STATE OF CONNECTICUT *v.* VINCENT ARDIZZONE (AC 46442)

Seeley, Westbrook and Palmer, Js.

Syllabus

The acquittee appealed from the judgment of the trial court denying his application for discharge from the jurisdiction of the Psychiatric Security Review Board pursuant to statute (§ 17a-593). He claimed, inter alia, that the court improperly found that, if he were discharged, he would present a danger to himself or others. *Held*:

The trial court properly determined that the acquittee was not a person who should be discharged from the jurisdiction of the Psychiatric Security

Review Board, as the court's finding that, if discharged, the acquittee would constitute a danger to himself or others was not clearly erroneous.

The acquittee's claim that § 17a-593, as applied to him, was unconstitutionally vague was unavailing because he failed to meet his burden of proving beyond a reasonable doubt that he had inadequate notice that noncompliance with the rules of his treating hospital could result in a denial of his application for discharge, as a reasonable person would have anticipated that the trial court would consider his noncompliance with hospital rules when making a determination of dangerousness pursuant to § 17a-593, and the acquittee was aware of the rules and that the rules were intended to mitigate his risk of dangerousness.

The acquittee failed to meet his burden of proving beyond a reasonable doubt that he was the victim of arbitrary and discriminatory enforcement of § 17a-593, as the trial court reached its dangerousness conclusion on the basis of evidence in the record of the acquittee's severe and repetitive noncompliant behavior, which was associated with risk factors for decomposition and dangerousness.

Argued November 12, 2024—officially released January 21, 2025

Procedural History

Application for discharge from the jurisdiction of the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Dennis*, *J.*; judgment denying the application, from which the acquittee appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (acquittee).

Meryl R. Gersz, assistant state's attorney, with whom, on the brief, was *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The acquittee,[1] Vincent Ardizzone, appeals from the judgment of the trial court denying his application for discharge from the jurisdiction of

[1] Pursuant to General Statutes § 17a-580 (1), the term "acquittee" refers to a defendant who was found not guilty by reason of mental disease or defect in a criminal proceeding pursuant to General Statutes § 53a-13.

the Psychiatric Security Review Board (board) in accordance with General Statutes § 17a-593 (a).[2] On appeal, the acquittee claims that (1) the court improperly found that, if he were discharged, he would present a danger to himself or others and (2) § 17a-593 is unconstitutionally vague as applied to him.[3] We disagree and, accordingly, affirm the judgment of the trial court.

This court's opinion in *State* v. *Ardizzone*, 215 Conn. App. 854, 283 A.3d 982 (2022), cert. denied, 346 Conn. 905, 287 A.3d 1089 (2023), in which we affirmed the trial court's denial of a prior application for discharge by the acquittee, and the present administrative record set forth the following relevant facts and procedural history. "The acquittee killed his father on November 29, 1991, as a result of a delusional belief that his father was molesting his daughter. On January 12, 1993, the acquittee was found not guilty of the charge of murder

[2] General Statutes § 17a-593 (a) provides in relevant part: "The board . . . may recommend to the court the discharge of the acquittee from custody or the acquittee may apply directly to the court for discharge from custody. . . ."

[3] The acquittee additionally claims that the court improperly admitted the board's May 4, 2021 "Report to Court Re: Application for Discharge" as evidence because it (1) contains inadmissible hearsay and (2) violates his due process rights. In his appellate brief, the acquittee acknowledges that *State* v. *Harris*, 277 Conn. 378, 394, 890 A.2d 559 (2006) (holding that board's report did not contain inadmissible hearsay, and its admission did not violate due process), and *State* v. *Warren*, 100 Conn. App. 407, 424, 919 A.2d 465 (2007) (same), are binding on this court. He claims that "[t]his issue is being raised for the sake of future review" by our Supreme Court. Because, "[a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it"; (internal quotation marks omitted) *State* v. *Gonzalez*, 214 Conn. App. 511, 522 n.10, 281 A.3d 501, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022); and "this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel"; (internal quotation marks omitted) *State* v. *Dayvid J.*, 227 Conn. App. 755, 760, 322 A.3d 1126, cert. denied, 350 Conn. 919, 325 A.3d 218 (2024); the acquittee cannot prevail on his evidentiary and constitutional claims concerning the court's alleged improper admission into evidence of the May 4, 2021 "Report to Court Re: Application for Discharge."

by reason of mental disease or defect pursuant to General Statutes § 53a-13.[4]

"On March 5, 1993, the acquittee was committed to the jurisdiction of the board for a period not to exceed thirty-five years. At the time of his commitment, the acquittee had been diagnosed with schizophrenia, was experiencing psychotic symptoms, was abusing alcohol, and was not complying with psychiatric treatment. That term of commitment is due to expire on March 4, 2028.

"At the beginning of his confinement, the acquittee was committed to a maximum security facility and initially was reported to be progressing well. . . . On July 17, 1994, however, the acquittee was placed in four point restraints after threatening staff. . . . [T]he acquittee had stopped taking his medication, was experiencing symptoms of psychosis, and had engaged in inappropriate behavior and sexual improprieties that resulted in his transfer to a different facility unit. . . .

"Over the next two years, the acquittee began to show progress in his mental health treatment. He agreed to resume his psychotropic medication and his participation in treatment groups was described as candid and forthcoming. In light of that progress, the acquittee was transferred to a less restrictive facility on August 20, 1998.

"In a report issued approximately one year later, the board found that the acquittee had exhibited a lack of insight into his crime and his mental illness. The board noted that the acquittee continued to minimize his crime

[4] "General Statutes § 53a-13 provides in relevant part: '(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. . . .' " *State* v. *Ardizzone*, supra, 215 Conn. App. 856 n.2.

and believed that he had been cured of his mental illness for at least four years.

"In 2000 . . . the acquittee and his girlfriend impermissibly engaged in sexual activity in a visitor's room at the hospital facility . . . [and] the girlfriend [later] reported that the acquittee had made harassing telephone calls to her. Thereafter, the acquittee's privilege level was reduced due to an increased risk of his leaving the facility without permission.

"In January, 2001, the facility reported to the board that the acquittee had displayed difficulty adhering to rules and regulations of the facility and had struggled to be open and honest with his treatment team. . . . [T]he acquittee's privilege level was placed on hold after [several incidents of inappropriate behavior of a sexual nature] in violation of facility policy.

"On December 14, 2001, the board held a hearing to review the status of the acquittee, which was continued to May 3, 2002. The testimony adduced at that hearing indicated that the acquittee had displayed significant difficulty in all treatment aspects . . . had sent a letter intended for his daughter, in violation of both the facility's mail policy and the acquittee's divorce decree, which forbade any contact between the acquittee and his daughter . . . continued to violate the facility's policies regarding sexual relationships and . . . demonstrated a consistent level of inappropriate behaviors that now required him to be transferred to a more secure unit. [A] forensic psychiatrist for Connecticut Valley Hospital, testified at the hearing that the acquittee had displayed a level of character pathology and poor impulse control, and that he presented a danger to vulnerable patients. The acquittee thereafter was transferred to a maximum security facility on December 14, 2001.

"In the following years, the acquittee was transferred between maximum security and less restrictive confinement on a near yearly cycle. Transfers to a less restrictive confinement were based on treatment progress made during periods of maximum security confinement. Once the acquittee was returned to a less restrictive confinement, however, he resumed rule breaking behaviors, including sexual impropriety, gambling, selling cigarettes to other patients, and assaultive behavior.

"On June 22, 2006, the facility reported that the acquittee was psychiatrically stable and taking prescribed medication. That report detailed the acquittee's goals for treatment . . . [and] concluded that, although the acquittee was medically compliant and had attained a good degree of clinical stability, his own personality and characterological issues will need to be monitored to assure that his behavior is conforming to the unit rules. Six months later . . . the acquittee filed an application in a self-represented capacity for discharge from the jurisdiction of the board, but this application ultimately was withdrawn.

