "irregularities [and] missing funds," [and] falsely and maliciously accusing the plaintiff of "borrowing from the funds" of the estate without any evidence whatsoever.' On or about April 9, 2020, Pearce sent an email to the individual beneficiaries' counsel that stated in part: 'I guess that means that the rumor I heard that [the plaintiff] was "borrowing" from the funds isn't true.'

"In November, 2020, after a hearing about the plaintiff's attorney's fees, the plaintiff, counsel for the individual beneficiaries, and [Pepe] held a settlement conference. [The plaintiff alleges that] [Pepe] demanded an additional distribution of $80,000 to Connecticut Hospice prior to the approval of the financial report. The plaintiff alleges that this payment would have been precluded by language in the agreement that any subsequent distribution after the interim distribution of $800,000 would be made after the conclusion of the final accounting and approval by the Probate Court. [The plaintiff further alleges that] [Pepe] then threatened to grieve the plaintiff if he did not make the $80,000 disbursement. On November 30, 2020, the plaintiff e-filed a letter with the Probate Court, requesting sanctions against [Pepe] for his threat to grieve the plaintiff and against Pearce for her threat to 'extract a pound of flesh.'

"On December 18, 2020, Pearce, in her capacity as chief executive officer of Connecticut Hospice, filed a grievance against the plaintiff, [which the plaintiff

alleges contained false statements]. In that grievance, Pearce complained about the fees charged by the plaintiff, the delays in filing accountings with the Probate Court, and the failure to pay Connecticut Hospice at least $100,000 of the additional $200,000 it expected to receive after the interim payment of $800,000.

"In a separate grievance brought by the plaintiff against Pearce, the [grievance] panel found probable cause that Pearce had engaged in misconduct when she sent the email referring to the rumors about 'borrowing from the [e]state funds' and when she filed the grievance against the plaintiff.

"[The plaintiff alleges that], [i]n December, 2020, the defendants contacted the Office of the Attorney General, which filed another appearance in the Probate Court [in reliance on the defendants' false claims].

"[The plaintiff further alleges that], [a]fter the plaintiff and the executrix consulted with Attorney Paul Knierim in January, 2021, [Knierim] [allegedly] called the executrix and then held a conference call with both the executrix and the plaintiff to tell them that [Knott] was alleging that funds were missing from the estate. . . . Later that same month, [Knott] stated in a letter to the Probate Court that Connecticut Hospice had no other objections to the final account other than the plaintiff's attorney's fees.

"In addition to the grievance he filed against Pearce, the plaintiff also filed a grievance against [Knott]. The [grievance] panel found probable cause that [Knott] engaged in misconduct, including allegations that the plaintiff may have been involved in forging a signature and 'inaction' in connection with his client's 'comments/innuendos' as to the plaintiff borrowing estate funds. The litigation at issue in the grievance was the *In re Spirito Estate* Probate Court matter.

"[Finally, the plaintiff alleges that], [o]n May 14, 2021 [Pepe] sent an ex parte communication to the Probate Court that ultimately caused the presiding probate judge to recuse himself." (Footnotes added; footnote in original.)

The plaintiff brought the underlying action against the defendants in September, 2022. In the operative five count complaint, the plaintiff alleged that the defendants' conduct during the pendency of the underlying probate matter constituted breach of the settlement agreement, defamation, defamation per se, fraud, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

The defendants filed separate special motions to dismiss the action pursuant to § 52-196a (b).[8] In their accompanying memoranda of law, the defendants claimed that the plaintiff's complaint is based on the exercise of their right of free speech and right to petition the government in connection with a matter of public concern within the meaning of § 52-196a (a) and that, because the complaint is barred by Connecticut's absolute litigation privilege, the plaintiff could not satisfy his burden to show that there was probable cause that he would prevail on the merits of his complaint pursuant to § 52-196a (e) (3). The defendants also requested attorney's fees pursuant to § 52-196a (f) (1).[9]

[8] General Statutes § 52-196a (b) provides: "In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

[9] General Statutes § 52-196a (f) (1) provides: "If the court grants a special motion to dismiss under this section, the court shall award the moving party costs and reasonable attorney's fees, including such costs and fees incurred in connection with the filing of the special motion to dismiss."

The plaintiff filed an objection to the defendants' special motions to dismiss, to which Connecticut Hospice filed a reply. In his memorandum of law in support of his objection to the motions, the plaintiff argued that the defendants' alleged conduct did not constitute the exercise of the defendants' rights to petition the government. He also asserted that his complaint is not barred by the litigation privilege because (1) the complaint is not based on the defendants' statements and conduct during a proceeding in the Probate Court, and (2) "[t]he defendants' statements and conduct fall under an exception to absolute immunity for causes of action alleging an improper use of the judicial system." (Internal quotation marks omitted.)

On January 19, 2023, following a hearing, the court issued a memorandum of decision granting the defendants' special motions to dismiss. In its analysis, the court identified the defendants' conduct and communications as alleged in the plaintiff's complaint. Specifically, as to Pearce, individually or on behalf of Connecticut Hospice, the court identified the following conduct and communications: "Pearce's statement . . . that she wanted to 'extract a pound of flesh'; Pearce's April 9, 2020 email to the individual beneficiaries' counsel that stated in part: 'I guess that means that the rumor I heard that [the plaintiff] was "borrowing" from the funds isn't true'; and Pearce's filing of a grievance against the plaintiff." As to communications made by counsel on behalf of Connecticut Hospice, the court highlighted the following: "Knott's filing of a petition to remove the fiduciary; counsel's making false claims of irregularities and missing funds and accusing the plaintiff of borrowing from the funds of the estate 'at subsequent hearings' before the Probate Court; [Pepe's] demand for $80,000 to be paid to Connecticut Hospice before the approval of the final accounting and his threat to grieve the plaintiff if the $80,000 was not paid;

counsel's contact with the Office of the Attorney General that caused it to file another appearance with the Probate Court; [Knott's] statement to [Knierim] that funds were missing from the estate [Knott's] allegation that the plaintiff may have been involved in forging a signature and[Knott's] inaction in response to his client's comments or innuendos about the plaintiff's borrowing estate funds; and [Pepe's] sending an ex parte letter to the Probate Court."

The court determined that all of the communications alleged in the plaintiff's complaint "were [made] in connection with a matter of public concern" as defined in § 52-196a (a)[10] because they "related to a charitable organization that was named as the sole residual beneficiary receiving its share of an estate and [to] the possible actions of the plaintiff and his client that might have interfered with that organization's rights under the will." As to the statements that the plaintiff was borrowing estate funds or was responsible for irregularities or missing funds, the court found that they also "raised matters of public concern" because "[p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern" and because "the public has an interest in being informed of the outcome of disciplinary proceedings involving attorneys licensed to practice law in this state." (Internal quotation marks omitted.) See *Gleason* v. *Smolinski*, 319 Conn. 394, 415, 125 A.3d 920 (2015) (noting that crimes are matter of public concern); *Elder* v. *Kauffman*, 204 Conn. App. 818, 830 n.3, 254 A.3d 1001 (2021) (noting that there is public interest in disciplinary proceedings).

[10] General Statutes § 52-196a (a) provides in relevant part: "As used in this section: (1) 'Matter of public concern' means an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ."

As to the particular constitutional right at issue, the court concluded that only some of the communications constituted exercises of the defendants' right of free speech as defined in § 52-196a (a) (2),[11] but it nonetheless concluded that all the communications constituted exercises of the defendants' right to petition the government "in connection with an issue under consideration by a judicial body" within the meaning of § 52-196a (a) (3) (A).[12] At the outset of its analysis, the court noted that "[t]he questions raised by the parties' dispute over the right to petition the government definition [were] (1) whether 'in connection with' requires that the communications actually occur during a Probate Court hearing, and (2) whether that same language requires that the communications must be explicitly about 'the issue under consideration or review.' "

As to the first issue, the court concluded that the phrase "communication in connection with an issue under consideration or review by a . . . judicial . . . body" in § 52-196a (a) (3) (A) "does not require that the communication happen during a hearing." The court noted that its conclusion was "consistent with Connecticut case law on the litigation privilege, which construes

[11] General Statutes § 52-196a (a) (2) provides in relevant part: " 'Right of free speech' means communicating, or conduct furthering communication, in a public forum on a matter of public concern . . . ."

The court concluded that the email from Pearce to the individual beneficiaries' counsel, the in-person conversations, and the phone calls among lawyers during the probate litigation "were not made in a public forum" because they "were private communications sent from one individual to another" rather than "freely transmitted to a large number of people and . . . accessible to the public." The court noted, however, that its conclusion did "not foreclose the possibility that these communications were exercises of the defendants' rights to petition the government."

[12] General Statutes § 52-196a (a) provides in relevant part: "(3) 'Right to petition the government' means (A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body . . . ."

'judicial proceeding' 'liberally to encompass much more than civil litigation and criminal trials.' "[13]

As to the second issue, the court noted that, although its research revealed no relevant Connecticut case law regarding whether the communications must be explicitly about the "issue under consideration or review"; General Statutes § 52-196a (a) (3) (A); it had found several cases from courts in California applying a provision in its anti-SLAPP statute that is "almost identical to § 52-196a (a) (3)." See Cal. Code Civ. Proc. § 425.16 (e) (2).

The court relied on *Neville* v. *Chudacoff*, 160 Cal. App. 4th 1255, 1266, 73 Cal. Rptr. 3d 383 (2008), review denied, California Supreme Court, Docket No. S162917 (June 11, 2008), in which the California Court of Appeals held that "a statement is 'in connection with' litigation under [California's anti-SLAPP statute] if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." Noting that the test articulated in *Neville* "is consistent with Connecticut case law," the court applied it in the present case and concluded that "the communications at issue here were made 'in connection with an issue under consideration or review by a . . . judicial or other governmental body.' All of the communications, including

[13] Additionally, the court concluded that, "even if Pearce's statements in the grievance that she filed against the plaintiff were not 'in connection with' the Probate Court proceeding, they were 'in connection with' an issue under consideration by another judicial body—the grievance panel." See, e.g., *Carter* v. *Bowler*, 211 Conn. App. 119, 125, 271 A.3d 1080 (2022) (holding "that the statewide bar counsel's review of complaints of attorney misconduct is quasi-judicial in nature under Connecticut law"); *Cohen* v. *King*, 189 Conn. App. 85, 90, 206 A.3d 188 (2019) (concluding that "[a]n attorney who is the subject of a grievance proceeding is a party to a quasi-judicial proceeding, and, therefore, relevant statements made by the attorney are shielded by the litigation privilege"), cert. denied, 336 Conn. 925, 246 A.3d 986 (2021); see also *Noble* v. *Hennessey*, Docket No. CV-20-6045166-S, 2021 WL 830014, *12 (Conn. Super. January 12, 2021) (filing grievance complaint constitutes petitioning government).

those that alleged that the plaintiff was borrowing funds or that funds were missing from the estate, relate to the substantive issues in [the probate matter] and were directed to persons having some interest in those probate proceedings." Accordingly, the court held that the defendants met their burden under the statute, thereby shifting the burden to the plaintiff to set "forth with particularity the circumstances giving rise to the complaint . . . and [to demonstrate] to the court that there is probable cause, considering all valid defenses, that [he would] prevail on the merits of the complaint . . . ." General Statutes § 52-196a (e) (3).

As to the plaintiff's burden, the court concluded that the plaintiff's breach of contract, fraud, and CUTPA counts were legally insufficient because he failed to plead essential elements of those causes of action. In particular, the court concluded that the plaintiff lacked standing to sue for breach of the settlement agreement because he did not, and could not, allege that he was a party to it. As to his fraud count, the court concluded that the plaintiff failed to allege "that any of [the defendants'] communications . . . were made to him, that he relied on any of those communications, or that he suffered harm as a result of that reliance." Finally, as to his CUTPA count, the court found that, even if the plaintiff could allege an unfair or deceptive act or practice that caused him to suffer an ascertainable loss, "he could not allege the trade or commerce element" because, inter alia, "the practice of law is not considered to be [a] trade or commerce, and attorneys may only be held liable under CUTPA for the 'entrepreneurial' aspects of their practice." In addition, the court concluded that "all five of the counts . . . are barred by the defense of absolute immunity based on the litigation privilege" because all of the communications alleged in the plaintiff's complaint "occurred in statements during Probate Court hearings, in filings made [in] the Probate

Court, and in emails or phone calls with other lawyers and the Office of the Attorney General."[14] The court reasoned that the litigation privilege is not limited to "hearings in court when the judge is on the bench" but also applies to "communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding." (Internal quotation marks omitted.)

After noting that "[t]he privilege applies if the statement has some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it," the court reasoned that, "[e]ach of the communications here, including those that alleged that the plaintiff had borrowed funds from the estate or that funds were missing, all had some reference to the estate that was the subject of the probate litigation." For that reason, the court concluded that all of the alleged communications are protected by the litigation privilege and that, consequently, the plaintiff had failed to demonstrate a likelihood of success on the merits of his complaint.[15] Accordingly, the court dismissed the complaint and

[14] The court noted that "[t]he one possible exception would be the grievance filed by Pearce, but that, too, was part of a judicial proceeding," given this court's holding in *Carter* v. *Bowler*, 211 Conn. App. 119, 125, 271 A.3d 1080 (2022). See footnote 13 of this opinion.