"Following a review hearing in August, 2007 . . . the acquittee was granted temporary leave to visit with friends and family twice per month. . . . At a status review hearing held months later, the board granted temporary leave for the acquittee to participate in day treatment services in the community four days per week.

"In March, 2011, the board held another hearing to consider further temporary leave for the acquittee. At this hearing, it was discovered that the acquittee had engaged in numerous episodes of rule breaking behavior while attending day treatment in the community, including sexual impropriety and accruing significant credit card debt of approximately $14,000. The board

subsequently voted to transfer the acquittee to the Community Mental Health Center in New Haven for day treatment service that provided more structure and a higher level of supervision.

"In December, 2011, the board denied the facility's request to allow the acquittee to have overnight visits in the community based on testimony from medical experts. Significantly, in the nine months since the previous status hearing, the acquittee had increased his credit card debt to approximately $17,000. The board thus concluded that financial stress was a risk factor for psychiatric decompensation due to the acquittee's history of impulsive behavior, poor decision making, and increased risk if transitioned to a setting with decreased supervision and monitoring.

"At a subsequent hearing on May 31, 2013, the acquittee's treatment providers testified that he was an active member in his treatment groups and individual therapy. The acquittee was reported to have made good progress and had no deterioration of his mental state. Although the acquittee had continued to engage in rule violations, his providers testified that he had not engaged in violent or threatening behaviors. In light of his treatment progress, the acquittee was permitted to transition to a residential program and reside overnight in the community with continued supervision and treatment.

"On August 21, 2015, the board held another review hearing at which the board determined that, despite attending treatment sessions and remaining clinically stable, the acquittee's temporary leave had been suspended several times due to [rule violations]. Despite these continued rule violations, the board allowed the acquittee to remain in the community on temporary leave, noting that he remained clinically stable and his

community providers were committed to providing increased supervision and monitoring.

"Following a review hearing in May, 2016, the board terminated the acquittee's temporary leave privileges due to his violation of the terms of a prior decision of the board. In so doing, the board noted that the acquittee had transitioned from committing technical violations of those terms to committing more serious violations involving untruthfulness. . . .

"On February 28, 2018 . . . the acquittee filed an application with the court seeking discharge from the jurisdiction of the board. In response, the board held a hearing on April 20, 2018, to review the acquittee's status and to prepare a report to the court regarding his application for discharge. At that hearing, the board was presented with evidence of several instances of rules violations by the acquittee following the May, 2016 termination of his temporary leave. Specifically . . . the acquittee had attempted to pay another patient to assault his treating psychiatrist, had attempted to purchase cigarettes against hospital rules, and had attempted to make contact with his daughter. . . . [T]he acquittee had informed [a medical service director] that he did not want to live under any kind of rules that might typically accompany temporary leave. . . . Following the hearing, the board voted to recommend that the court deny the acquittee's application for discharge. The trial court then held a hearing on that application, which it subsequently denied on November 19, 2018.

"On October 4, 2019, the board held a hearing to review the acquittee's status and to consider the facility's application for temporary leave. Testimony established that [although] the acquittee's psychotic symptoms from the time of the offense that led to his arrest, including paranoia and auditory hallucinations, were in

remission . . . the acquittee [nonetheless] had continued his rule breaking behavior and . . . it was unlikely that [he] could comply with the rules set for him and would more likely continue to challenge some rules. . . . [T]he board denied the request for temporary leave. . . .

"On November 19, 2019, the acquittee filed in the Superior Court another application for discharge from the jurisdiction of the board. The board thereafter prepared and filed a [report to the court] on December 19, 2019. In that report, the board recommended that the court deny the application . . . ." (Footnote in original; internal quotation marks omitted.) *State* v. *Ardizzone*, supra, 215 Conn. App. 856–63.

"In January, 2020, the acquittee's then current facility provided an updated report to the board on his mental condition, treatment progress, and current assessment of his risk. Although the acquittee's mental condition and treatment remained clinically stable, he had been diagnosed with stage IV prostate cancer and was undergoing treatment. In the risk assessment provided in that report, the facility stated that the acquittee remained clinically stable and free of psychotic symptoms on his medication regimen and had collaborated to make changes in his medications to address his impulsivity and smoking. The facility also noted that the acquittee recently had engaged in improper sexual activity with another patient, but thereafter complied with facility rules after that conduct was reported. The assessment indicated that the acquittee's insight, judgment, and impulse control remain limited in circumstances [in which] his immediate desires overwhelm his ability to delay gratification, and he continues to struggle with following rules that he deems unnecessary to maintaining his psychiatric stability. The facility reported that the acquittee remained open and willing to understanding his rule breaking behaviors in individual ther-

apy, but ultimately declined to recommend any change in the acquittee's status to the board.

"On March 3, 2020, the trial court held an evidentiary hearing on the acquittee's application for discharge from the jurisdiction of the board, at which several witnesses, including the acquittee, testified. In its subsequent memorandum of decision dated July 2, 2020, the court found that the acquittee had failed to demonstrate by a preponderance of the evidence that he is a person who should be discharged . . . and, accordingly, denied the application for discharge." (Internal quotation marks omitted.) Id., 864–65. The acquittee subsequently appealed from the court's denial of his November 19, 2019 application for discharge to this court and, on October 18, 2022, we affirmed the judgment of the trial court. Id., 865–66.

On January 26, 2021, while the acquittee's prior appeal to this court regarding his November 19, 2019 application for discharge was pending, the acquittee filed another application for discharge in the Superior Court, which is the subject of the present appeal. On November 5, 2021, the board held a hearing to review the acquittee's status pursuant to General Statutes § 17a-585.[5]

On May 10, 2021, pursuant to § 17a-593 (d),[6] the board filed a "Report to Court Re: Application for Discharge"

[5] General Statutes § 17a-585 provides: "The board shall conduct a hearing and review the status of the acquittee not less than once every two years. At such hearing the board shall make a finding and act pursuant to [General Statutes §] 17a-584."

[6] General Statutes § 17a-593 (d) provides: "The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within ninety days of its receipt of the application or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report."

(board's report to the court), detailing the acquittee's history of evaluations, activities, and treatment. The board's report to the court set forth the following findings of fact: "Despite [the acquittee's] improvement relative to psychotic symptoms and aggression, [the acquittee] has consistently displayed a disregard for the rules and protocols in his various treatment settings. While some rule breaking behaviors have been technical in nature, such as smoking cigarettes while escorted in the community, other violations have involved planning and deception, demonstrating a blatant indifference for important safeguards. He has a history of actively misleading his treatment [team] relative to gambling activity, financial matters, and associations with women not approved by his treatment team, all known risk factors which remain largely unchanged. [The acquittee's] engagement in such behaviors exacerbates his risk to reside safely in the community.

"[The acquittee's] poor judgment and disregard for established limits that are designed to mitigate his risk have resulted in significant consequences to his goal of transitioning to the community. [The acquittee] has continued to demonstrate a blatant indifference to safeguards, rules, and stipulations designed to promote his recovery and prevent his involvement in activities that may reactivate his risk factors. [The acquittee's] judgment remains compromised as he continues to be unable to discern what is in his best interest and what behaviors may pose a risk to him. He continues to justify his refusal to follow stipulations simply because he does not believe that they should apply to him. [The acquittee's] treaters have been unable to understand the origins and motivations for [the acquittee's] repeated engagement in self-sabotaging behavior, thereby limiting appropriate interventions for his antisocial traits and stating (or rendering judgment) that the same behavior would likely continue.

"Given [the acquittee's] failure to conform his behavior appropriately in supervised settings, the [b]oard concludes that [the acquittee's] behavior in a non-supervised setting would deteriorate, thereby increasing his risk for treatment noncompliance. Therefore, the [b]oard finds that [the acquittee] cannot reside safely in the community without [b]oard oversight and should remain under the supervision and jurisdiction of the [b]oard."

On November 30, 2021, the board issued a memorandum of decision in which it found the following facts: "[The acquittee] is an individual with psychiatric illness requiring care, custody, and treatment. During this review period, [the acquittee] remained hospitalized and engaged in the same behaviors of concern from previous reporting periods. While [the acquittee] remained cooperative with medication, he continued to struggle with behaviors that elevate his risk and raise concerns for his treatment team. [The acquittee] continued to exhibit impulsive and emotionally driven behaviors. Also, he continued to display inappropriate behavior toward staff members and to pursue relationships not supported by his treatment team. [The acquittee's] behavior continues to have a deceptive undertone where he will express remorse and cooperation after he is found to violate a rule; however, he can also respond with volatile behavior such as chair flipping. The board is concerned about [the acquittee] having unsupervised community time as he continued to conceal information from his treatment team, disregarded hospital and societal rules/norms and has struggled with emotional regulation." The board concluded that "[the acquittee] has a psychiatric disability to the extent that his discharge or conditional release would constitute a danger to himself or others."

On February 2, 2022, pursuant to General Statutes § 17a-586,[7] the acquittee's then current facility, Whiting

[7] General Statutes § 17a-586 provides: "The superintendent of any hospital for psychiatric disabilities in which an acquittee has been confined or the

Forensic Hospital (hospital), provided an updated report to the board on his mental condition, treatment progress, and current assessment of his risk (hospital's report). The hospital found that the acquittee "has chronic difficulty adhering to rules and maintaining appropriate boundaries, particularly with women. This, coupled with his limited insight, affective reactivity, and low frustration tolerance when situations do not go according to his expectations, resulted in periods of interpersonal discord and conflict with others." Additionally, the acquittee "displayed residual paranoid thinking, but his psychotic symptoms were otherwise non-acute. His adherence to psychotropic medications was initially inconsistent, however as the reporting period progressed, he became more amenable to making adjustments to his medication regimen as recommended. [The acquittee's] privilege level fluctuated during the reporting period in response to mood dysregulation and boundary violations. He continued to participate in weekly individual psychotherapy, and although initially his attendance in recommended groups was sporadic, his attendance improved over the course of the reporting period."

The hospital also stated: "For the first few months of this reporting period, [the acquittee] continued to require ongoing reminders and education on maintaining appropriate boundaries particularly as it pertained to his interactions with two female staff members. To summarize, in August, [2021], a female staff member who had previously been transferred to another unit after repeated concerns with [the acquittee], reported that during breakfast in the [hospital's] dining

Commissioner of Developmental Services with whom an acquittee has been placed pursuant to order of the board, or the person or agency responsible for the supervision or treatment of a conditionally released acquittee, shall submit to the board at least every six months a written report with respect to the mental condition of the acquittee. The board shall furnish copies of the report to the counsel for the acquittee and the state's attorney."

hall, [the acquittee] continuously stared at her causing her to become uncomfortable. Unit staff members also observed [the acquittee] looking out the window in order to watch this staff person in the parking lot. In addition to the above, a different female employee of the hospital reached out to hospital administration; she reported that [the acquittee] called her several times at her assigned work location within the hospital and suggested that they walk outdoors together, and on a few occasions he followed her while outside on hospital grounds. Previously, when she worked on [the acquittee's] unit, he was observed to have followed her on the treatment unit as well. Hospital administration discussed their concerns with [the acquittee]. Although his insight remained limited, he agreed to stop contacting and following this staff person. The treatment team then discussed the incidents involving both women with [the acquittee] on September 17, 2021. Although [the acquittee] was receptive to discussion during his previous conversation with hospital administrators, on this occasion, he became argumentative and threw a chair in the direction of [the] [p]rincipal [p]sychiatrist, James Gusfa . . . . In response, to address safety concerns and to better monitor [the acquittee] in light of his increased reactivity, his privilege level was decreased . . . .

"To address [the acquittee's] poor boundaries, emotional outbursts, and in an attempt to help him move forward with his desired goal of community reintegration, the treatment team developed a behavioral support plan. The behavioral support plan outlined clear expectations of [the acquittee] . . . [and] his treaters relayed that . . . [a]dherence with a behavioral support plan would demonstrate his ability to abide by rules and expectations and allow for reasonable discussions related to [t]emporary [l]eave in the future. [The acquittee] reviewed, agreed to, and signed the behavioral support plan on September 24, 2021 . . . .

"Despite [the acquittee's] efforts to improve his behavior and adhere to the behavioral support plan, interpersonal boundaries and following hospital rules and protocols remained challenging for him. A continued area of concern was money management and excessive spending. [The acquittee] continued to demonstrate poor judgment with his financial decisions and had limited insight into how his spending was a risk factor. . . . Notably, staff continued to remind [the acquittee] of the rules and expectations around money [at the hospital] and encouraged him to consider his long-term goal of transitioning to the community and the importance of both demonstrating adherence to unit rules and expectations as well as ensuring he had adequate funds to transfer to the community."

The hospital's report concluded that, "[o]verall, [the acquittee] had an uneven reporting period. He initially continued to present with difficulty maintaining prosocial interpersonal boundaries and making sound choices with regard to his finances. Through ongoing treatment targeting those areas paired with the development and implementation of a behavioral support plan, by the close of the reporting period, [the acquittee] made and maintained some clinical gains. While initially reluctant to do so, as the reporting period progressed, he collaborated with his psychiatrist to make adjustments to his medication to target residual paranoia, impulsivity, and frequent mood changes, particularly frustration with hospital rules." On the basis of its findings, the hospital recommended that the board maintain the acquittee's treatment status.

On April 27 and 28, 2022, the court, *Dennis*, *J.*, conducted a trial on the acquittee's application for discharge. On the first day of trial, the acquittee filed a memorandum of law in which he conceded that the board's report to the court was admissible under our Supreme Court's precedent; see footnote 3 of this opin-

ion; but nevertheless asserted that its admission raised evidentiary and constitutional concerns.[8] On the same day, the acquittee also filed a motion in limine setting forth a constitutional challenge to § 17a-593 that he intended to address in a posttrial memorandum. On August 3, 2022, the parties presented their final arguments to the court. On November 15, 2022, the acquittee filed a posttrial memorandum in which he presented his evidentiary and constitutional challenges regarding the board's report and § 17a-593, addressed this court's opinion affirming the denial of his November 19, 2019 application for discharge, and requested retroactive application of No. 22-45, §§ 4 through 6, of the 2022 Public Acts (P.A. 22-45),[9] which became effective on October 1, 2022, subsequent to his trial.

[8] In particular, he argued that the board's report to the court should not be admitted because it constitutes inadmissible hearsay and violates his procedural due process rights.

At the beginning of trial, the acquittee's counsel stated: "I would like to note for the record that, in accordance with the statutory procedure, the board has filed a report to the court, as is required under the statute, and that item is a matter of evidence as per [*State* v. *Harris*, 277 Conn. 378, 890 A.2d 559 (2006)] to the extent that it may be referred to in testimony of witnesses . . . ." He thereafter requested the court to rule on his memorandum of law regarding the board's report to the court, which the court did not do at that time.

During closing arguments, on August 3, 2022, the acquittee's counsel stated: "The law is very clear. The board's report to [the] court has the . . . legal status, at least up until now, by [*Harris*], as an expert report. . . . [W]e've litigated in the past whether it should be stricken for various reasons, and we've lost those claims. However, the court, in [*Harris*], indicated that we can use any other means at our disposal, or any other . . . standard means to challenge the weight of the evidence, which we've done.

* * *

"[R]ather than . . . arguing that the [board's report to the court] itself should be stricken, I think we have made arguments to show that Your Honor should give it very little weight at this point in time because it's not a valid forensic risk assessment and screening."