[15] The court also rejected the plaintiff's argument that the defendants' statements fall under an exception to the litigation privilege for causes of action alleging an improper use of the judicial system. The court explained: "In those situations where a defendant is being sued for words used in a judicial proceeding, our courts have applied the privilege and dismissed the action. By contrast, where a defendant is being sued for causes of action such as abuse of process or vexatious litigation because they made improper use of the judicial system, our courts have declined to apply absolute immunity. . . . The complaint in this case does not include any causes of action that challenge the underlying purpose of the probate matter. Instead, each cause of action is based on the communications made by Connecticut Hospice's lawyers and by Pearce." (Citations omitted.) On appeal, the plaintiff does not challenge the court's conclusion in this regard.

invited the defendants to submit affidavits of their attorney's fees and costs.[16]

The plaintiff filed a motion to reargue and reconsider the dismissal, asserting that "the court's decision deprive[d] [him] of his due process rights by relying upon and adopting California statutory language and case law . . . [on] which [he] could not rely . . . [at the] time of filing the complaint and [which he had] no opportunity to refute by brief or oral argument." In a written order denying the plaintiff's motion, the court stated: "The plaintiff's motion to reargue does not identify any factual mistakes or inconsistencies with the court's decision. . . . Instead, [he] argues that he should be allowed to do additional research because the court relied on other states' anti-SLAPP case law . . . . To determine whether the communications were within the scope of [§ 52-196a], the court had to construe the statutory definitions. Because Connecticut's anti-SLAPP statute was so recently enacted, Connecticut courts routinely refer to other states' case law, including California and Nevada, to interpret the Connecticut statute. None of this should have been a surprise to the plaintiff. Nothing in the plaintiff's motion to reargue demonstrates that it was incorrect for the court to rely on this out-of-state case law or that there is any controlling authority that contradicts the case law on which the court relied. Therefore, the motion to reargue is denied."[17] This appeal followed.[18]

[16] The defendants separately filed affidavits of attorney's fees on February 9, 2023, which they subsequently supplemented. The court, *Stewart*, *J.*, issued a memorandum of decision on June 14, 2023, awarding Connecticut Hospice attorney's fees of $33,400 and costs of $2469.52, and awarding Pearce attorney's fees of $20,875.

[17] The plaintiff's appeal form indicates that he also appeals from the court's denial of his motion to reargue. In his principal appellate brief, however, the plaintiff does not challenge the court's denial of his motion to reargue.

[18] On November 24, 2023, the defendants filed a joint motion to dismiss this appeal for the plaintiff's alleged "repeated failure to file papers within deadlines . . . ." The plaintiff objected to the motion, asserting that he "has

I

The plaintiff first claims that the court improperly concluded that his "claims against the defendants fall within the ambit of protected constitutional conduct as defined by . . . § 52-196a." More specifically, the plaintiff claims that the court incorrectly concluded that the defendants' conduct constituted the exercise of their right to petition the government in connection with a matter of public concern within the meaning of § 52-196a and that the plaintiff failed to satisfy his burden of demonstrating that there is probable cause that he would prevail on the merits of his complaint. We address each subclaim in turn.

A

First, the plaintiff claims that the court incorrectly concluded that the defendants satisfied "their threshold burden of showing by a preponderance of the evidence that the plaintiff's suit was based on the defendants' exercise of their state or federal constitutional rights in connection with a matter of public concern."

On appeal, the plaintiff does not address all of the conduct that was the basis for his complaint in the underlying action. Although he argues that "not all the conduct on which [his claims] are based . . . involve" protected communications, his arguments in his principal appellate brief focused exclusively on Pearce's private email that stated: "I guess that means that the rumor I heard that [the plaintiff] was 'borrowing' from the funds isn't true." Thus, we consider any claim as to conduct other than Pearce's email abandoned.[19]

complied with the rules and orders of this court and has met all deadlines . . . ." On January 17, 2024, this court denied the motion to dismiss.

[19] Despite the narrow focus of his arguments in his principal appellate brief, during oral argument before this court, the plaintiff's counsel insisted that he was challenging the trial court's judgment as to all of the defendants' alleged conduct. The plaintiff's principal brief simply does not support such a statement, as it provides no analysis of any of the defendants' conduct other than Pearce's email. "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the

issue properly. . . . Where a claim receives only cursory attention in the brief without substantive discussion, it is deemed to be abandoned." (Internal quotation marks omitted.) *Kawecki* v. *Saas*, 132 Conn. App. 644, 646 n.2, 33 A.3d 778 (2011).

Furthermore, the defendants contend that the plaintiff's claims are inadequately briefed or were raised for the first time in the plaintiff's reply brief and that this court should therefore decline to review them. We agree that the plaintiff has failed to provide meaningful analysis of the issues raised on appeal, as his entire argument section consists of conclusory assertions without analysis and with minimal citations from the record. See, e.g., *Estate of Rock* v. *Commission on Human Rights & Opportunities*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("[c]laims are . . . inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record" (internal quotation marks omitted)). Notwithstanding the inadequacy of the plaintiff's brief, we exercise our discretion to review the claims raised in his principal appellate brief challenging the trial court's construction and application of the recently enacted anti-SLAPP statute to Pearce's email, which involves a question of law subject to our plenary review. See, e.g., *Avon* v. *Sastre*, 224 Conn. App. 155, 169 n.7, 312 A.3d 40 ("[w]e agree with the commission that the claim was inadequately briefed; however, while we are not *required* to review an issue that has not been adequately briefed, in the interest of thoroughness in explaining why the log is a public record under the act and in our plenary review, we will address the relation between the log and the public's business" (emphasis in original)), cert. denied, 349 Conn. 905, 312 A.3d 1058 (2024).

Nevertheless, we decline to consider arguments that the plaintiff raised for the first time in his reply brief. See *State* v. *Griffin*, 217 Conn. App. 358, 375 n.9, 288 A.3d 653 ("it is well established that we do not entertain arguments raised for the first time in a reply brief"), cert. denied, 346 Conn. 917, 290 A.3d 799 (2023). "Arguments must be raised in an appellant's original brief . . . so that the issue as framed . . . can be fully responded to by the appellee in its brief, and so that [an appellate court] can have the full benefit of that written argument." (Internal quotation marks omitted.) *Benjamin* v. *Corasaniti*, 341 Conn. 463, 476 n.8, 267 A.3d 108 (2021).

In his reply brief, the plaintiff argued for the first time that the court erred in concluding that he did not establish probable cause that he would prevail on the merits because he was a third-party beneficiary to the settlement agreement. He also argued that Pearce's statement that she would "extract a pound of flesh" is not an exercise of her right to petition the government in connection with a matter of public concern. In addition, the plaintiff rephrased his ex post facto claim in his reply brief, arguing that the "court erred by violating the due process clause of the fourteenth amendment requirement of fair notice as to what conduct is prohibited when it adopted case law of sister jurisdictions and tests used by California courts to punish the plaintiff by the award of attorney's fees." In support of that argument, the plaintiff cited the vagueness doctrine, which he did not apply in his principal appellate brief. During oral argument before this court, the plaintiff's counsel suggested that the ex post facto argument in his principal brief

With respect to Pearce's email, we understand his claim to be that the court misconstrued § 52-196a (a) in concluding that Pearce's email constituted a communication in connection with (1) an issue under consideration by a judicial body pursuant to § 52-196a (a) (3) (A), and (2) a matter of public concern.

The plaintiff argues in cursory fashion that "[a] private email does not fit within the ambit of the protected constitutional conduct as defined by the anti-SLAPP statute [and] is not connected to a matter of public concern." (Internal quotation marks omitted.) He further argues that, "[t]o the extent that the trial court's decision can be interpreted as adopting the defendants' position equating the knowingly false allegation in a private email that the plaintiff was 'borrowing from the funds' to the exercise of a constitutional right in connection with a matter of public concern, it is legally erroneous. The trial court cited no case supporting such a novel proposition, nor is there any credible argument that the defendants' alleged conduct qualifies as protected speech or petitioning activity." (Internal quotation marks omitted.)

As previously noted in this opinion, the plaintiff alleged that Pearce "sent an email to Attorney David Crotta, Jr. [who represented the individual beneficiaries in the probate matter], which read in part, 'I guess that means that the rumor I heard that [the plaintiff] was "borrowing" from the funds isn't true.' " The subject line of the email is "RE: update on spirito estate," and it was sent in response to Crotta's update about the status of the administration of the Spirito estate.

and the due process argument in his reply brief are one and the same. To the extent, however, that the plaintiff argues in his reply brief that § 52-196a violates the due process clause because it is unconstitutionally vague, that argument was raised for the first time in his reply brief. Accordingly, we decline to consider these belated arguments. See *Benjamin* v. *Corasaniti*, supra, 341 Conn. 476 n.8.

We begin our analysis with the applicable standard of review and relevant legal principles. "[W]hether conduct falls within the province of a statute is a matter of statutory construction presenting a question of law over which our review is plenary." *Chapnick* v. *DiLauro*, 212 Conn. App. 263, 269–70, 275 A.3d 746 (2022).

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Deer* v. *National General Ins. Co.*, 225 Conn. App. 656, 670–71, 317 A.3d 19 (2024).

In accordance with § 1-2z, we begin with the relevant statutory language. Section 52-196a (e) (3) provides in relevant part: "The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern . . . ."

In order to satisfy this initial burden, the moving party must show that the complaint is based on the exercise of one of the constitutional rights defined in § 52-196a (a) and "that the exercise of that right is in connection with a 'matter of public concern,' as defined in § 52-196a (a) (1)." *Robinson* v. *V. D.*, 346 Conn. 1002,1009, 293 A.3d 345 (2023).

Our reading of the plain language of § 52-196a (a) confirms the trial court's conclusions that Pearce's email was a communication "in connection with" (1) an issue under consideration or review by the Wallingford Probate Court and (2) a matter of public concern.

1

The statute defines "[r]ight to petition the government" as any "communication *in connection with* an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body . . . ." (Emphasis added.) General Statutes § 52-196a (a) (3) (A).

We agree with the trial court that the phrase "in connection with" in § 52-196a (a) (3) (A) does not require that the conduct occur during an official proceeding. In *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 235, 983 A.2d 1 (2009), our Supreme Court interpreted the same phrase in a different statutory context. As in the present case, the statute at issue in *Key Air, Inc.*, did not define the phrase "in connection with," and our Supreme Court therefore looked to the common understanding of the phrase as expressed in a dictionary. Id. The court explained that "[t]he dictionary defines the word 'connection' as, inter alia, a 'causal or logical relation or sequence . . . contextual relation or association . . . [or] relationship in fact. . . .' Accordingly, the plain meaning of the statutory phrase 'in connection with' necessarily includes *any* factual, contextual or causal relationship. . . .

Had the legislature intended there to be a narrower meaning of the phrase 'in connection with' . . . it could have either: (1) used clarifying language to narrow the scope of the phrase 'in connection with'; or (2) used language other than 'in connection with' that has a more restrictive meaning." (Citation omitted; emphasis in original.) Id., 235–36.

Similarly, in the present case, had the legislature intended to limit the protections afforded under the anti-SLAPP statute to communications made *during* an official proceeding, it could have used clarifying language to that effect. See *Costanzo* v. *Plainfield*, 344 Conn. 86, 108, 277 A.3d 772 (2022) ("the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (internal quotation marks omitted)). Moreover, construing the phrase "in connection with" broadly in accordance with its plain meaning is consistent with our precedent applying the litigation privilege. As this court has observed, "[t]here is no requirement under Connecticut jurisprudence that to be considered part of a judicial proceeding, statements must be made in a courtroom or under oath or be contained in a pleading or other documents submitted to the court. Indeed, [t]he privilege extends beyond statements made during a judicial proceeding to preparatory communications that may be directed to the goal of the proceeding. . . . In addition . . . the absolute privilege that is granted to statements made in furtherance of a judicial proceeding extends to every step of the proceeding until final disposition." (Citation omitted; internal quotation marks omitted.) *Kenneson* v. *Eggert*, 196 Conn. App. 773, 783, 230 A.3d 795 (2020); see also *Hopkins* v. *O'Connor*, 282 Conn. 821, 832, 925 A.2d 1030 (2007) ("[t]he scope of privileged communication extends not merely to those made directly to a tribunal, but also to those preparatory communications that may be directed to the goal of the

proceeding"). Because the litigation privilege and the anti-SLAPP statute have similar goals of protecting a person's right to seek relief through the judicial process or by otherwise petitioning the government without fear of being sued for doing so, it makes sense that the scope of protection each offers should be the same. Thus, we are not persuaded that Pearce's email falls outside the ambit of the anti-SLAPP statute simply because it did not occur during a hearing before the Probate Court.

As to whether Pearce's statement suggesting that the plaintiff was "borrowing funds" from the estate was made "in connection with" the issue under consideration or review by the Probate Court, the plaintiff argues that the court improperly relied on the California Court of Appeals' construction of California's anti-SLAPP statute in *Neville* v. *Chudacoff*, supra, 160 Cal. App. 4th 1255. According to the plaintiff, "[w]hile the court may look to other states for guidance if the statute is unclear or case law is absent on certain meanings, the trial court cannot wholesale add meanings based on another state's interpretation of its statute, which contains different language and substantially broadens the [breadth] and scope of the Connecticut statute which was not intended by the legislature." We conclude that the test adopted by the trial court is the proper construction of the statutory language.

Again, the statutory phrase "in connection with" is not defined, and the plain meaning of this phrase "necessarily includes *any* factual, contextual or causal relationship." (Emphasis in original.) *Key Air, Inc.* v. *Commissioner of Revenue Services*, supra, 294 Conn. 235. In rejecting the plaintiff's argument that the communication had to relate to the specific issue under consideration or review, the trial court considered whether a greater degree of relevancy was required in the context of the anti-SLAPP statute. Given the absence of any

statutory definition or relevant precedent interpreting the phrase in the context of our anti-SLAPP statute, the trial court reasonably looked to California case law interpreting a provision of California's anti-SLAPP statute that has nearly identical language to § 52-196a (a) (3) (A). Compare General Statutes § 52-196a (a) (3) (A) (" '[r]ight to petition the government' means . . . communication *in connection with an issue under consideration or review by a . . . judicial . . . body*" (emphasis added)), with Cal. Code Civ. Proc. § 425.16 (e) (2) (" 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . (2) any written or oral statement or writing made *in connection with an issue under consideration or review by a . . . judicial body*" (emphasis added)).