[9] General Statutes § 17a-584 provides in relevant part: "At any hearing before the board considering the discharge, conditional release or confinement of the acquittee . . . the board shall make a finding as to the mental condition of the acquittee and, *considering that its primary concerns are the protection of society and the safety and well-being of the acquittee*,

On March 1, 2023, the trial court issued a memorandum of decision regarding the acquittee's arguments set forth in his memorandum of law regarding the board's report to the court, motion in limine, request to apply P.A. 22-45 retroactively, and application for discharge. The court rejected the acquittee's arguments presented in his memorandum of law and denied his motion in limine, finding that the board's report was admissible and that § 17a-593 is not void for vagueness. The court granted the acquittee's request to apply P.A. 22-45, § 5, retroactively[10] indicating that, "[a]s the amended statute

shall do one of the following: (1) If the board finds that the acquittee is a person who should be discharged, it shall recommend such discharge to the court . . . . (2) If the board finds that the acquittee is a person who should be conditionally released, the board shall order the acquittee conditionally released subject to such conditions as are necessary to prevent the acquittee from constituting a danger to himself or others. (3) If the board finds that the acquittee is a person who should be confined, the board shall order the person confined in a hospital for psychiatric disabilities or placed with the Commissioner of Developmental Services for custody, care and treatment." (Emphasis added.)

The legislature amended § 17a-584, effective October 1, 2022, to add to the primary concerns of the board the phrase "the safety and well-being of the acquittee." See P.A. 22-45, § 4.

General Statutes § 17a-593 (g) provides: "The court shall make a finding as to the mental condition of the acquittee and, considering that its primary concern is the protection of society *and its secondary concern is the safety and well-being of the acquittee*, make one of the following orders: (1) If the court finds that the acquittee is not a person who should be discharged, the court shall order the recommendation or application for discharge be dismissed; or (2) if the court finds that the acquittee is a person who should be discharged, the court shall order the acquittee discharged from custody. The court shall send a copy of such finding and order to the board." (Emphasis added.)

The legislature amended subsection (g) of § 17a-593, effective October 1, 2022, to add the phrase "and its secondary concern is the safety and well-being of the acquittee." See P.A. 22-45, § 5.

Additionally, the legislature mandated that, "[o]n or before January 1, 2023, the Commissioner of Mental Health and Addiction Services shall convene a working group to evaluate the [board]," as well as guidelines and requirements of such working group. See P.A. 22-45, § 6.

[10] The trial court's retroactive application of P.A. 22-45, §§ 4 through 6, is not at issue on appeal. Accordingly, all references herein to § 17a-593 are to the current revision of the statute.

[§ 17a-593] is procedural in nature, and is being applied in a civil case, there is a presumption of retroactivity." The court thereafter found that "[the acquittee] has not met his burden of proving by a preponderance of the evidence that he is a person who should be discharged. . . . [He] suffers from a psychiatric illness, which requires ongoing treatment, and [he] would be a danger to himself or others if discharged from [the board's] supervision." The court thus concluded that the acquittee should remain under the board's jurisdiction and, accordingly, denied his application for discharge. This appeal followed.

I

The acquittee first claims that the trial court improperly found that, if he were discharged from the jurisdiction of the board, he would present a danger to himself or others because (1) four providers testified that he would not constitute a danger to himself or others, (2) he had not physically attacked any person in twenty years, and (3) the state failed to prove a causal connection between his mental illness and dangerousness. After reviewing the totality of the record, we cannot conclude that the court's finding of dangerousness was clearly erroneous.

As a preliminary matter, we note that "the confinement of insanity acquittees, although resulting initially from an adjudication in the criminal justice system, is not punishment for a crime. The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness." (Internal quotation marks omitted.)

Payne v. *Fairfield Hills Hospital*, 215 Conn. 675, 683–84, 578 A.2d 1025 (1990). "[A]s a matter of due process, an acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." *State* v. *Metz*, 230 Conn. 400, 417–18, 645 A.2d 965 (1994).

As our Supreme Court has explained, "[a]fter an acquittee has applied for discharge from the board's jurisdiction and the board, in accordance with the requirement of § 17a-593 (d), has filed its report regarding whether the acquittee should be discharged, the trial court must hold a hearing on the application, at which the acquittee bears the burden of proving that he or she is a person who should be discharged. General Statutes § 17a-593 (f).[11] After the hearing, the court, considering that its primary concern is the protection of society [and its secondary concern is the safety and well-being of the acquittee], must make a finding as to whether the acquittee is a person who should be discharged. General Statutes § 17a-593 (g). The term [p]erson who should be discharged is defined as an acquittee who does not have psychiatric disabilities . . . to the extent that his discharge would constitute a danger to himself or others. . . . General Statutes § 17a-580 (11)." (Footnote altered; footnote omitted; internal quotation marks omitted.) *State* v. *March*, 265 Conn. 697, 705, 830 A.2d 212 (2003). Our Supreme Court has defined "danger to self or to others" to mean "the risk of imminent physical injury to others or self, including the risk of loss or destruction of the property of others." (Internal quotation marks omitted.) Id., 709. It has further defined "imminent" as "ready to take place [or] hanging threateningly over one's head . . . ."

[11] "General Statutes § 17a-593 (f) provides [in relevant part that, at a hearing on an application for discharge], " 'the acquittee shall have the burden of proving by a preponderance of the evidence that the acquittee is a person who should be discharged.' " *State* v. *March*, 265 Conn. 697, 705 n.10, 830 A.2d 212 (2003).

(Internal quotation marks omitted.) *State* v. *Harris*, 277 Conn. 378, 389, 890 A.2d 559 (2006).

The determination of dangerousness presents a question of fact for the court to resolve. See *State* v. *March*, supra, 265 Conn. 710–11. Accordingly, appellate review of a court's dangerousness determination is governed by the clearly erroneous standard. See id., 711–12. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Internal quotation marks omitted.) *Meineke Bristol, LLC* v. *Premier Auto, LLC*, 227 Conn. App. 64, 73, 319 A.3d 826 (2024). "In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. Our authority . . . is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence . . . ." (Internal quotation marks omitted.) *State* v. *Jacob*, 69 Conn. App. 666, 680, 798 A.2d 974 (2002).

Although the acquittee claims that the court's dangerousness determination is clearly erroneous, the record belies that claim. In its memorandum of decision, the court indicated that it had considered, inter alia, the testimony of various medical professionals, the board's report to the court, and the hospital's report. The court specifically credited the hospital's report that the acquittee has "chronic difficulty with rule adherence and maintaining appropriate boundaries," that he engaged in stalking behavior toward two female staff members, that he threw a chair in the direction of Dr. Gusfa, and that his money management and excessive spending put him at risk for decompensation. Additionally, the court credited the board's report to the court

that "[h]e has a history of actively misleading his treatment team relative to gambling activity, financial matters, and unapproved associations with women, which the [b]oard finds to be known risk factors which exacerbate his risk to reside safely in the community," that his "poor judgment in disregarding established limits designed to mitigate his risk have resulted in significant consequences to his goal of transitioning to the community," and that "[h]e continues to demonstrate a blatant indifference to safeguards, rules and stipulations designed to promote his recovery and prevent his involvement in activities that may activate his risk factors." The court, as the trier of fact, was entitled to credit that evidence. See *State* v. *Lawrence*, 282 Conn. 141, 155, 920 A.2d 236 (2007) ("[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence" (internal quotation marks omitted)). We conclude that the board's report to the court and the hospital's report provide ample support for the court to reasonably infer that the acquittee, if discharged from the jurisdiction of the board, poses a risk of imminent physical injury to himself or others.

The acquittee nevertheless points to the testimony of four providers—Marc Hillbrand and Andrew Meisler, psychologists licensed in Connecticut, Gregory Peterson, a psychiatrist for the hospital, and Brian Conover, a clinical psychologist for the hospital—to support his argument that he is not a danger to himself or others. We are not persuaded.

As this court has observed, "psychiatric predictions of future dangerousness are tentative at best and are frequently conceded, even within the profession, to be unreliable. . . . Consequently, both the American Psychiatric Association . . . and the American Bar Association . . . have cautioned against the unfettered reliance in the criminal justice context on expert psychiatric

predictions of future dangerousness as a predicate to the release from confinement of persons who have been adjudged guilty of, but not criminally responsible for, a criminal offense.

"In addition, the goals of a treating psychiatrist frequently conflict with the goals of the criminal justice system. . . . While the psychiatrist must be concerned primarily with therapeutic goals, the court must give priority to the public safety ramifications of releasing from confinement an individual who has already shown a propensity for violence. As a result, the determination of dangerousness in the context of a mental status hearing reflects a societal rather than a medical judgment, in which the rights and needs of the [acquittee] must be balanced against the security interests of society. . . . The awesome task of weighing these two interests and arriving at a decision concerning release rests finally with the trial court. . . .

"Although psychiatric testimony as to the [acquittee's] condition may form an important part of the trial court's ultimate determination, the court is not bound by this evidence. . . . It may, in its discretion, accept all, part, or none of the experts' testimony." (Internal quotation marks omitted.) *State* v. *Corr*, 87 Conn. App. 717, 725, 867 A.2d 124, cert. denied, 273 Conn. 929, 873 A.2d 998 (2005); see also *Song* v. *Collins*, 152 Conn. App. 373, 376, 97 A.3d 1024 (2014) (finder of fact was "free to disbelieve, in whole or in part, the testimony of either or both of the expert witnesses who testified at trial" (internal quotation marks omitted)).

The court, in its memorandum of decision, discussed the testimony and reports of the acquittee's providers, particularly as they pertained to risks associated with the acquittee's stalking behavior. The court stated: "Dr. Meisler was asked what conclusions he would draw from the repeated instances of harassing or stalking

behavior with various females. Dr. Meisler acknowledged that the rules and regulations put in place have been unsuccessful in stopping those behaviors. Noting that it is unlikely that [the acquittee] will engage in any sexually aggressive behaviors, he conceded that there is risk that he will continue with the behaviors including unwanted attention, phone calls, et cetera." The court also noted that, "[a]lthough it was Dr. Conover's opinion that [the acquittee] would not cross lines of appropriate behavior or become physically aggressive, absent any psychotic or psychiatric symptoms, he did concede that assaultive/aggressive acts, stealing items and stalking type behaviors could all be risk factors for future violence." Furthermore, Dr. Hillbrand acknowledged the acquittee's stalking incidents and agreed that rejection from a female romantic interest, peer member, or staff member would be a stressor that could exacerbate the acquittee's risk of decompensation.[12]

After considering Dr. Meisler's and Dr. Conover's testimonies, which indicate that the acquittee's stalking behavior is likely to continue, and Dr. Hillbrand's testimony, which indicates that rejection from a romantic

[12] The following exchange occurred between the state's counsel, Margaret E. Kelley, state's attorney for the judicial district of Ansonia-Milford, and Dr. Hillbrand:

"Q. And when looking to the future and looking for possibilities of stressors, you had indicated that those stressors would not be present. Wouldn't a rejection by a female or someone that [the acquittee] was interested in, couldn't that, in fact, be a very important stressor that may exacerbate the situation?

"A. Oh, yes. I think he's vulnerable like any human being to experiencing distrust of a failed relationship.

"Q. And in your review of the report to the court, as well as the periodic six month reports, you're aware, are you not, that there have been claims that [the acquittee] essentially stalked some of the female staff members? You're aware of that?

"A. Yes.

"Q. And when you talk about stressors, would not the rejection from a peer member or a female staff member, would that also not be a stressor situation?

"A. Yes, it is."

interest could result in the acquittee's decompensation, the court reasonably could infer that, if the acquittee were discharged, he would present a risk of imminent physical injury to others. Such an inference is further supported by the court's explanation that, "[i]n assessing the implications of [the acquittee's] serious, and frequently obsessive 'boundary issues' with women, the court is mindful that the crime of stalking is included in the category of 'crimes against security of person' in the Penal Code." See General Statutes § 53a-181d (b) (1) (A) and (B) (defining stalking as person knowingly engaging in course of conduct, directed at specific person, that would cause reasonable person to fear for his or her physical safety or suffer emotional distress); General Statutes § 53a-181e (a) (person guilty of third degree stalking when such person recklessly causes another person to reasonably fear for his or her physical safety or suffer emotional distress).

Even if the providers' testimonies supported the acquittee's contention that he is not a danger to himself or others, it remained within the discretion of the trial court, as the trier of fact, to credit or discredit such evidence. See *State* v. *Nowell*, 262 Conn. 686, 696, 817 A.2d 76 (2003) ("the testimony was for the trial court to assess and [reviewing courts] have no appropriate role at this level in determining which of the various witnesses to credit"); see also *State* v. *Ardizzone*, supra, 215 Conn. App. 870 ("[a]s sole arbiter of credibility, the [trial] court was free to find [some] testimony more compelling" than other testimony); *State* v. *Damone*, 148 Conn. App. 137, 174, 83 A.3d 1227 ("[a]lthough the acquittee presented the testimony of an expert who testified that he did not present a danger either to himself or to others, the court was free to reject that testimony in favor of the findings of the board"), cert. denied, 311 Conn. 936, 88 A.3d 550 (2014). Thus, we

reject the acquittee's argument that his providers' testimonies render the court's dangerousness determination clearly erroneous.

The acquittee additionally argues that he has not physically attacked another person in twenty years and, therefore, the evidence shows that he is not a danger to himself or others. This argument is belied by the evidence. In 2016, the acquittee was transferred to a maximum security unit as a result of allegations that he attempted to pay another patient to assault his treating psychiatrist. The acquittee also engaged in stalking behavior toward two female staff members and, when the hospital's treatment team addressed such behavior, the acquittee threw a chair in the direction of Dr. Gusfa. Although Dr. Gusfa testified before the board that the acquittee did not attack him with the chair, he described the acquittee's behavior as explosive, impulsive, and lacking forethought. Even if the acquittee did not physically attack his providers or female staff members, the court could reasonably infer from such behavior that the acquittee continues to present a danger to others.

Lastly, the acquittee argues that the court's dangerousness determination is clearly erroneous because the state did not establish a causal connection or nexus between the acquittee's mental illness and his dangerousness. To support his argument, the acquittee cites to medical malpractice cases in which "[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." (Internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 460, 270 A.3d 713, cert. denied, 343 Conn. 906, 272 A.3d 1128 (2022). Medical malpractice cases, however, are not applicable in the present matter because we have stated that "the determination of dangerousness in the

context of a mental status hearing reflects a *societal rather than a medical judgment*,'' and the court has discretion to accept all, part, or none of an expert's testimony in making such determination. (Emphasis added; internal quotation marks omitted.) *State* v. *Corr*, supra, 87 Conn. App. 725. Moreover, the legislature has placed the burden on the acquittee to prove, by a preponderance of the evidence, that he is a person who should be discharged. General Statutes §17a-593 (f). Accordingly, the state was not required to produce expert medical testimony establishing a causal connection between the acquittee's mental illness and his dangerousness.

The acquittee also relies on Oregon case law to support his argument that the state is required to establish a causal connection between his mental illness and dangerousness. He argues that Oregon cases are instructive in the present matter because (1) Connecticut's board is modeled after Oregon's Psychiatric Review Board (Oregon board), and (2) Connecticut and Oregon are the only two states with similar statutory schemes governing acquittees. The state, on the other hand, argues that Oregon imposes a different statutory burden and, therefore, Oregon case law is not instructive in the present matter. We agree with the state.