As noted previously in this opinion, the court adopted the test employed by California courts, which provides that a communication is made "in connection with" an issue under consideration by a judicial body if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation. See *Neville* v. *Chudacoff*, supra, 160 Cal. App. 4th 1266. As the trial court noted in its decision, this test is consistent with Connecticut's application of the litigation privilege, which includes a similar relevancy requirement. See, e.g., *Gallo* v. *Barile*, 284 Conn. 459, 470, 935 A.2d 103 (2007) ("we consistently have held that a statement is absolutely privileged if it is made in the course of a judicial proceeding and *relates to the subject matter of that proceeding*" (emphasis added)); *Kenneson* v. *Eggert*, supra, 196 Conn. App. 782 ("[W]e first determine whether . . . the statements at issue in this case were made during a judicial proceeding. If so, we then consider whether . . . the alleged misrepresentation is sufficiently relevant to the issues involved in those proceedings."). Accordingly, we adopt it for purposes of applying § 52-196a (a) (3) (A).

Applying that test in the present case, there is no question that Pearce's email, which was directed to counsel for the individual beneficiaries under the Spirito's will and concerned the plaintiff's handling of estate property in connection with a pending probate matter, is related to an issue under consideration or review by the Probate Court overseeing the administration of that estate. Rather than providing any arguments as to how this test is not consistent with the plain meaning of "in connection with" or why Pearce's email does not satisfy its requirements, the plaintiff solely challenges the court's reliance on California case law in reaching its conclusion. This contention warrants little discussion.

When courts consider an issue of first impression, they routinely consider decisions from other state and federal jurisdictions. See, e.g., *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 573, 113 A.3d 932 (2015) ("[w]hen contemplating issues of first impression with regard to Connecticut's common law, we often have sought to benefit from the collective wisdom and experience of our sister states"); *Connecticut Coalition for Justice in Educational Funding, Inc.* v. *Rell*, 295 Conn. 240, 299, 990 A.2d 206 (2010) ("[a] review of the sister state decisions in this area is of paramount importance to . . . a question of first impression in an area of constitutional law that uniquely has been the province of the states"); *Lovan C.* v. *Dept. of Children & Families*, 86 Conn. App. 290, 299–300, 860 A.2d 1283 (2004) ("[t]o aid in our determination, we find the decisions of our sister states persuasive"). Moreover, in conducting an analysis of Connecticut's anti-SLAPP statute, our Supreme Court recently explained that "[a]n examination of federal and sister state case law is particularly instructive with respect to the jurisdictional issue before [it] because the legislative history of our anti-SLAPP statute signifies that it was modeled after anti-SLAPP statutes that came before it in other states."

Smith v. *Supple*, 346 Conn. 928, 953 n.22, 293 A.3d 851 (2023). Accordingly, there is no merit to the plaintiff's assertion that the court improperly relied on persuasive authority from the California Court of Appeals. The trial court properly sought to determine the meaning of the statutory language in a reasoned manner and its interpretation is consistent with the plain statutory language.

Consequently, we conclude that the court properly determined that a communication is made "in connection with" an issue under review by a judicial body pursuant to § 52-196a (a) (3) (A) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation. We further conclude that, under this standard, Pearce's email was made in connection with an issue under consideration or review by the Wallingford Probate Court and was directed to another attorney, Crotta, who was directly involved in the litigation. It, therefore, constituted the exercise of her right to petition the government within the meaning of the statute.

2

The plaintiff also asserts that the court's conclusion that Pearce's email alleging that the "plaintiff was 'borrowing from the [estate] funds' [constituted] the exercise of a constitutional right in connection with a matter of public concern . . . is legally erroneous." The plaintiff's unsupported assertion is unavailing.

"Matter of public concern" is statutorily defined as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." General Statutes § 52-196a (a) (1).

The trial court concluded that the defendants' alleged conduct and communications were made in connection

with a matter of public concern because they "related to a charitable organization that was named as the sole residual beneficiary receiving its share of an estate and [to] the possible actions of the plaintiff and his client that might have interfered with that organization's rights under the will." As to Pearce's email in particular, the court concluded that "the statements that the plaintiff was borrowing estate funds or was responsible for irregularities or missing funds in the estate raised matters of public concern" because "[p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern" and because "the public has an interest in being informed of the outcome of disciplinary proceedings involving attorneys licensed to practice law in this state." (Internal quotation marks omitted.) As support for its conclusion, the court cited *Gleason* v. *Smolinski*, supra, 319 Conn. 415, in which our Supreme Court observed that "[p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern." (Internal quotation marks omitted.) The trial court also cited this court's decision in *Elder* v. *Kauffman*, supra, 204 Conn. App. 830 n.3, in which we stated that "[i]t is indisputable that the public has an interest in being informed of the outcome of disciplinary proceedings involving attorneys licensed to practice law in this state." Accordingly, the court concluded that Pearce's email concerned "an issue related to . . . economic or community well-being" pursuant to § 52-196a (a) (1) (B).

Although the plaintiff quotes the definition of "[m]atter of public concern," he neither analyzes that statutory definition nor addresses the court's reasoning for its conclusion that Pearce's email concerned an issue related to economic or community well-being. In short, the plaintiff has failed to marshal any arguments as to why the court's determination that Pearce's email suggesting that he improperly borrowed estate funds

related to a "[m]atter of public concern" was incorrect, and our own review of the statutory language reveals no error in the court's reasoning.[20] Thus, the plaintiff's claim fails.

B

Second, the plaintiff claims that, even if the defendants satisfied their initial burden under § 52-196a (e) (3), the court incorrectly concluded that the plaintiff failed to satisfy his burden of demonstrating that there is probable cause that he would prevail on the merits of his complaint. We decline to review the plaintiff's claim due to inadequate briefing.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth

[20] The plaintiff also argues that "the conduct at issue does not involve a communication in a public forum," which is required for conduct to qualify as the exercise of the right of free speech under the anti-SLAPP statute. (Internal quotation marks omitted.) Because we have determined that the trial court properly concluded that the private email constituted an exercise of the defendants' rights to petition the government on a matter of public concern, and thus brings the plaintiff's complaint within the scope of the anti-SLAPP statute, there is no need for us to address whether that communication also constituted an exercise of Pearce's right of free speech. See *Robinson* v. *V. D.*, supra, 346 Conn. 1010 n.8 (having concluded that defendant asserted colorable claim under right to petition government, our Supreme Court declined to decide whether alleged statements also fell within statutory definitions of "right of free speech" and "right of association" (internal quotation marks omitted)).

their arguments in their briefs. . . . [B]riefing is inadequate when it is not only short, but confusing, repetitive, and disorganized." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022).

In support of this subclaim, the plaintiff argues that his complaint "sets forth with particularity the circumstances upon which the defendants breached the [settlement agreement] to which he is a party, defamed the plaintiff, are liable for defamation per se, committed fraud, and violated CUTPA. Clearly the plaintiff established facts strong enough to justify a reasonable [person] in the belief that [he] has lawful grounds for prosecuting the defendant[s] under any one of the five counts of his complaint." As previously noted in this opinion, the court concluded that the plaintiff lacked standing to assert a breach of the settlement agreement because he was not a party to it and failed to allege the necessary elements of both his fraud and CUTPA claims. The plaintiff, however, does not address any of the court's reasoning as to those counts. Moreover, he fails to address the court's conclusion that "all five of the counts . . . are barred by the defense of absolute immunity based on the litigation privilege."[21]

[21] We note that, in support of his "ex post facto" claim, the plaintiff argues that the trial court extended the litigation privilege "to include a communication in the specter of litigation; apparently meaning a communication where litigation is under serious consideration, thereby triggering the litigation privilege, which the plaintiff asserts is beyond the scope of Connecticut's statute." Although this vague assertion as to unspecified conduct in a separate part of his appellate brief references the court's application of the litigation privilege, it is insufficient to save the inadequacy of his brief as to this subclaim. Moreover, the court's conclusion that the litigation privilege extends to communications made outside of an official proceeding is not an extension of the scope of the litigation privilege, which "extends beyond statements made during a judicial proceeding to preparatory communications that may be directed to the goal of the proceeding." (Internal quotation marks omitted.) *Kenneson* v. *Eggert*, supra, 196 Conn. App. 783.

Consequently, by failing to address the dispositive bases for the court's conclusion that the plaintiff had failed to establish that he was likely to prevail on the merits of his complaint, his brief is inadequate for us to conduct any meaningful review of this claim. See *C. B.* v. *S. B.*, supra, 211 Conn. App. 630. Accordingly, we decline to review it.

II

The plaintiff also claims that the court erred by (1) "adopting language in the California anti-SLAPP statute and California case law not contained in the Connecticut anti-SLAPP statute in violation of the separation of powers under the constitution"; and (2) "adopting definitions of language in the Connecticut anti-SLAPP statute based upon California case law interpretation of the California statute in violation of the rule against ex post facto legislation as applied to the courts through the due process clause." The gravamen of both claims is that the court's consideration of persuasive authority from another state in construing a Connecticut statute somehow violates the separation of powers doctrine or the ex post facto clause under the federal constitution. Both claims are unavailing.

First, interpreting a statute is precisely within the power of the judiciary, as "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury* v. *Madison*, 5 U.S. 137, 177, 2 L. Ed. 60, 1 Cranch 137 (1803). As previously noted in part I A 1 of this opinion, when faced with an issue of first impression, courts routinely consider decisions from other state and federal jurisdictions and, in this particular context, "[a]n examination of federal and sister state case law is particularly instructive . . . because the legislative history of our anti-SLAPP statute signifies

that it was modeled after anti-SLAPP statutes that came before it in other states." *Smith* v. *Supple*, supra, 346 Conn. 953 n.22. Thus, the trial court's reliance on California case law to interpret and apply § 51-296a did not violate the separation of powers doctrine under the constitution.

Second, there is no ex post facto violation arising from the court's interpretation of § 52-196a. According to the plaintiff, the court's "unforeseen" application of California case law "amount[ed] to a denial of due process, as the new interpretation is retrospective, in that the court applied the new interpretation to the [complaint]," which was filed "before the memorandum of decision was published in this case, and it disadvantaged the [plaintiff] by awarding substantial attorney's fees" to the defendants. The plaintiff's claim is unavailing.[22]

"[A]s the text of the [ex post facto] [c]lause makes clear, it is a limitation upon the powers of the [l]egislature, and does not of its own force apply to the [J]udicial

[22] Insofar as the plaintiff's assertion that the court's construction and application of the statute in the present case "amount[ed] to a denial of due process" can be construed as a distinct claim independent of his ex post facto claim, his brief is devoid of any legal analysis in support of such a claim, and we therefore decline to review it. See, e.g., *OneWest Bank, N.A.* v. *Ceslik*, 202 Conn. App. 445, 467, 246 A.3d 18 (defendant's due process claim was unreviewable due to inadequate brief in which defendant made only conclusory statements), cert. denied, 336 Conn. 936, 249 A.3d 39 (2021). Furthermore, there is simply no merit to the plaintiff's alleged due process violation, the gravamen of which is that he did not prevail due to the court's interpretation of the statute. As the United States Supreme Court has explained, "[t]he essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). In the present case, the trial court performed its role by interpreting and applying the law, and the resulting disappointment of the plaintiff's individual expectations does not transform "[t]he essence of judicial decisionmaking" into a due process violation. Id.

[B]ranch of government. . . . Nevertheless, limitations on ex post facto judicial decisionmaking are inherent in the notion of due process. . . . [T]he United States Supreme Court [has] observed: If a state legislature is barred by the [e]x [p]ost [f]acto [c]lause from passing such a law, it must follow that a [s]tate Supreme Court is barred by the [d]ue [p]rocess [c]lause from achieving precisely the same result by judicial construction. . . . If a judicial construction of *a criminal statute* is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." (Citations omitted; emphasis added; internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 805–806, 950 A.2d 1220 (2008).

"It is well established that *the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them*. . . . [I]n an ex post facto analysis, a court must first determine whether the challenged law is a penal statute . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Rios* v. *Commissioner of Correction*, 224 Conn. App. 350, 360, 312 A.3d 1059, cert. denied, 349 Conn. 910, 314 A.3d 601 (2024).

The anti-SLAPP statute is not a penal statute; rather, § 52-196a "provides a *procedural* mechanism . . . to achieve an important substantive goal, namely, protecting the parties from expensive and time-consuming lawsuits on the merits. In that sense, the statute provides an expedited off-ramp for a party to avoid further litigation." (Emphasis added; internal quotation marks omitted.) *Smith* v. *Supple*, supra, 346 Conn. 946 n.16. The fact that the statute provides for the award of costs and reasonable attorney's fees to the prevailing party does not transform the law into a penal statute. There-

fore, because § 52-196a is not a penal statute, the plaintiff's ex post facto claim necessarily fails.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARQUE GREENE-PENDERGRASS
(AC 45493)

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

Syllabus

The defendant appealed from the judgments of the trial court revoking his probation in two separate dockets and sentencing him to an additional period of incarceration, claiming, inter alia, that the court abused its discretion in considering pending charges against him when making its decision. *Held*:

The trial court did not improperly rely on various pending charges against the defendant in revoking his probation and imposing a term of incarceration, as, during a probation revocation hearing, a court may consider evidence of crimes for which the defendant was indicted but neither tried nor convicted.

In light of the entire record, the trial court did not abuse its discretion when it imposed a total effective sentence representing nearly all of the defendant's remaining suspended sentences.