To establish the necessity of a nexus requirement, the acquittee cites to *Drew* v. *Psychiatric Security Review Board*, 322 Or. 491, 499, 909 P.2d 1211 (1996) (''the record contains substantial evidence that could support [the Oregon board's] finding that [the acquittee] was a substantial danger to others, but [the Oregon board] did not connect its decision to that evidence''), and *Rinne* v. *Psychiatric Security Review Board*, 297 Or. App. 549, 559, 443 P.3d 731 (2019) (considering ''whether substantial evidence and reason support [the Oregon board's] finding of a causal relationship between any qualifying mental disease or defect that [the acquittee]

has and the substantial danger to others that he presents"). Connecticut and Oregon, however, differ on which party bears the burden when an acquittee files an application for discharge. The Connecticut legislature has placed the burden of proof on the acquittee to demonstrate, by a preponderance of the evidence, that he is a person who should be discharged. General Statutes § 17a-593 (f). On the other hand, after an acquittee has been committed for two years, the Oregon legislature shifts the burden to the *state* to prove, by a preponderance of the evidence, that the acquittee should *not* be discharged. Or. Rev. Stat. § 161.341 (4) (2023).[13] In this significant respect, the two statutory schemes governing applications for discharge are materially different. Consequently, the acquittee's contention that we should follow *Drew* v. *Psychiatric Security Review Board*, supra, 499, and *Rinne* v. *Psychiatric Security Review Board*, supra, 559, in requiring a nexus between the acquittee's mental illness and dangerousness is based on a false premise, namely, that our statutory scheme concerning discharge applications is substantially similar to Oregon's statutory scheme. For that reason, we are not persuaded that any nexus requirement set forth in *Rinne* and *Drew* is applicable to the present matter.

The state maintains that the record nonetheless supports the existence of a causal connection between the acquittee's mental illness, his rule breaking behavior, and his risk of dangerousness. In support of its argument, the state points to the board's report to the court,

[13] Section 161.341 (4) of the Oregon Revised Statutes provides in relevant part: "When application is made [for discharge or conditional release] . . . [t]he applicant must prove by a preponderance of the evidence the applicant's fitness for discharge or conditional release . . . unless more than two years has passed since the state had the burden of proof on that issue, in which case the state shall have the burden of proving by a preponderance of the evidence the applicant's lack of fitness for discharge or conditional release. . . ."

which states that the acquittee demonstrated "poor judgment and disregard for established limits that are designed to mitigate his risk," that he "continued to demonstrate a blatant indifference to safeguards, rules, and stipulations designed to promote his recovery and prevent his involvement in activities that may reactivate his risk factors," and that "his judgment remains compromised as he continues to be unable to discern what is in his best interest and what behaviors may pose a risk to him." We conclude that, on the basis of such evidence, the court reasonably could infer that the acquittee's mental illness causes him to engage in behaviors that exacerbate his dangerousness.

The acquittee bore the burden of demonstrating that he is a person who should be discharged. See *State* v. *March*, supra, 265 Conn. 705. The record before us contains evidence to support the court's finding that, if discharged, the acquittee would constitute a danger to himself or others. That finding, therefore, is not clearly erroneous. Because the acquittee did not satisfy his statutory burden of proof pursuant to § 17a-593, the court properly determined that the acquittee is not a person who should be discharged from the jurisdiction of the board.

II

The acquittee next claims that § 17a-593, as applied to him in the present matter, is unconstitutionally vague. He argues that (1) he had inadequate notice that his noncompliance with the hospital's rules would result in denial of his application for discharge and (2) the court arbitrarily denied his application for discharge on the basis of his noncompliance with rules that are unconnected to his mental illness and risk of dangerousness. The state, on the other hand, argues that § 17a-593, as applied to the acquittee, is not unconstitutionally vague because the acquittee's noncompliance with rules

is associated with known risk factors which were communicated to the acquittee. We agree with the state.

We begin with the applicable standard of review and general governing principles. "The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review." *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010). "In challenging the constitutionality of a statute, the defendant bears a heavy burden. To prevail on his vagueness claim, [t]he defendant must demonstrate beyond a reasonable doubt that the statute, as applied to him, deprived him of adequate notice of what conduct the statute proscribed or that he fell victim to arbitrary and discriminatory enforcement. . . . The proper test for determining [whether] a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. . . . The test is objectively applied to the actor's conduct and judged by a reasonable person's reading of the statute. . . . [O]ur fundamental inquiry is whether a person of ordinary intelligence would comprehend that the defendant's acts were prohibited . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 139 Conn. App. 107, 110, 54 A.3d 638 (2012).

With these principles in mind, we turn to the statute at issue. Section 17a-593 provides that "[a]n acquittee may apply for discharge [from the jurisdiction of the board] not more than once every six months . . . ." General Statutes § 17a-593 (a). "The court shall forward any application for discharge received from the acquittee . . . to the board. The board shall . . . file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The

board may hold a hearing or take other action appropriate to assist it in preparing its report." General Statutes § 17a-593 (d). "Within ten days of receipt . . . of the board's report filed under subsection (d) of this section, either the state's attorney or counsel for the acquittee may file notice of intent to perform a separate examination of the acquittee. An examination conducted on behalf of the acquittee may be performed by a psychiatrist or psychologist of the acquittee's own choice and shall be performed at the expense of the acquittee unless he is indigent. If the acquittee is indigent, the court shall provide him with the services of a psychiatrist or psychologist to perform the examination at the expense of the state. . . ." General Statutes § 17a-593 (e).

"After receipt of the board's report and any separate examination reports, the court shall promptly commence a hearing on the . . . application for discharge . . . . At the hearing, the acquittee shall have the burden of proving by a preponderance of the evidence that the acquittee is a person who should be discharged." General Statutes § 17a-593 (f). A " '[p]erson who should be discharged' means an acquittee who does not have psychiatric disabilities . . . to the extent that such acquittee's discharge would constitute a danger to himself or others . . . ." General Statutes § 17a-580 (11). " 'Danger to himself or others' includes danger to the property of others . . . ." General Statutes § 17a-580 (5).

After the hearing, "[t]he court shall make a finding as to the mental condition of the acquittee and, considering that its primary concern is the protection of society and its secondary concern is the safety and well-being of the acquittee, make one of the following orders: (1) If the court finds that the acquittee is not a person who should be discharged, the court shall order the

recommendation or application for discharge be dismissed; or (2) if the court finds that the acquittee is a person who should be discharged, the court shall order the acquittee discharged from custody. . . .'' General Statutes § 17a-593 (g).

''We note that the statute at issue in the present case, § 17a-593, is not a criminal statute. [T]he confinement of [not guilty by reason of mental disease or defect] acquittees, although resulting initially from an adjudication in the criminal justice system, is not punishment for a crime. The purpose of commitment following [a not guilty by reason of mental disease or defect] acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. . . . We also note that § 17a-593 was not intended to guide any individual conduct on the part of the acquittee but, rather, it serves to guide the court in making a determination about whether an acquittee is a person who should be discharged.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Jacob*, supra, 69 Conn. App. 673.

''While a statute may be invalidated as impermissibly vague as a result of a failure to give fair warning of the conduct proscribed by law, generally, the fair-warning requirement is not applicable to commitment scheme challenges, since the person is not confined as a result of any particular acts he or she may have performed, but is instead confined on the basis of his or her status. . . .'' 53 Am. Jur. 2d 464, Mentally Impaired Persons § 4 (1996). ''We, nonetheless, apply the void for vagueness doctrine to § 17a-593 in recognition of the fact that involuntary commitment imposes a significant curtailment on liberty.'' *State* v. *Jacob*, supra, 69 Conn. App. 673–74.