Argued September 5—officially released October 15, 2024

Procedural History

Substitute information in the first case charging the defendant with possession of narcotics with intent to sell, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, where the defendant was presented to the court on a plea of guilty, and substitute information in the second case charging the defendant with possession of narcotics with intent to sell, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Scarpellino*, *J.*, on a plea of guilty; judgments of guilty in accordance with the pleas;

thereafter, information in each case charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the court, *B. Fischer, J.*; judgments revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Kirstin B. Coffin, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, and *Melissa Holmes*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The issue presented in this appeal is whether the trial court abused its discretion in revoking the probation of the defendant, Marque Greene-Pendergrass, and sentencing him to five years of incarceration. We conclude that the court did not abuse its discretion and, accordingly, affirm the judgments of the trial court.

The record reveals the following facts. On January 18, 2017, in the Superior Court in the judicial district of New Haven, the defendant was convicted of possession of narcotics with intent to sell and was sentenced to seven years of incarceration, execution suspended after twenty-one months, and two years of probation (New Haven matter). On January 19, 2017, in the Superior Court in the judicial district of Ansonia-Milford, the defendant was convicted of possession of narcotics with intent to sell and was sentenced to seven years of incarceration, execution suspended after twenty months, and three years of probation (Milford matter). The sentences in the New Haven and Milford matters were concurrent. In both matters, the defendant physically was released from the custody of the Department

of Correction on September 7, 2018, and, at that time, his two year term of probation commenced. The defendant signed the conditions of his probation, which included submitting to any required psychological counseling, reporting as required by his probation officer, and keeping his probation officer informed of his current address. Subsequently, in both the New Haven and Milford matters, the defendant was charged with violation of probation.

Following a hearing, the court found that the defendant had violated the conditions of his probation in the following ways: (1) he was negatively discharged twice from a substance abuse counseling and treatment program; (2) he failed to report to his probation officer on three separate occasions; and (3) he provided his probation officer with an invalid address for his residence.

In determining whether the defendant's probation should be revoked and what sentence to impose, the court considered multiple factors. The court discussed the defendant's "substantial criminal history," noting that he pleaded guilty in September, 2013, to assault, robbery, and violation of a protective order and, following his release from incarceration as to those offenses, he pleaded guilty in the New Haven and Milford matters to criminal possession of narcotics with intent to sell. Once on probation in those two matters, the defendant violated three conditions of his probation. The court detailed the defendant's additional criminal cases, which were pending at the time of the violation of probation hearing. The court stated that it had reviewed the four arrest warrants in those pending matters and noted there had been findings of probable cause. The court explained that the warrants concerned allegations that the defendant had stolen an envelope containing $1760; had been involved in a "very violent domestic matter" that involved the assault with a firearm and

strangulation of a pregnant woman while children witnessed the incident, and culminated in the defendant driving away in the victim's car; had been in contact with the victim in violation of a protective order in an attempt to influence her version of events; and had tampered with witnesses by encouraging them to lie about the assault. The court revoked the defendant's probation in both the New Haven and Milford matters and sentenced him to five years of incarceration in each matter. This appeal followed.

The defendant does not contest the court's findings that he violated the terms of his probation. He argues instead that the court abused its sentencing discretion in relying on pending charges when it revoked his probation and imposed a five year sentence.[1] We disagree.

"A revocation proceeding is held to determine whether the goals of rehabilitation thought to be served by probation have faltered, requiring an end to the conditional freedom obtained by a defendant at a sentencing that allowed him or her to serve less than a full sentence." (Internal quotation marks omitted.) *State* v. *Hill*, 256 Conn. 412, 427, 773 A.2d 931 (2001). In the sentencing phase of a violation of probation hearing, the court is vested with broad discretion to decide whether to revoke probation and require the defendant to serve the sentence imposed or any lesser sentence.[2] See *State* v. *Santos T.*, 146 Conn. App. 532, 535, 77 A.3d 931, cert. denied, 310 Conn. 965, 83 A.3d 345 (2013).

[1] The defendant concedes in his brief that, because he did not object to the introduction of the arrest warrants, any confrontation clause or hearsay claims are unpreserved and unreviewable.

[2] Pursuant to General Statutes § 53a-32, violation of probation hearings are comprised of an evidentiary phase wherein a trial court makes a factual determination as to whether a probationer has violated a condition of probation and a dispositional phase wherein, if a violation is found, the court then determines whether probation should be revoked because the beneficial aspects of probation are no longer being served. See *State* v. *Maurice M.*, 303 Conn. 18, 25–26, 31 A.3d 1063 (2011).

The court considered many factors in its decision to revoke the defendant's probation and to impose a sentence of incarceration, including the defendant's past criminal history, his three violations of probation in connection with the New Haven and Milford matters, and his pending criminal charges. The court explained that "because [the charges relating to the New Haven and Milford matters] would have been the second substantial sentence he served, you know when you're on probation, you're on very thin ice. You have to be on your best behavior and you weren't. I've already found you in violation of the probation. Now, in imposing a fair and just sentence, our statutes and our case law [allow] the judge to consider other pending cases . . . ."

The court did not abuse its discretion in considering the pending charges. "[D]uring a probation revocation hearing, a court may consider the types of information properly considered at an original sentencing hearing because a revocation hearing is merely a reconvention of the original sentencing . . . . *The court may*, *therefore*, *consider* hearsay information, *evidence of crimes for which the defendant was indicted but neither tried nor convicted*, evidence of crimes for which the defendant was acquitted, and evidence of indictments or informations that were dismissed. . . . For the determination of sentences, justice generally requires consideration of more than the particular acts for which the crime was committed and that there be taken into account the circumstances of the offense together with the character and the propensities of the offender. . . . Included as part of this consideration is conduct arising subsequent to the conviction and the underlying crime and prior to final sentencing." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Pettigrew*, 117 Conn. App. 173, 179–80, 978 A.2d 159 (2009). The defendant's argument that the court improp-

erly relied on the pending charges in revoking his probation and imposing a term of incarceration, therefore, is without merit.

The defendant further argues that the court abused its discretion in imposing a total effective sentence of five years, which time represented nearly all of his remaining suspended sentences, because his violations of probation were, according to the defendant, "technical" in that they were premised on violations of the terms of his probation and not the commission of new crimes. The court imposed a sentence requiring the defendant to serve five years of the five years and four months unexecuted portion of his sentences. In light of the whole record, including the defendant's (1) failures to provide a correct address to his probation officer and to report to his probation officer on three separate occasions when asked to do so, (2) being discharged twice from a substance abuse counseling and treatment program, (3) past criminal history, and (4) pending charges, the court did not abuse its discretion in imposing a five year sentence. See, e.g., *State* v. *Santos T.*, supra, 146 Conn. App. 535 ("On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion." (Internal quotation marks omitted.)).

After a thorough examination of the record, we conclude that the court did not abuse its discretion in examining the defendant's whole probation record, including pending cases, along with other factors. The court reasonably exercised its discretion in revoking the defendant's probation in each matter and sentencing him to five years of incarceration.

The judgments are affirmed.

ANTHONY JOHNSON *v.* COMMISSIONER OF CORRECTION (AC 46910)

Suarez, Seeley and Sheldon, Js.

Syllabus

The petitioner, who had been convicted of murder, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claimed, inter alia, that the habeas court erroneously concluded that he failed to establish that his trial counsel provided ineffective assistance by allegedly failing to convey a plea offer to him. *Held*:

The habeas court did not abuse its discretion in denying the petition for certification to appeal as the petitioner failed to show that his claim involved an issue that was debatable among jurists of reason, that a court could resolve in a different manner, or that was adequate to deserve encouragement to proceed further.

Even if this court were to assume that a plea offer had been made to the petitioner and that his trial counsel performed deficiently by failing to inform him of the offer and to advise him to take it, the petitioner failed to meet his burden of demonstrating that it was reasonably probable that he would have accepted a plea deal but for the deficient performance of his trial counsel and, therefore, that he was prejudiced by his counsel's allegedly deficient performance.

Argued September 6—officially released October 15, 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, *Newson*, *J.*, judgment denying the petition; thereafter, the court, *Newson*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Christian M.*

Watson, state's attorney, and *Erin Stack*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. The petitioner, Anthony Johnson, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal; (2) improperly concluded that he failed to establish that his trial counsel's performance was constitutionally deficient; and (3) improperly concluded that he was not prejudiced by his trial counsel's deficient performance in the underlying criminal proceeding. We disagree and dismiss the appeal.

The following facts and procedural history, as set forth by this court in the petitioner's direct appeal from his conviction or found by the habeas court, are relevant to our resolution of this appeal. "On October 31, 2009, several people, including the [petitioner] and Iyshia Lamboy, attended a Halloween party at the Paris Bar in Bristol. Lamboy had known the [petitioner] for three or four years. After the party broke up, Lamboy stopped at a Sunoco gas station, where the [petitioner], Freddy Felix (victim), and others were engaged in an argument. Lamboy noticed the red Acura automobile that the [petitioner] was known to drive also at the Sunoco station. Lamboy later drove to Davis Drive in Bristol. When she arrived, the [petitioner's] red Acura already was parked in the area. Approximately twenty-five people were gathered around some men, who were arguing. Lamboy got out of her car and stood next to the victim, who was standing next to his car. The [petitioner] was present and standing off to the side. Two of the men who were arguing got into a fistfight, but the situation

defused after some people agreed to leave. Soon thereafter, however, the fighting resumed, and the [petitioner], after stating that he 'had the heat,' walked over to his car, where Lamboy saw him place a mask over the bottom portion of his face, pull the hood of his sweatshirt over his head, and put on a dark nylon glove. Lamboy approached the [petitioner] and began shouting at him. Other people then pulled her away from the [petitioner]. The [petitioner] approached the victim, pulled a gun from his chest area, and fired four shots, two of which hit the victim, killing him. The [petitioner] ran from the area, leaving the red Acura behind.

"Prior to the shooting, Ebony Shell, who lived in a second floor apartment on Davis Drive, was asleep in her bedroom when she was awoken by the sounds of people arguing outside. She looked out of her bedroom window and saw approximately thirty people gathered. She recognized the [petitioner], who was wearing a dark hooded sweatshirt. The [petitioner] was arguing with a heavyset woman until two other people pulled her away from him. Shell saw the victim standing next to his car, arguing with another man whom she knew as Javi. The [petitioner] then walked around a dumpster and reemerged with a mask covering part of his face and his hood raised over his head. He moved his arm toward his chest; Shell then saw flashes and heard gunfire, and she closed her curtain. Upon reopening the curtain, Shell saw a man lying on the ground, and the [petitioner] was gone.

"When the police conducted their investigation, they found, parked in the area, the red Acura that Lamboy had seen the [petitioner] driving, which was registered to the [petitioner's] father. Inside the car, they found the [petitioner's] driver's license and a photograph of the [petitioner] and his friend, Javier, which had been taken and printed at the Halloween party at the Paris Bar.

"Very late on October 31, 2009, Michael Bergin picked up his friend, Anthony Garcia. The two later picked up the [petitioner] and another man named Lamar. While in Bergin's vehicle, Lamar repeatedly asked the [petitioner] why he shot the victim, and the [petitioner] told Lamar not to discuss his business, but he later explained that there had been a fight at the Sunoco gas station, and, when the argument moved to Davis Drive, he went and got his gun. Bergin dropped off the [petitioner] and Lamar at the Plymouth Motor Lodge, and the [petitioner] paid him with cocaine for the ride. Bergin, fearing that he could be considered an accessory after the fact, went to a police station and told officers what he had heard. Two nights later, the police arrested the [petitioner] at the Holiday Inn in Southington. On the [petitioner's] nightstand was a newspaper clipping about the murder." (Footnote omitted.) *State* v. *Johnson*, 149 Conn. App. 816, 818–20, 89 A.3d 983, cert. denied, 312 Conn. 915, 93 A.3d 597 (2014).

The petitioner was charged with murder in violation of General Statutes § 53a-54a (a). On May 26, 2011, the petitioner was convicted of that charge following a jury trial, and, on August 5, 2011, he was sentenced to a term of forty-five years of incarceration. In 2014, this court affirmed the petitioner's conviction on direct appeal; see *State* v. *Johnson*, supra, 149 Conn. App. 831; and our Supreme Court denied certification to appeal. See *State* v. *Johnson*, 312 Conn. 915, 93 A.3d 597 (2014).

The petitioner commenced this habeas action in 2017 and amended his petition for a writ of habeas corpus on December 10, 2021, alleging ineffective assistance by his trial counsel, Attorney Norman Pattis (trial counsel). Specifically, he alleged, inter alia, that his constitutional right to the effective assistance of counsel during plea negotiations was violated because trial counsel failed to convey to the petitioner a plea offer from the state and to adequately advise the petitioner to accept the

plea, or to at least recommend that the petitioner pursue a plea agreement with the prosecuting authority.[1] The court conducted a trial on April 26 and May 30, 2023, during which the petitioner was represented by counsel. He testified on his own behalf and presented the testimony of his trial counsel; Brian W. Preleski, then state's attorney in the judicial district of New Britain during the petitioner's trial (and now a judge of the Superior Court); Paul Rotiroti, an assistant state's attorney in the judicial district of New Britain during the petitioner's trial; and Attorney Michael Blanchard, a criminal defense expert.

On July 14, 2023, the court, *Newson*, *J.*, issued a memorandum of decision in which it denied the petitioner's amended habeas petition. In addressing the petitioner's claim that his trial counsel's performance was deficient during the plea process, the court stated: "On August 8, [2010],[2] [trial counsel] and the petitioner appeared in court, however, the attorney assigned to handle the file for the state, Attorney . . . Preleski, was not at work that day. The case was covered by [Assistant] State's Attorney . . . Rotiroti. After apparently discussing matters briefly with [the trial judge] in chambers, the parties went on the record, discussed setting trial dates, and made mention of a failed attempt at plea negotiations. Specifically, the conversation, during which the petitioner was physically present, went as follows:

[1] The petitioner's amended habeas petition sets forth four other reasons in support of his claim that his trial counsel's performance was deficient. On appeal, however, the petitioner challenges only the court's determination that the petitioner's trial counsel was not deficient for failing to convey a plea offer and to advise the petitioner to accept a plea or to pursue a plea offer with the prosecuting authority. We limit our review, therefore, to that ground only.

[2] As noted by the petitioner at oral argument before this court, the memorandum of decision incorrectly identifies the date of the relevant court proceedings as August 8, 2011, instead of the correct date, August 8, 2010. This scrivener's error does not affect our analysis.

" '[The Court]: Okay. I understand this is [Attorney] Preleski's matter and, what we had discussed, that the offer was given is rejected, just so I can go on the record with that.

" '[Trial Counsel]: The state conveyed a willingness to deal with a certain range that we think is well beyond what we're prepared to accept.

" '[The Court]: Okay.

" '[Attorney Rotiroti]: And just to make a record, that was from [Attorney] Preleski, and I accept the court and [trial counsel's] representation, but I was not involved.' . . .

"Following court that day, Attorney Rotiroti marked the outside of the state's file with a note saying, 'Client rejects your offer of "in 30yr range.' " . . . [The petitioner] insists, rather vehemently, that the above constituted evidence of an earnest plea offer 'for thirty years' that [his trial counsel] failed to convey and discuss with the petitioner and that the petitioner should now have the opportunity to accept. Other than the petitioner's Twilight Zone view of the evidence, there is uncontroverted testimony that there was never any plea [offer]." (Emphasis omitted; footnote omitted.) The court, thus, concluded that trial counsel "was not deficient because there was no plea offer and [that] the petitioner suffered no prejudice for the same reason."[3]

[3] The court also discussed the strength of the state's case against the petitioner, stating: "The petitioner shot someone in front of a crowd of as many as twenty-five people, including one [individual] he had known for years and personally interacted with immediately before the shooting and at least one other who knew him personally. . . . [Trial counsel] [testified] that he went over the case with the petitioner and that the petitioner understood that the case against him was rather solid, including letting the petitioner know that two of the people who identified the petitioner knew him personally. [Trial counsel] also advised the petitioner that . . . he could likely expect something close to the maximum sixty years if he was convicted after a trial."

As to the portion of the petitioner's ineffective assistance of counsel claim relating to trial counsel's alleged failure to advise the petitioner that resolving the case by way of a plea bargain was the best course of action for the petitioner, the court stated: "[Trial counsel] testified that he did not believe he advised the petitioner that an offer in the area of thirty years was something he should consider because the petitioner had made it clear he was not interested in taking a plea and [trial counsel] did not want to seem disloyal to his client's wishes. [Trial counsel] did testify that he had advised the petitioner that 'he could likely expect to get the sixty years if convicted.' Whether [trial counsel] was deficient for failing to advise the petitioner that he should seek a plea offer need not be resolved, because the court finds the credible evidence provided indicates that the petitioner was not interested in accepting a plea bargain or at least not at all willing to accept one 'in the area of thirty years.'

"The credible evidence found by this court indicates that the petitioner was never interested in a plea bargain. Although the petitioner denied it, the court found particularly credible the statement [trial counsel] said [the petitioner] made to him when he discussed [the petitioner's] exposure and the possibility of a plea agreement [namely] that the petitioner responded: 'I could never make a deal. It would break my mother's heart.' In fact, at sentencing, after having been convicted by a jury, the petitioner continued to maintain his innocence. Anyone serving forty-five years would, with hindsight, obviously find a prior offer 'in the thirty year range' acceptable, but a man who stands convicted at sentencing and continues to profess his innocence does not exhibit the mindset of a person who had any true willingness to accept a plea bargain." (Footnote omitted.)

The petitioner subsequently filed a petition for certification to appeal, which the court also denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The petitioner claims that the court abused its discretion by denying his petition for certification to appeal from the judgment denying his amended habeas petition. Specifically, he challenges the court's determinations that his trial counsel did not perform deficiently with respect to counsel's alleged failure to convey a plea offer from the state and counsel's failure to advise the petitioner to settle his case by way of plea bargain, and that the petitioner was not prejudiced by any alleged deficient performance of his trial counsel concerning the plea negotiation process. According to the petitioner, "[t]his case involves the question of trial counsel's obligation to present the possibility of a plea agreement to his client and, where the evidence of guilt is overwhelming, [to] recommend to the client that he should accept the plea offer." The petitioner argues that, because his trial counsel's performance was deficient and because he was prejudiced thereby, it was an abuse of the court's discretion to deny his petition for certification to appeal. Before we address the merits of the petitioner's claim, we first set forth the legal principles and standard of review that guide our analysis.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his [or her] petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he [or she] must demonstrate that the

denial of his [or her] petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he [or she] must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 215–16, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022). We thus turn to the merits of the petitioner's claim that the court erroneously concluded that the petitioner failed to establish that his trial counsel provided ineffective assistance by failing to present and recommend a plea offer from the state.

The following additional facts are relevant to this claim. At the habeas trial, the petitioner testified that he "told [his trial counsel] that [he] was willing to take a plea, if it was the right offer" and that he "felt like . . . [his] best bet was to take a plea, which is why [he] expressed [that] to [trial counsel]." The petitioner also answered affirmatively when questioned as to whether he had asked his trial counsel to "pursue a plea bargain" and if he would have accepted a plea bargain. The petitioner denied that he ever told trial counsel that he would not accept a plea offer in the

range of thirty years. He asserted that he "felt as though . . . if [he] could get something around the twenty-five-ish range . . . that would be reasonable" and also claimed that trial counsel told him "that [counsel] felt like [he] had a winnable case at trial" because "a lot of the evidence was circumstantial and . . . [counsel] didn't feel like the [eyewitnesses] [were] that strong," never conveyed to him any offer made by the state before the August 8, 2010 hearing and told him afterward "that the offer was of thirty years and [trial counsel] was not willing to take that because [counsel] had confidence in going to trial."

Trial counsel, on the other hand, testified that he told the petitioner that he faced twenty-five to sixty years if convicted and that the state had a "strong case" in which there was "a substantial likelihood that he would be convicted . . . ." Trial counsel also testified that he inquired as to whether "[the petitioner] want[ed] to try to work this case out" with the state. He further testified that the petitioner responded to his suggestion that he "approach the state on an offer" by telling trial counsel that "[h]e could never take a deal. It would break his mother's heart." Trial counsel acknowledged discussing the possibility of an offer in the "thirty year range" with the assigned state's attorney and relaying the same back to the petitioner, however, trial counsel asserted that the petitioner "was never interested in negotiating" and responded by saying, "I can't do it. It would break my mother's heart . . . ."[4]

The following relevant legal principles govern our review of this claim. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court

[4] In addition to the testimony of the petitioner and trial counsel, Preleski testified that his "recollection of the plea negotiations were that [trial counsel] never wanted an offer. What he indicated is, [the petitioner] didn't want to entertain any offers."

cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong." (Citations omitted; internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, supra, 215 Conn. App. 216–17.

"To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) Id., 217. Furthermore, "[a] defendant's right to effective representation applies to all critical stages of a criminal prosecution, including any plea negotiations. . . . Counsel performs effectively and reasonably when he provides a client with adequate information and advice on which the client can make an informed decision as to whether to accept the state's plea offer. . . . As part of this advice, counsel must communicate to the defendant the terms of the plea offer . . . ." (Citations omitted; internal quotation marks omitted.) *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 462–63, 298 A.3d 588 (2023). Thus, to

perform effectively, "[a]lthough trial counsel must leave the ultimate decision of whether to accept or to reject a plea offer to a defendant—and must avoid coercing the defendant into taking a particular plea—he must also provide the petitioner with adequate professional advice on his options." Id., 471.

To demonstrate prejudice under the *Strickland* test when the deficient performance of counsel occurred in the plea process and resulted in a defendant not entering into a plea agreement, "the habeas petitioner must show that but for the [deficient performance] of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (Internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, 221 Conn. App. 852, 865, 303 A.3d 1196 (2023), cert. denied, 348 Conn. 939, 307 A.3d 273 (2024); see also *Bonds* v. *Commissioner of Correction*, 223 Conn. App. 645, 654, 309 A.3d 411 (to demonstrate prejudice resulting from trial counsel's performance during plea negotiations, petitioner must establish "there was a reasonable probability that—but for the deficient performance—the petitioner would have accepted the plea offer, and that the trial court would have assented to the plea offer" (internal quotation marks omitted)), cert. denied, 348 Conn. 956, 310 A.3d 380 (2024).

"Furthermore . . . the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly

erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, supra, 221 Conn. App. 865–66; see *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 655–56 (explaining that clearly erroneous standard of review applies to factual question of whether there was reasonable probability that petitioner would have accepted plea offer in absence of deficient performance of counsel); see also *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 351, 53 A.3d 983 (2012) ("[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous" (internal quotation marks omitted)), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

"It is well settled that [a] reviewing court can find against a petitioner on either [prong of *Strickland*], whichever is easier." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 780, 272 A.3d 189 (2022). As stated in *Strickland*, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies." *Strickland* v. *Washington*, supra, 466 U.S. 697. In the present case, the court denied the amended habeas petition on the grounds that the petitioner failed to show both deficient performance and prejudice concerning trial counsel's performance during the plea process. On appeal, the petitioner challenges both grounds for the court's decision. We, however, need not decide whether the petitioner's trial counsel rendered deficient

performance because, even if we assume that a plea offer in the thirty year range was made and that trial counsel performed deficiently by failing to inform the petitioner of the offer and to advise the petitioner to take it, the petitioner has failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance in that respect. See *Martinez* v. *Commissioner of Correction*, supra, 221 Conn. App. 864–65 (petitioner's failure to satisfy either prong of *Strickland* is fatal to habeas petition); see also *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667–68, 289 A.3d 1206 (same), cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

We conclude that the court's finding that the petitioner would not have accepted a plea offer is supported by the record and is not clearly erroneous. The petitioner's trial counsel testified that the petitioner had made it clear that he was not interested in taking a plea. Trial counsel further testified that when he discussed the possibility of a plea agreement with the petitioner, the petitioner responded that he "could never take a deal" because "[i]t would break his mother's heart." The court's finding is further supported by the fact that the petitioner continued to maintain his innocence, even after the jury found him guilty. See *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 656–57 (court reasonably could have concluded that petitioner was unlikely to plead guilty when petitioner testified at habeas trial that he "told the judge at sentencing six times that he was innocent and that he was not going to admit to something he did not do").

Moreover, the court based its finding on its assessment of the credibility of the evidence before it. As the court stated in its memorandum of decision: "The credible evidence found by this court indicates that the petitioner was never interested in a plea bargain.

Although the petitioner denied it, the court found particularly credible the statement [trial counsel] said [the petitioner] made to him when he discussed [the petitioner's] exposure and the possibility of a plea agreement [namely] that the petitioner responded: 'I could never make a deal. It would break my mother's heart.' In fact, at sentencing, after having been convicted by a jury, the petitioner continued to maintain his innocence. Anyone serving forty-five years would, with hindsight, obviously find a prior offer 'in the thirty year range' acceptable, but a man who stands convicted at sentencing and continues to profess his innocence does not exhibit the mindset of a person who had any true willingness to accept a plea bargain." (Footnote omitted.)

It is axiomatic that, "[a]s an appellate court, we do not reevaluate the credibility of testimony . . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . This court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316–17, 34 A.3d 1046 (2012). "A pure credibility determination made by a habeas court is *unassailable*." (Emphasis added; internal quotation marks omitted.) *Heywood* v. *Commissioner of Correction*, 211 Conn. App. 102, 116, 271 A.3d 1086, cert. denied sub nom. *Tajay H.* v. *Commissioner of Correction*, 343 Conn. 914, 274 A.3d 866 (2022).

This court defers to a habeas court's finding that a petitioner was not willing to accept a plea offer when that finding was based on the court's credibility determination. For example, in *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 645, this court addressed

a claim similar to the one in the present case—that trial counsel rendered ineffective assistance during plea negotiations by failing to advise the petitioner to accept a plea deal. We affirmed the habeas court's determination that the petitioner failed to establish prejudice by finding the petitioner's testimony that he would have pleaded guilty instead of proceeding to trial not credible; id., 653; and that finding was made by the court "solely on the basis of credibility determinations, which calls for further deference." Id., 656. We also concluded that there were other factors supporting the court's determination that the petitioner was not a credible witness on the issue of prejudice, including that the petitioner "told the judge at sentencing six times that he was innocent and that he was not going to admit to something he did not do."[5] Id.

Similarly, in *Fields* v. *Commissioner of Correction*, 179 Conn. App. 567, 569, 180 A.3d 638 (2018), the petitioner alleged that his trial counsel provided ineffective assistance by failing to advise him prior to trial of a plea offer made by the state. The habeas court concluded that counsel's performance was deficient but that the petitioner had not been prejudiced by counsel's deficient performance, as the petitioner failed to prove that he would have accepted the plea offer if counsel had conveyed it to him. Id. On appeal, we affirmed the judgment of the court. Id., 577. In doing so, we noted that the record showed "no evidence independent of the petitioner's own testimony that he would have accepted the state's plea offer had [his counsel] conveyed it to

[5] In *Bonds*, in light of the petitioner's failure to prove that he would have pleaded guilty to the offer, which was fatal to his appeal, we did not address the second factor of the prejudice test—whether the petitioner established that the court would have accepted the plea offer—and we noted that there was "no dispute about the third factor of the prejudice test, namely, that the plea offer would have involved a conviction and sentence less severe than that which was imposed." *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 657–58.

him"—testimony that the court discredited—and that it was "not the role of this court on appeal to second-guess credibility determinations made by the habeas court . . . ." (Citation omitted; internal quotation marks omitted.) Id.; see also *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 127–29, 281 A.3d 1189 (2022) (affirming habeas court's determination that petitioner failed to show prejudice resulting from counsel's allegedly deficient performance during plea process when court credited counsel's testimony that petitioner insisted that he was innocent of crimes and thought plea offer was unfair, and discredited petitioner's habeas trial testimony that, but for his counsel's deficient advice, he would have accepted plea offer, as this court would not reevaluate credibility determination of habeas court); *Watts* v. *Commissioner of Correction*, 194 Conn. App. 558, 566–67, 221 A.3d 829 (2019) ("[b]ecause the habeas court discredited the petitioner's testimony [that he would have accepted plea offer], and there was no other evidence from which the court could have found that the petitioner would have accepted the plea deal offered, the petitioner failed to meet his burden of demonstrating prejudice"), cert. denied, 334 Conn. 919, 222 A.3d 514 (2020); *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 350–51, 221 A.3d 81 (2019) (deferring to habeas court's determination discrediting petitioner's testimony that he would have accepted plea offer if counsel had performed competently and affirming court's conclusion that petitioner was not prejudiced "even if his trial counsel did not competently advise him").