This court has previously held that § 17a-593 is not void for vagueness on its face[14] because ''the ordinary

[14] ''A facial challenge, in this context, means a claim that the law is invalid in toto–and therefore incapable of any valid application. . . . A *facial* chal-

meaning of the terms 'danger' and 'dangerous,' the statutory definition set out in [General Statutes] § 17a-495 (a) and (b)[15] and our Supreme Court's interpretation of 'dangerousness'[16] provide Connecticut acquittees with fair warning of what 'danger to himself or others' means for purposes of a § 17a-593 discharge application hearing, as well as the factors that a court may and should consider in making such a determination." (Footnotes added.) Id., 677. Now we turn to the acquittee's claims that he lacked adequate notice and that he was the victim of arbitrary and discriminatory enforcement.

A

The acquittee claims that he had inadequate notice that violating the hospital's rules would result in the denial of his application for discharge pursuant to § 17a-593 because the rule violations are not listed in the relevant statutory scheme. We conclude that a reasonable person would have anticipated that the court would consider the acquittee's noncompliance with hospital rules in making a dangerousness determination and, therefore, the acquittee had adequate notice.

lenge, as compared to an *as applied* challenge is not dependent on the facts of a particular case." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 522 n.21, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

[15] Subsections (a) and (b) of General Statutes § 17a-495, which are applicable to civil commitments, define "dangerous to himself or herself or others" to mean "there is a substantial risk that physical harm will be inflicted by an individual upon his or her own person or upon another person . . . ."

Because "the legislature . . . employed nearly identical phrases in both the civil commitment and the insanity acquittee commitment statutory schemes," we previously have concluded that it "intend[ed] those phrases to have the same meaning." *State* v. *Jacob*, supra, 69 Conn. App. 675–76.

[16] As previously stated in part I of this opinion, "our Supreme Court interpreted the phrase [d]anger to self or others . . . [to mean] the risk of imminent physical injury to others or self, including the risk of loss or destruction of the property of others." (Internal quotation marks omitted.) *State* v. *Dyous*, 198 Conn. App. 253, 272, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020).

In the present matter, the evidence shows that the acquittee was aware of the hospital's rules and that the rules were intended to mitigate his risk of dangerousness. The hospital's report stated that the acquittee's treatment team provided "ongoing reminders and education on maintaining appropriate boundaries," and it developed a behavioral support plan "to help him move forward with his desired goal of community reintegration . . . ." The behavioral support plan clearly outlined the hospital's expectations of the acquittee and his treatment team informed him that "[a]dherence with a behavioral support plan would demonstrate his ability to abide by rules and expectations and would allow for reasonable discussions related to [t]emporary [l]eave in the future." The treatment team continued to provide "psychoeducation on appropriate boundaries and hospital rules and protocols. . . . Notably, staff continued to remind [the acquittee] of the rules and expectations around money . . . and encouraged him to consider his long-term goal of transitioning to the community and the importance of both demonstrating adherence to unit rules and expectations as well as ensuring he had adequate funds to transfer to the community."

The hospital, pursuant to § 17a-586, is required to report on the acquittee's mental health status every six months, and we have stated that the court, in making a dangerousness determination, should "consider the entire record available to it, including the [acquittee's] history of mental illness, his present and past diagnoses, his past violent behavior, the nature of the offense for which he was prosecuted, the need for continued medication and therapy, and the prospects for supervision if released." (Internal quotation marks omitted.) *State* v. *Ardizzone*, supra, 215 Conn. App. 874. The hospital clearly informed the acquittee that the hospital rules were intended to mitigate his risk of decompensation and that failure to comply with hospital rules would

hinder his reintegration into the community. Accordingly, the acquittee had fair warning that the hospital would report his noncompliance as it relates to his risk for decompensation and that the court would consider the hospital's report in making its dangerousness determination.

Thus, after considering the hospital's efforts to educate the acquittee on the importance of adhering to its rules, we conclude that a reasonable person would anticipate that the court would consider the acquittee's failure to abide by such rules in making a dangerousness determination. Therefore, the acquittee has not met his burden of proving beyond a reasonable doubt that he had inadequate notice that noncompliance with the hospital's rules could result in denial of his application for discharge.

B

The acquittee additionally claims that he is a victim of arbitrary and discriminatory enforcement of § 17a-593 because the trial court made its dangerousness determination on the basis of rule violations that are unconnected to his mental illness and risk of dangerousness. We are not persuaded.

Although the acquittee maintains that the court made its dangerousness determination on the basis of merely "technical" violations of hospital rules, the court's memorandum of decision describes the acquittee's consistent pattern of noncompliant behavior, including violations of substantive rules. The board's report to the court, on which the court relied, stated: "Despite [the acquittee's] improvement relative to psychotic symptoms and aggression, [the acquittee] has consistently displayed a disregard for the rules and protocols in his various treatment settings. *While some rule breaking behaviors have been technical in nature*, such as smoking cigarettes while escorted in the community, *other*

violations involved planning and deception, demonstrating a blatant indifference for important safeguards." (Emphasis added.) Dr. Hillbrand testified that the acquittee has a long history of violating the hospital's rules, including "essential rules"—taking medication, attending therapeutic activities, maintaining general cooperation, and maintaining good relationships with peers and staff—and "minor rules"—smoking and contacting certain individuals without board approval. Indeed, the record reveals that the acquittee took his medication inconsistently, struggled to regulate his emotions, engaged in financial deception, retaliated against hospital staff members, engaged in stalking behavior toward two female staff members, and threw a chair in the direction of a provider. The court therefore reached its dangerousness determination on the basis of the acquittee's severe and repetitive noncompliant behavior.

Moreover, the evidence demonstrates that the acquittee's noncompliance with hospital rules is associated with risk factors for decompensation. The acquittee argues that "gambling, excessive spending, [and] involvement in secretive romantic relationships do not constitute a danger to [himself] or anyone else." The board, however, found that "[the acquittee's] engagement in such behaviors *exacerbates his risk to reside safely in the community*." (Emphasis added.) It also found that "[the acquittee's] poor judgment and disregard for established limits that are *designed to mitigate his risk* have resulted in significant consequences to his goal of transitioning to the community. [The acquittee] has continued to demonstrate a blatant indifference to safeguards, rules, and stipulations designed to promote his recovery and prevent his involvement in activities that *may reactivate his risk factors*." (Emphasis added.) Accordingly, the hospital's rules have a direct correlation to the acquittee's risk for dangerousness.

Furthermore, the court expressly considered the acquittee's noncompliant behavior as it relates to his risk of dangerousness by stating: "Of much concern to this court is [the testimony of Paul Bryant, a psychiatrist] that, despite past efforts made by multiple treaters, [the acquittee] has been unable to appreciate the potential impact that relational or financial stressors could play on his psychotic illness, particularly in light of the fact that these factors do appear to be related to some past psychotic episodes he's had, including the one that led to the index offense." (Emphasis omitted.) The court also considered Dr. Hillbrand's testimony in which he acknowledged that rejection by romantic interests and gambling are two stressors that may exacerbate the acquittee's risk of decompensation upon release. Accordingly, the court made its dangerousness determination on the basis of rule violations that are associated with risk factors for decompensation and dangerousness and, therefore, we conclude that the acquittee has not met his burden of proving beyond a reasonable doubt that he was the victim of arbitrary and discriminatory enforcement of § 17a-593.

Because the acquittee had notice of the prohibited conduct and was not the victim of arbitrary enforcement, we conclude that the acquittee has failed to satisfy his burden of showing that § 17a-593 is unconstitutionally vague as applied to him.

The judgment is affirmed.

In this opinion the other judges concurred.

ALDIN ASSOCIATES LIMITED PARTNERSHIP *v.* STATE OF CONNECTICUT ET AL.
(AC 46504)

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

Syllabus

The plaintiff appealed from the judgment of the trial court denying its request for a writ of mandamus to compel the defendants, the state of Connecticut and the Commissioner of Energy and Environmental Protection, to make payment on the plaintiff's claims under the act (§ 22a-449a et seq.) establishing an underground storage tank petroleum cleanup fund. The plaintiff claimed, inter alia, that the court improperly failed to shift the burden of proof to the defendants. *Held*:

The trial court did not exceed the scope of this court's remand in the plaintiff's prior appeal, *Aldin Associates Ltd. Partnership* v. *State* (209 Conn. App. 741), when it held the plaintiff to its burden of establishing its entitlement to a writ of mandamus.