This precedent commands a similar result in the present case. Here, the court, in finding that the petitioner did not prove that he would have accepted a plea offer in the thirty year range, had trial counsel conveyed one to him, implicitly found the petitioner's testimony to the contrary not credible. See *Watts* v. *Commissioner*

of Correction, supra, 194 Conn. App. 566. It also "found particularly credible" trial counsel's testimony that, when he mentioned the possibility of a plea agreement to the petitioner, the petitioner responded that he "could never make a deal" because "[i]t would break his mother's heart." Although the record contains conflicting testimony, "the habeas court, as the trier of fact, was the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [When] there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine. . . . *State* v. *James*, 237 Conn. 390, 407, 678 A.2d 1338 (1996); see *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 26, 257 A.3d 399 ([a]lthough the petitioner testified that he would have gone to trial but for [trial counsel's] advice, the habeas court, as the sole arbiter of the credibility of witnesses and the weight to be given to their testimony, was entitled to reject his testimony in light of the other evidence presented during trial), cert. denied, 340 Conn. 913, 265 A.3d 926 (2021); *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 53, 250 A.3d 44 (petitioner failed to prove prejudice in part because the court clearly did not credit the petitioner's testimony that he would not have pleaded guilty had he been advised properly [by trial counsel]), cert. denied, 336 Conn. 948, 250 A.3d 695 (2021)." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 359–60, 273 A.3d 680 (2022).

The petitioner did not present any evidence demonstrating that he would have accepted a plea deal in the thirty year range other than his own testimony, which the court did not credit. On the other hand, the court specifically credited trial counsel's testimony that the petitioner clearly stated that he could "never" take a

deal. Indeed, given that the court's finding that the petitioner was never willing to accept a plea offer was based on its credibility assessment of testimony, and in light of our well established deference to the court's credibility determinations, which are unassailable; see *Heywood* v. *Commissioner of Correction*, supra, 211 Conn. App. 116; we conclude that the petitioner failed to meet his burden of demonstrating that it was reasonably probable that he would have accepted a plea deal but for the deficient performance of his trial counsel and, therefore, that he was prejudiced by his trial counsel's allegedly deficient performance.[6] Consequently, the petitioner has failed to show that this claim involves an issue that is debatable among jurists of reason, that a court could resolve in a different manner, or that it is adequate to deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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[6] Given this determination, we need not reach the second prong of the prejudice test, namely, whether the trial court would have accepted a plea deal in the thirty year range, as the petitioner's failure to prove the first prong of the prejudice test—that he would have accepted a plea offer—is fatal to his claim of prejudice in this appeal. See *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 657–58. We note, nonetheless, that the record does not contain any evidence that would support a conclusion that the court would have accepted a plea deal in the thirty year range, especially in a case such as this one, in which there were eyewitnesses to the crime and the state's case was particularly strong.

STATE OF CONNECTICUT *v.* MAURICE B.* (AC 46775)

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

Syllabus

Convicted of, inter alia, the crime of sexual assault in the first degree, the defendant appealed. He claimed that the prosecutor engaged in certain improprieties during rebuttal closing argument that deprived him of a fair trial. *Held*:

The prosecutor's response to the defendant's investigative inadequacy defense was not improper, as this court was not persuaded that the prosecutor misstated the law or improperly appealed to the jurors' emotions, and the prosecutor's puzzle piece analogy was consistent with and tied to his proper argument that the state's flawed investigation did not raise a reasonable doubt of the defendant's guilt in light of the victim's testimony and the other evidence the state presented.

The prosecutor's remark that the jury was "given two diametrically opposed version[s] of events that [were] irreconcilable with each other" did not violate the rule set forth in *State* v. *Singh* (259 Conn. 693) because the prosecutor did not expressly argue that, to find the defendant not guilty, the jury was required to find that the victim had lied, and he did not make a direct connection between the defendant's acquittal and the victim's credibility.

The prosecutor's isolated reference to "lov[ing] [the] fact that" he could refer to the police officer who interviewed the victim as a "former officer" was not improper because it was ambiguous.

The prosecutor's statements that implied that there existed an undetectable substance that could have been added to the alcohol or marijuana consumed by the victim and the defendant to which the defendant could have built up an immunity was improper because there was no evidence in the record to support that inference.

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* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, 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.

Pursuant to the factors set forth in *State* v. *Williams* (204 Conn. 523), the single instance of prosecutorial impropriety did not deprive the defendant of a fair trial because it was not particularly egregious or pervasive, defense counsel did not object to it or request a curative instruction, the trial court's general jury instructions sufficiently addressed it to mitigate any harm, and the state's case was not so weak as to be overshadowed by it.

Argued September 10—officially released October 15, 2024

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and sexual assault in the third degree, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Vitale*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Timothy J. Sugrue, assistant state's attorney, with whom were *Kelly E. Davis*, senior assistant state's attorney, and, on the brief, *John P. Doyle, Jr.*, state's attorney, and *Alexander Beck*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Maurice B., appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (4).[1] On appeal, the defendant

[1] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (4) engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse."

The defendant also was convicted of sexual assault in the third degree in violation of General Statutes (Rev. to 2017) § 53a-72a (a), which provides in relevant part: "A person is guilty of sexual assault in the third degree when such person . . . (2) engages in sexual intercourse with another person whom the actor knows to be related to him or her within any of the degrees of kindred specified in section 46b-21." We note that, although the

claims that the prosecutor committed prosecutorial impropriety and deprived him of a fair trial when the prosecutor made certain improper statements during the state's rebuttal closing argument. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant is the biological father of the victim. One day in May, 2017, the defendant invited the victim to a hotel in New Haven (hotel), where he was staying. The victim walked to the hotel and met with the defendant in his hotel room. The two shared a bottle of alcohol and marijuana blunts,[2] talked, and watched television. The victim "[did not] remember anything after that." While the victim was incapacitated, the defendant engaged in sexual intercourse with her. When the victim woke up, she was fully dressed, but her clothing was wet[3] in the area of her genitals and thighs. The victim gave birth to a child in February, 2018.[4] The results of genetic testing were consistent with the defendant being the father of the victim's child.

The defendant was charged with sexual assault in the first degree and sexual assault in the third degree.

defendant's appeal form lists a challenge to the judgment of conviction on the charge of sexual assault in the third degree, he has not briefed any challenge to that conviction and his request for relief seeks reversal of his conviction of sexual assault in the first degree only.

[2] "A blunt is a street term used to describe a cigar filled with marijuana, instead of tobacco, and smoked to ingest the drug." (Internal quotation marks omitted.) *State* v. *McCarthy*, 105 Conn. App. 596, 599 n.1, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008).

[3] The victim did not say that the wetness was semen or from sexual arousal. She also did not say that she had spilled water on herself or whether her underwear was wet.

[4] At the hospital, upon the birth of the victim's child in February, 2018, a paternity test revealed that her boyfriend was not the father of the child. After the victim applied for state assistance, additional paternity testing was performed on two men. Neither was identified as the father. The victim testified that the defendant was aware that she was having men tested for the paternity of the child and that the defendant acted like he was trying to help her find out who the child's father was.

A jury trial was held in March, 2023. The state presented the testimony of the victim; the victim's mother; Cherelle Carr, a detective employed by the New Haven Police Department; and Michael Morganti, a forensic science examiner employed by the Department of Emergency Services and Public Protection. The defense presented the testimony of Patrick Bengtson, who was a patrol officer with the New Haven Police Department.

The victim testified as to the following regarding her relationship with the defendant and the events leading up to the assault. The defendant had been in and out of her life growing up, and she began spending time with him regularly when she was sixteen or seventeen years old. She drank alcohol and smoked marijuana with the defendant on prior occasions. When she visited the defendant in his hotel room in May, 2017, she arrived at his room and the two smoked marijuana and drank alcohol together. The defendant had one blunt already rolled when she arrived, and then he rolled another blunt. They shared the alcohol and marijuana, passing the bottle and blunts back and forth.

The victim further testified to the following regarding her alcohol and marijuana use. She had a high tolerance for alcohol, and it usually made her feel energetic. As to marijuana, she smoked it frequently, and it also did not make her feel tired. Marijuana and alcohol never had caused her to pass out before. She did not think that the marijuana she smoked on the date of the incident smelled or tasted any different. Although she was aware that other drugs or substances could be added to a blunt, she did not believe there was anything else in the marijuana. She did not remember falling asleep before the assault, stating that the last thing she remembered was watching a debate on television before it "goes all black." It was nighttime when she woke up, and her clothes were wet in the area of her genitals and thighs. She left the hotel room to go to her aunt's

house. The victim testified that she did not have consensual sex with the defendant.

The victim testified that in December, 2018, ten months after she gave birth to her child, the defendant sent her a voice message using the Facebook Messenger application,[5] in which he stated that "he should get tested because he drugged me and raped me while I was sleeping one night I went to go see him" (Facebook voice message). The Facebook voice message was not played for, or shared with, anyone. The victim also exchanged Facebook text messages with the defendant, screenshots of which were provided to the police and subsequently introduced into evidence at trial.[6] In one text message, the defendant asked the victim, "[W]ho knows this?" She replied: "Nobody . . . you said don't tell nobody . . . ." The defendant responded: "Hell no don't. I'm trying to think too hard right now." In another text message, the defendant stated: "You can't say who it is do you not understand. You gotta say a dead homie or something. . . . Do you understand you can't. BIG trouble." Some of the victim's responses to the defendant included: "why did you do what you did" and "[y]ou should have never did it . . . why wouldn't I be mad at you . . . ."

The victim testified that she captured screenshots of the Facebook text messages and sent them to her brother, who then sent them to her mother. The victim testified that her mother, after receiving the screenshots of the Facebook text messages, drove with her friend

[5] The victim testified that she does not give her phone number out and instead regularly uses the Facebook Messenger application. Through the application, one can send text messages, make audio calls, videochat, and send voice messages. She communicated with the defendant using only the Facebook Messenger application.

[6] The victim testified at trial that a "little arrow," shown on one of the screenshots of the Facebook text messages, showed the "voice message that was sent." That screenshot was introduced into evidence as exhibit 5.

in a vehicle to pick the victim up. The victim testified that, while in the vehicle, the defendant made an audio call to the victim using the Facebook application and that the victim's mother began recording the conversation.[7] Two clips of the Facebook audio call were introduced into evidence.[8]

A few days after the Facebook audio call between the defendant and the victim, on December 24, 2018, the victim met with Bengtson, who performed an initial interview of the victim with the victim's mother and stepfather present. Bengtson explained that his initial interview responsibility was to get the foundation of the complaint before forwarding the complaint to detectives. When asked by defense counsel whether it would be a more valuable approach to interview a witness without others present, Bengtson agreed that it would be.

Carr was assigned to investigate the case and met with the victim on January 16, 2019. The victim sent Carr the screenshots of the Facebook text messages between herself and the defendant and gave Carr her Facebook account login information so that Carr could access the account.[9] A few months later, in May, 2019, Carr sought access to the victim's Facebook account but was not able to access it, as it had been deactivated. Carr did not seek a search warrant for the account.[10]

On March 26, 2019, the defendant met with Carr and told her that the victim had "[made] herself available"

[7] The victim's mother also testified that she recorded the conversation.

[8] In one clip of the Facebook audio call, the defendant refused to take a paternity test, stating that he did not want to go to jail.

[9] The victim also signed a consent form allowing Carr to search the Facebook account history between herself and the defendant.

[10] Carr testified that she did not get a search warrant because "once the [Facebook] page is deactivated, I knew that I wouldn't be able to see the other party's messages. So, if a person's page is deactivated, you can't see what they're saying to the other person any longer."

to have sex with him and that he had consensual sex with the victim at the hotel on multiple occasions, specifically, that the number was "in the teens." He told Carr that he did not believe that he could be the father of the victim's child because he either had used a condom or had withdrawn prior to ejaculation. Carr did not ask the defendant for consent, or apply for a warrant, to search his Facebook account history or cell phone. A video recording of Carr's interview of the defendant was introduced into evidence.

In February, 2023, the victim told Carr that she found an old phone that might have messages saved. Carr offered to drive her to the storage facility where the phone was located but the victim declined, saying that it was not her storage. On February 27, 2023, Carr went to the hotel and retrieved records of the defendant's stays there, one of which was from May 22 to May 23, 2017.

At the conclusion of the trial, the jury found the defendant guilty of both charges. On June 15, 2023, the trial court, *Vitale*, *J.*, sentenced the defendant to a total effective sentence of twenty-five years of incarceration, execution suspended after twenty years, two years of which was a mandatory minimum, followed by ten years of probation.[11] This appeal followed. Additional facts will be set forth as necessary.

We first set forth the relevant legal principles governing our review of the defendant's claim that the state violated his due process right to a fair trial when the prosecutor committed several improprieties during the state's rebuttal closing argument. "In analyzing claims

[11] On count one, the court sentenced the defendant to twenty years of incarceration, two years of which was a mandatory minimum. On count two, the court sentenced the defendant to five years of incarceration, execution fully suspended, to be served consecutively to the sentence on count one.

of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Under the *Williams* general due process standard, the defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . . The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude [that] the defendant has failed to establish either prong." (Citations omitted; internal quotation marks omitted.) *State* v. *Pernell*, 194 Conn. App. 394,

403–404, 221 A.3d 457, cert. denied, 334 Conn. 910, 221 A.3d 44 (2019).

Because the claimed prosecutorial improprieties occurred during rebuttal closing argument, we also set forth the following legal principles. "It is well established that prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 341–42, 260 A.3d 1152 (2021).

Lastly, we note that defense counsel did not object to any of the remarks that form the basis of this appeal. "[O]ur Supreme Court has explained that a defendant's

failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time."[12] (Internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App. 687, 694–95, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014), and cert. denied, 314 Conn. 926, 101 A.3d 272 (2014). With these principles in mind, we proceed with our review of the defendant's claims.

I

PROSECUTORIAL IMPROPRIETY

A

The defendant first contends that the prosecutor committed impropriety in responding to the defendant's investigative inadequacy defense during the state's rebuttal closing argument.[13] Specifically, he argues that the prosecutor both misstated the law and improperly appealed to the emotions of the jurors. Because the two claims are interrelated, we address them together and conclude that no impropriety occurred.

[12] "[U]nder settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 340 n.4.

[13] We consider the instances of alleged impropriety in a different order from which the defendant briefed them.

The following additional procedural history is relevant. In his closing argument, defense counsel presented argument regarding the defendant's investigative inadequacy defense. He argued that the initial interview performed by Bengtson should not have been conducted with the victim's mother and stepfather present. He further argued that Carr's issues with respect to the Facebook accounts, including failing to timely review the victim's account to determine whether the voice message was available and failing to seek access to the defendant's account, caused a loss of information.

In the state's rebuttal argument, the prosecutor argued: "The New Haven Police Department absolutely did not do their job. Dropped the ball. So, my question to you, who pays the price for that? Where should that consequence fall? Does [the victim] take the hit for that or should the New Haven Police Department have to face what they did? We talked—and you heard [defense counsel] basically say, well, shouldn't [the victim have] preserved the evidence? She did. She gave it to the New Haven Police Department. Here it is. Access. Everything. Go. This is after, in December, she finds out for the first time that she's raising her sister. You know what, you handle it. She's got her own stuff to deal with. Right? She's got to process this world and, you know what, she gave her faith and she placed it in the New Haven Police Department, they let her down. No question. Does that make what she says up here any less reliable? That when she says no, I wouldn't have sex with my dad, that that makes that unreliable. And you think about this also. What kind of case is this? Is this a case where the police have to do an enormous amount of investigation to uncover the who, what, where, when, why. Was there scene analysis? [Were] there photographs that need to be developed? What kind of case was this? Or was this a case that [the victim] said this happened to me and the reasonable

and logical inferences that flow from that are that X, Y, and Z, the defendant sexually assaulted me because I would never willingly have sex with my father and the evidence supports that I was unconscious at the hands of that man. And, again, you have messages from that time period. You have the recordings. You have the Facebook messages. You have the tenor of the conversation that was going on when these other messages were happening. These are all pieces of a puzzle and I submit to you, you don't need every single piece of a puzzle to know what it is you're looking at. Very rarely in life do we have all the pieces of a puzzle before we are made to make decisions of important consequences. Correct? If a missing piece of [the puzzle was] somehow going to change what you thought was a waterfall into a horse, I don't know, but let me ask you. Are these missing pieces somehow going to change the fact that [the victim] consented to this?"

The court instructed the jury as to the defendant's investigative inadequacy defense as follows: "[Y]ou have heard some testimony of witnesses and arguments by counsel that the state did not adequately pursue a thorough investigation and that as a consequence, including by the lapse of time, relevant investigative leads or evidence were either lost or insufficiently developed. This is a factor that you may consider in deciding whether the state has met its burden of proof in this case because the defendant may rely on relevant deficiencies or lapses in the police investigation to raise reasonable doubt. Specifically, you may consider whether those alleged deficiencies or lapses would normally be taken under the circumstances, whether . . . if these actions were taken, they could reasonably have been expected to lead to significant evidence of the defendant's guilt or evidence creating a reasonable doubt of his guilt, and whether there are reasonable explanations for the omission of those actions. If you

find that any omissions in the investigation were significant and not reasonably explained, you may consider whether the omissions tend to affect the quality, reliability, or credibility of the evidence presented by the state to prove beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged in the information. The ultimate issue for you to decide, however, is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the crimes with which he is charged."

The defendant first argues that the prosecutor misstated the law and improperly appealed to the jurors' emotions when he "told the jury that finding reasonable doubt in an investigative inadequacy punishes the complainant and makes her pay the price or take the hit for the police failings."

Our appellate courts recently have reaffirmed recognition of a defendant's entitlement to present an investigative inadequacy defense, explaining that "[t]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if [it] conclude[s] that the investigation was careless, incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits." (Internal quotation marks omitted.) *State* v. *Prudhomme*, 210 Conn. App. 176, 188, 269 A.3d 917, cert. denied, 343 Conn. 902, 272 A.3d 198 (2022); see also *State* v. *Gomes*, 337 Conn. 826, 852–53, 256 A.3d 131 (2021).

We are not persuaded that the prosecutor, in making the challenged argument, misstated the law with

respect to the defendant's investigative inadequacy defense or improperly appealed to the jurors' emotions.[14] Considered in isolation, the statement relied on by the defendant could be construed as suggesting that the jury would be making the victim "pay the price" by finding the defendant not guilty if it determined that deficiencies in the police investigation raised reasonable doubt. When the statement is put into the context of the whole trial and rebuttal argument, however, the prosecutor's remarks instead suggest that any investigative inadequacies should not cause the jury to disbelieve the victim's account or to question her credibility. See *State* v. *Rivera*, 169 Conn. App. 343, 353, 150 A.3d 244 (2016) (reviewing challenged statement in context of entire trial and closing argument), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017). As the state emphasizes in its appellate brief, the prosecutor immediately followed the challenged remark by asking the jury whether any investigative inadequacies made the victim's testimony any less reliable.

Finally, the defendant challenges the prosecutor's question whether the "missing piece of [the puzzle was] somehow going to change what you thought was a waterfall into a horse . . . ." The defendant contends that this remark "suggested that the jury could not find reasonable doubt based on the inadequate investigation unless the missing evidence would prove [the defendant's] innocence."

[14] "[A] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . [S]uch appeals should be avoided because they have the effect of diverting the [jurors'] attention from their duty to decide the case on the evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal. . . . No trial—civil or criminal—should be decided upon the basis of the jurors' emotions." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 375–76, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

This court has held that the prosecutor's use of a missing puzzle piece argument does not constitute prosecutorial impropriety. See *State* v. *Henry D.*, 173 Conn. App. 265, 282, 163 A.3d 642, cert. denied, 326 Conn. 912, 166 A.3d 635 (2017). In *Henry D.*, the prosecutor stated in his rebuttal argument: "And as I alluded to earlier, listen to the court's instruction . . . that we . . . don't have to prove [the state's burden] beyond all . . . to a mathematical certainty or remove every single doubt from your mind. . . . And as I stated before and I can't state it enough, we have to prove the elements beyond a reasonable doubt and [defense counsel] threw a lot of things on this table right here, a lot of facts out here, some favorable for the state, some favorable for the defense. *Almost like a jigsaw puzzle putting it together. You bring this piece over here, you bring this piece over here, bring this piece over here and you don't need every single piece to put that jigsaw puzzle together. For argument sake, if it was a jigsaw puzzle of an elephant, if it came in and you had a piece of the trunk and you had a piece of the grey body, the . . . leg as well and there's still six or seven empty pieces over here, you don't need the whole puzzle to determine hey, that's a puzzle and the picture . . . in the puzzle is an elephant.* Again, that's in keeping with the burden that the state has." (Emphasis in original; internal quotation marks omitted.) Id., 279. The defendant claimed that the prosecutor's argument "diluted the state's burden of proof, creating a significant risk that the jury would convict the defendant on a standard less than reasonable doubt." (Internal quotation marks omitted.) Id., 279–80. In rejecting this claim, this court concluded: "Using the [puzzle] analogy, the prosecutor told the jury that it could conclude that the puzzle was a picture of an elephant when only a majority of the pieces were in place. This is representative of the accurate statement of law that the state was not required

to prove its case beyond *all* doubt." (Emphasis in original.) Id., 282–83.

In the present case, the prosecutor argued, as did the prosecutor in *Henry D.*, that "you don't need every single piece of a puzzle to know what it is you're looking at. Very rarely in life do we have all the pieces of a puzzle before we are made to make decisions of important consequences." He then asked the jury whether *the* missing piece of a puzzle would somehow change what they thought was a waterfall into a horse. The clear implication from this argument was that if every piece of the puzzle otherwise depicted a waterfall, a missing piece would not raise a reasonable doubt as to whether the completed puzzle would be a waterfall. The prosecutor's puzzle analogy in the present case, although less artfully drawn than that in *Henry D.*, was consistent with and tied to the prosecutor's proper argument that the state's flawed investigation did not raise a reasonable doubt of the defendant's guilt in light of the victim's testimony and the other evidence the state presented. We thus conclude that the prosecutor's puzzle piece analogy in the present case was not improper.[15]

B

Next, the defendant argues that the prosecutor improperly "argued, in effect, that the jury could only acquit [the defendant] if it concluded that [the victim] had lied." The defendant claims that the prosecutor violated the rule set forth in *State* v. *Singh*, 259 Conn. 693, 712, 793 A.2d 226 (2002). We do not agree.

During the state's rebuttal argument, the prosecutor argued: "[T]his is a case that is simple and it's simple because you are being—you are given two diametrically opposed version[s] of events that are irreconcilable

[15] We reiterate our caution in *State* v. *Henry D.*, supra, 173 Conn. App. 284, that "puzzle analogies should, in general, be used with great caution, as the risk for impropriety is significant."

with each other. You have been given a version of events from [the victim] as she sat here in front of you under oath and told you that she would not willingly or knowingly have sex with her father. . . . Opposed to that, standing right next to it, again, unable to be reconciled between those two is the fact that the defendant wants you to believe that [the victim] knowingly and willingly had sex with him. . . . It's either it was consensual or the daughter was not going to have sex with her father. Those are the two diametrically opposed version[s] of events that you have to reconcile."

"In *Singh*, [our Supreme Court] held that it is improper for a prosecutor essentially to argue during closing that, in order to find the defendant not guilty, the jury must find that witnesses had lied . . . . [Our Supreme Court] explained that [t]he reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof and preclude[s] the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit. . . . [Our Supreme Court] later held, in *State* v. *Albino*, 312 Conn. 763, 97 A.3d 478 (2014), that, in closing argument, there is a distinction between characterizing a witness' testimony as a lie and characterizing it simply as wrong. [W]hen the prosecutor argues that the jury must conclude that one of two versions of directly conflicting testimony must be wrong, the state is leaving it to the jury to make that assessment [of the witness' veracity]. . . . [B]y framing the argument in such a manner, the jury is free to conclude that the conflict exists due to mistake (misperception or misrecollection) or deliberate fabrication. . . . Nonetheless, the mere use of the term wrong instead of lying will not always be proper if the prosecutor's closing arguments provid[e], *in essence*, that in order to find the defendant not guilty, the jury must find that witnesses had lied . . . ." (Citations omitted;

emphasis in original; internal quotation marks omitted.) *State* v. *Diaz*, 348 Conn. 750, 771–72, 311 A.3d 714 (2024).

We are not persuaded that the prosecutor's argument was improper under *Singh*. The prosecutor did not expressly argue that, in order to find the defendant not guilty, the jury must find that the victim lied. Rather, the prosecutor argued that the accounts by the defendant and the victim were "diametrically opposed version[s] of events that [the jury would] have to reconcile." In advancing that argument, the prosecutor did not expressly make a direct connection between the defendant's acquittal and the victim's credibility. As our Supreme Court stated in *State* v. *Albino*, supra, 312 Conn. 787, it is not "improper under *Singh* for a prosecutor simply to state in closing argument that, where there are two directly conflicting accounts of an incident, one must be wrong." We therefore conclude that the challenged remark was not improper.

C

The defendant next argues that the prosecutor improperly referred to Bengtson as a "former officer" when addressing the defendant's investigative inadequacy defense. The defendant argues that the prosecutor "implied that Bengtson was fired for the department's failures," when there was no evidence as to why Bengtson left the New Haven Police Department. The state responds that the remark was ambiguous and also "was simply an in-kind response to defense counsel's argument." We agree with the state.

The following additional procedural history is relevant. At trial, Bengtson testified that he was currently employed by Yale New Haven Hospital but previously was employed by the New Haven Police Department. There was no evidence presented regarding the reason Bengtson changed jobs. Bengtson testified that, on

December 24, 2018, he took the victim's initial complaint in the presence of the victim's mother and stepfather. When asked whether it would be "a more valuable approach to assure that there was no outside influence to interview a witness without others present," Bengtson agreed that it would.

During defense counsel's closing argument, counsel emphasized Bengtson's interview of the victim conducted with the victim's mother and stepfather present. He argued that "[f]ormer Officer Bengtson then agreed that doing so was against New Haven Police Department protocol." Additionally, he argued: "The New Haven Police Department protocol that former Officer Bengtson admitted to having violated in conducting that interview with [the victim's mother] and [stepfather] present makes absolute sense—that New Haven Police Department protocol makes absolute sense. It is, in other words, commonsense protocol. There's no reasonable explanation that exists for Officer Bengtson to not adhere to that New Haven Police Department protocol." In total, defense counsel referred to Bengtson as a former officer seven times during closing argument.

During the state's rebuttal argument, the prosecutor addressed the victim's testimony and then stated: "At the end of the day, when you take into consideration that the failure of the New Haven Police Department, and I love that fact that we can call him former Officer Bengtson, should not be held against what [the victim] told you here in court. When you take into consideration that [the victim] has nothing to gain from holding this baby out to the rest of the world as her sister, when you view the defendant's statement as just damage control, how do I escape from this as cleanly as possible, and you remember that that is the only statement that we have that this was in any way, shape, or form consensual, you are left with the commonsense conclusion

that there is only one way that this happened. That [the victim] did not seduce her father. That she did not willingly and knowingly carry his child to term. That the only reasonable and logical inference that makes sense is that the defendant took advantage of [the victim] while she lay unconscious after unwillingly ingesting what he gave her and then he engaged in illicit intercourse that resulted in the birth of that child."

"Our Supreme Court has noted that, [w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider. . . . It also recognized that closing arguments of counsel . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." (Citations omitted; internal quotation marks omitted.) *State* v. *Massaro*, 205 Conn. App. 687, 714–15, 258 A.3d 735 (2021), aff'd, 347 Conn. 200, 296 A.3d 782 (2023). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. . . . We do not conclude that there was error simply because the meaning of an isolated statement was unclear." (Citation omitted; internal quotation marks omitted.) *State* v. *Salazar*, 151 Conn. App. 463, 473, 93 A.3d 1192 (2014), cert. denied, 323 Conn. 914, 149 A.3d 496 (2016).

We conclude that the prosecutor's isolated reference to "lov[ing] that fact that we can call him former Officer Bengtson" was ambiguous and, therefore, we cannot conclude that it was improper. See *State* v. *Schiller*, 115 Conn. App. 189, 196, 972 A.2d 272 (court could not conclude that remark was improper when meaning was

unclear), cert. denied, 293 Conn. 910, 978 A.2d 1113 (2009). Our conclusion that the remark was not improper is further buttressed by considering the sequence of the closing argument, in that defense counsel repeatedly referred to Bengtson as a "former officer." "[T]he state may properly respond to inferences raised by the defendant's closing argument." (Internal quotation marks omitted.) *State* v. *Pernell*, supra, 194 Conn. App. 410. Accordingly, we do not conclude that the prosecutor's remark was improper.

D

Finally, we address the defendant's argument that the prosecutor improperly introduced facts outside of the record when he used an anecdote to explain how the defendant and the victim could share the same bottle of alcohol and same blunts of marijuana with only the victim becoming incapacitated. We agree with the defendant that the challenged remark was improper.

The following additional procedural history is relevant. As noted previously, the victim testified at trial that the defendant had admitted in the Facebook voice message that "he drugged me and raped me while I was sleeping" when she went to see him. The victim testified to having a high tolerance for alcohol and smoking marijuana frequently and that these substances never had caused her to pass out before. She further testified that the marijuana she smoked on the date of the assault did not smell or taste any different. She testified that the defendant had one blunt already rolled when she arrived, and then he rolled another blunt.[16] She testified

[16] The following colloquy occurred on cross-examination between the prosecutor and the victim:

"Q. During your formal interview with Detective Carr, you indicated that . . . when you came to the hotel room you saw [the defendant] rolling the blunt?

"A. Yes.

"Q. Is that right? And in your interview with Detective Carr when she came to your house to do the buccal swab, you said the blunt was already rolled when you got there?

that she and the defendant shared the alcohol and marijuana, passing the bottle and blunts back and forth.

In closing argument, defense counsel argued: "[The victim] testified that she was familiar with the odor, the taste, and the smell of marijuana, yet, despite her high tolerance for marijuana and what she describes as her experience consuming alcohol, would have you believe that she became unconscious, but [the defendant] did not while they were consuming the same items."

During the state's rebuttal closing argument, the prosecutor argued: "And let's talk a little bit about the—about the marijuana in regards to was there one blunt, was there two blunts, who was rolling it. There is a great movie called 'The Princess Bride' if anybody has

"A. There was more than one.

"Q. There was more than one?

"A. Yes.

"Q. But you were smoking the same blunt, passing it back and forth?

"A. Yeah. It was more than one blunt that was rolled.

"Q. Okay. Okay. So you're saying that he had one rolled but he rolled—

"A. Yeah. He rolled another one—

"Q. When you were there?

"A. —in front of me.

"Q. Okay. . . . You never in all of your previous interviews, you never mentioned more than one blunt?

"A. They asked—I mean this happened in 2018. This is five years later. I can't remember everything."

During cross-examination, the following colloquy occurred between defense counsel and Carr:

"Q. And you recall [the victim] telling you that she felt, quote, like he took advantage of her, giving her drugs?

"A. Yes.

"Q. And [the victim] told you then that the blunt was already rolled up?

"A. Yes, she did.

"Q. And [the victim] also told you that normally [the victim], herself, would roll up weed?

"A. Yes, she did.

"Q. And [the victim] told you that she didn't know if he spiked the blunt or the liquor—

"A. Yes."

ever seen it. And there is a moment in that movie where there is a game of wits where two people are given two cups to drink from. One is poisoned and one is not. And one person has to decide which cup they're going to drink from and potentially die. One individual makes their decision and begins to laugh because he thought that he had outsmarted the other person. Then I switch the cup. You thought I was going to take this cup, but I drank from this cup and now you, my friend, are going to be sorry for the choice that I made and then that person then falls down dead. And when they're asked to explain how is it that you would even take this game, this 50—seemingly 50/50 chance and take that cup, the other person says, you know what I did, I poisoned both cups because, you know why, I have a tolerance for that poison. So, depending what's in that marijuana, if it's not just marijuana, if that other person has a tolerance for it that the other person doesn't share, one person's gonna go down, the other one's gonna stay up."

The defendant contends that the "anecdote introduced a fact outside the record—the notion of an undetectable drug which could be added to the shared alcohol and/or marijuana that would incapacitate [the victim] without affecting [the defendant]—which was never part of the state's evidence." Specifically, the defendant contends that the jury "might assume that a prosecutor would be familiar with the effects of 'date-rape' drugs and whether or not one can build a tolerance for them that would allow a culprit to safely share a drink or blunt with a victim." The state responds that the prosecutor's Princess Bride argument "offered the jury a reasonable and logical inference that did not invite speculation or depend on facts not in evidence." It maintains that "it was not so unreasonable as to be unjustifiable for the jury to infer that the defendant managed to somehow doctor the blunts and/or the alcohol in such a manner that caused [the victim] to lose

consciousness but left him sufficiently functional to engage in sexual intercourse with her before she regained consciousness." We conclude that the remark was improper.

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . [T]he state may [however] properly respond to inferences raised by the defendant's closing argument. . . . Furthermore, [a] prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 188–89, 133 A.3d 921 (2016). "The rationale for the rule prohibiting the state from making such a reference is to avoid giving the jury the impression that the state has private information, not introduced into evidence, bearing on the case." (Internal quotation marks omitted.) *State* v. *Billings*, 217 Conn. App. 1, 50, 287 A.3d 146 (2022), cert. denied, 346 Conn. 907, 288 A.3d 217 (2023).

We conclude that the prosecutor's argument improperly relied on facts not in evidence. See *State* v. *Crump*, 145 Conn. App. 749, 760–61, 75 A.3d 758 (prosecutor's comments that victim had not been required to undergo gynecological examination and that case would have gone forward regardless of whether she had agreed to examination improperly alluded to facts outside of record), cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). The prosecutor's argument implied that there exists an undetectable substance that could be added to alcohol or marijuana, to which the defendant could have built up an immunity. There was no evidence introduced at

trial as to such a substance or any immunity of the defendant to such a substance. Because there was no evidence in the record upon which this inference could be based, the argument was improper.

II

DUE PROCESS

Having determined that the prosecutor's Princess Bride argument was improper, we now turn to an analysis of whether that single instance of prosecutorial impropriety deprived the defendant of a fair trial.

"The defendant bears the burden of demonstrating that, when considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . [O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540], with due consideration of whether that [impropriety] was objected to at trial. . . . Those factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case. . . . Ultimately, [t]he issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 361–62. We examine each factor and conclude that the prosecutor's argument in the present case did not impermissibly infringe on the defendant's due process rights such that he was deprived of a fair trial.

We first note that two of the factors weigh in favor of the defendant. First, the state concedes that the impropriety was not invited by the conduct or argument of defense counsel. Next, the improper argument was relevant to, although it did not directly address, a critical issue—whether the victim was incapacitated or the sexual intercourse was consensual. Thus, the notion, as the defendant describes it, that the victim "could be drugged with an imperceptible drug to which [the defendant] was immune," was related to one of the central issues in the case. See *State* v. *McCoy*, 331 Conn. 561, 573, 206 A.3d 725 (2019) (impropriety involved critical issue of credibility of state's key witness and, thus, factor weighed in favor of defendant). Accordingly, we conclude that this factor weighs in favor of the defendant.

Next, we turn to several factors that weigh in favor of the state. As to the severity of the impropriety, we must consider whether defense counsel objected to the improper argument, requested a curative instruction, or moved for a mistrial. See *State* v. *Felix R.*, 319 Conn. 1, 17, 124 A.3d 871 (2015) (presuming that counsel did not consider impropriety severe enough to merit objection where defense counsel failed to object to impropriety at trial). Defense counsel did not object to the improper argument, which "demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 362. Additionally, the prosecutor's impropriety was not pervasive. It was asserted only once and was confined to the prosecutor's rebuttal closing argument. See *State* v. *Felix R.*, supra, 17 (impropriety was not frequent when it consisted of single statement buried in lengthy closing argument).

As to curative measures, we reiterate that defense counsel did not object to the argument or request a curative instruction. Thus, the court provided no specific curative measures. "[I]n nearly all cases in which defense counsel fails to object to and request a specific curative instruction in response to a prosecutorial impropriety, especially an impropriety that we do not consider to be particularly egregious, and the court's general jury instruction addresses that impropriety, we have held that the court's general instruction cures the impropriety. . . . If, however, defense counsel fails to object to particularly egregious or pervasive [impropriety], and the general jury instructions do not specifically address the prosecutor's [impropriety], we have held that the general jury instructions were insufficient to cure the [impropriety], in spite of defense counsel's failure to object." (Citations omitted; footnote omitted.) *State* v. *A. M.*, 324 Conn. 190, 207–208, 152 A.3d 49 (2016). For the reasons previously stated in this opinion, the prosecutor's improper argument in the present case was not particularly egregious or pervasive. Consequently, we consider whether the court's general instructions sufficiently cured the impropriety. In the present case, the trial court instructed the jury that it was the sole finder of facts,[17] that the evidence from which it was to decide the facts consisted of the testimony of witnesses and exhibits received into evidence, and that the arguments and statements of counsel were not evidence to be considered.[18] Immediately before

[17] The court instructed the jury: "You are the sole judges of the facts. It is your duty to find the facts. . . . You are to recollect and weigh the evidence and form your own conclusions as to what the ultimate facts are and to determine where the truth lies. You may not go outside the evidence introduced in court to find the facts. This means that you may not resort to guesswork, conjecture, or suspicion, and you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy."

[18] The court instructed the jury: "The evidence from which you are to decide what the facts are [consist] of the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; and, secondly, the exhibits that have been received into evidence. In reaching

closing arguments began, the court reinforced the difference between evidence and arguments of counsel by telling the jurors that the notebooks they used during the evidentiary portion of trial would not be available to them during closing arguments "because the arguments of counsel, as I told you, are not evidence . . . ." Thus, the trial court's general jury instructions sufficiently addressed the impropriety to mitigate any harm. See *State* v. *Payne*, 303 Conn. 538, 567, 34 A.3d 370 (2012) (trial court cured any harm by instructing jury that arguments of counsel were not evidence on which jurors could rely); *State* v. *Crump*, supra, 145 Conn. App. 762–64 (court's jury charge that arguments of counsel were not evidence adequately addressed prosecutor's improper remarks in closing arguments despite that single instance of impropriety was central to case and state's case was not particularly strong).

Finally, we consider the strength of the state's case. We conclude that the state's case was strong enough that the comment did not deprive the defendant of a fair trial. Although the central issue in the case was the comparative credibility of the defendant and the victim, the state presented evidence to support the victim's credibility. First, following the birth of the victim's child, the victim, consistent with her testimony that she was unaware at that time that the defendant had drugged her and assaulted her, identified other men as possible biological fathers of the child. Second, the defendant, in Facebook text messages, urged the victim to say that her child's father was "a dead homie" and

your verdict, you should consider all the testimony and exhibits received into evidence. Certain things are not evidence . . . and you may not consider them in deciding what the facts are. . . .

"These include arguments and statements by lawyers. The lawyers are not witnesses. What they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls."

told her that she cannot "say who it is" or it would be "BIG trouble." At the same time, the victim's messages to the defendant support her version of the events, including: "why did you do what you did" and "[y]ou should have never did it . . . why wouldn't I be mad at you . . . ." Although the Facebook voice message that the victim testified contained the defendant's admission to drugging her was not shared with anyone, there was evidence in the form of the "arrow" icon shown within the Facebook text messages on exhibit 5 that a voice message was sent by the defendant. Finally, there was evidence in the record that the victim, upon receiving the defendant's Facebook text messages, immediately provided the messages to her brother and her mother and also went to the police. The victim's account was buttressed by this evidence. In contrast, the defendant's account that the victim had "[made] herself available" to have sex with him and that he had consensual sex with her on multiple occasions, as shown to the jury through his statements to Carr, was unsupported by other evidence. "[W]e have never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 365–66. In the present case, we conclude that the state's case was "not so weak as to be overshadowed" by the impropriety. (Internal quotation marks omitted.) Id., 366.

Accordingly, because, on balance, the *Williams* factors weigh in favor of the state, we conclude that the prosecutorial impropriety in the present case did not deprive the defendant of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.