The trial court did not abuse its discretion in denying the plaintiff's request for a writ of mandamus directing the defendants to pay the plaintiff's approved claims under the act, the plaintiff having failed to demonstrate the existence of a clear legal right to be paid what it claims is due and owing from the commissioner under the act.

This court declined the plaintiff's request to impose onto the act a burden shifting requirement for the defendants to establish the existence of any pending claims in the program after the plaintiff has made an initial showing that there were sufficient funds in the program to pay its claims, as the plaintiff failed to make such an initial showing regarding sufficient funds, the plaintiff did not point to any authority or legislative history of the statutory scheme that would support the imposition of a burden shifting requirement onto the act, and sanctioning such burden shifting would clearly expand the writ of mandamus beyond its well established limits.

(*One judge concurring in part and dissenting in part*)

Argued October 17, 2024—officially released January 21, 2025

Procedural History

Action seeking a writ of mandamus to compel the defendants to adjudicate and make payment on the plaintiff's claims in connection with the state's underground storage tank petroleum cleanup program, and for other relief, brought to the Superior Court in the

judicial district of Hartford, where the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the defendants' motion to dismiss and rendered judgment thereon; thereafter, the plaintiff appealed to this court, *Bright, C. J.*, and *Moll* and *Harper, Js.*, which reversed in part the trial court's judgment and remanded the case to the trial court for further proceedings; subsequently, the plaintiff withdrew the portion of its application seeking to compel the defendants to adjudicate its claims, and the court, *Sicilian, J.*, rendered judgment for the defendants on the remaining portion of the plaintiff's complaint, from which the plaintiff appealed to this court. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (plaintiff).

Daniel M. Salton, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

SEELEY, J. The plaintiff, Aldin Associates Limited Partnership, which owns and operates gas stations where underground storage tanks for petroleum have been used, appeals from the judgment rendered by the trial court denying its request for a writ of mandamus against the defendants, the state of Connecticut and Katie Dykes, the Commissioner of Energy and Environmental Protection (commissioner), directing them to request the state comptroller (comptroller) to pay the plaintiff's approved applications that were submitted pursuant to an underground storage tank petroleum clean-up program administered by the defendants. On appeal, the plaintiff claims that the court improperly (1) denied its request for a writ of mandamus and (2) failed to shift the burden of proof to the defendants. We disagree with both claims and affirm the judgment of the court.

The following facts and procedural history were set forth by this court in a prior appeal in this matter or are undisputed in the record. "In 1989, the General Assembly enacted legislation titled 'An Act Concerning Underground Storage Tanks' (act), which established the underground storage tank petroleum clean-up fund (fund). See Public Acts 1989, No. 89-373 (P.A. 89-373), codified as amended at General Statutes (Rev. to 1991) § 22a-449a et seq. Initially, the act provided that the fund shall be credited one third of the tax imposed on gross earnings derived from the sale of petroleum products under General Statutes § 12-587 and that the fund is to be used by the commissioner to reimburse responsible parties for costs incurred in remediating leaking underground storage tanks.[1] See P.A. 89-373, §§ 3, 4 and 10. A responsible party could apply to the clean-up fund review board (board) for reimbursement from the fund. See P.A. 89-373, §§ 7 and 10.

"The act was amended several times during the years following its enactment in 1989. In 1994, the legislature replaced the fund with the underground storage tank petroleum clean-up account (account). See Public Acts 1994, No. 94-130, § 6. In 2009, the General Assembly repealed General Statutes § 22a-449b, which required that a portion of tax revenue collected under § 12-587 be deposited in the account, and replaced the account with the underground storage tank petroleum clean-up program (program) to reimburse responsible parties

[1] "A responsible party is 'any person who . . . at any time owns, leases, uses or has an interest in the real property on which an underground storage tank system is or was located from which there is or has been a release or suspected release, regardless of when the release or suspected release occurred, or whether such person owned, leased, used or had an interest in the real property at the time the release or suspected release occurred, or whether such person owned, operated, leased or used the underground storage tank system from which the release or suspected release occurred . . . .' General Statutes § 22a-449a (3) (B)." *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 744 n.1, 269 A.3d 790 (2022).

'within available appropriations . . . .' Public Acts, Spec. Sess., June, 2009, No. 09-3, §§ 423 and 513, codified at General Statutes (Supp. 2010) § 22a-449c.

"In 2012, the General Assembly replaced the board with the commissioner and cancelled the program. See Public Acts, Spec. Sess., June, 2012, No. 12-1, §§ 252 and 262, codified at General Statutes §§ 22a-449c and 22a-449s. General Statutes § 22a-449t established deadlines for applicants to apply for reimbursement under the program based on the applicant's status as a municipal, small station, mid-size station, large station, or other applicant. Section 261 of Public Act 12-1, which was codified at General Statutes (Rev. to 2013) § 22a-449r, established a reverse auction system. This system was applicable 'to all applications submitted by mid-size or large station applicants before, on or after June 15, 2012, including, but not limited to, applications for which payment or reimbursement has been ordered by the commissioner but has not been made. . . .' General Statutes § 22a-449r (c) (2)."[2] (Footnote in original.) *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 744–45, 269 A.3d 790 (2022) (*Aldin I*).

When the legislature cancelled the program in 2012 and indicated that no more applications would be accepted after October 1, 2014, it also changed how the program was funded. The program would no longer be funded by a tax; rather, the legislature authorized the issuance of bonds in the total aggregate amount of $36 million for the purpose of providing payment or reimbursement ordered by the commissioner pursuant to the program. See General Statutes § 22a-449u. The $36 million in bond funds were divided equally, with

[2] In light of the language in § 22a-449r making it applicable to "all applications submitted . . . before, on or after June 15, 2012"; General Statutes § 22a-449r (c) (2); the plaintiff's mandamus claim is governed by the current version of the act. See *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 766 n.5, 269 A.3d 790 (2022).

$9 million allocated to each of the four categories of applicants. In addition to the change in funding for the program, the legislature also implemented a reverse auction system, which was a new system for how payments to applicants in categories three and four for mid-size and large stations would be prioritized. "Under the reverse auction system, 'priority for payment or reimbursement shall be given to those applicants who . . . agree to accept the greatest reduction in the amount ordered for payment or reimbursement by the commissioner under the program . . . .' General Statutes § 22a-449r (c) (4). Section 22a-449r (c) (2) (A) provides in relevant part: 'In the fiscal year beginning July 1, 2012, no payment shall be made to mid-size station applicants in excess of thirty-five cents on each dollar the commissioner orders to be paid or reimbursed under the program. In the fiscal year beginning July 1, 2013, and each fiscal year thereafter, such amount shall increase by ten cents on each dollar per fiscal year and in such years no payment or reimbursement shall be made in excess of the amount in effect for such fiscal year. . . .'

"The plaintiff owns and operates more than five gasoline facilities where underground storage tanks used for petroleum products are located and, therefore, is a responsible party and a mid-size station applicant under the act.[3] The plaintiff remediated some of its properties pursuant to the act and submitted several applications to the Department of Energy and Environmental Protection [(department)] seeking reimbursement for the costs it incurred. At the time the plaintiff commenced

[3] "General Statutes § 22a-449a (10) defines " '[m]id-size station applicant'" as 'an applicant who owned, operated, leased, used, or had an interest in, at the time such applicant's first application was received by the underground storage tank petroleum clean-up program, six to ninety-nine separate parcels of real property, within or outside of the state, on which an underground storage tank system was or had been previously located . . . .' " *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 746 n.2.

this action, some of the plaintiff's applications had been approved and paid, at least one application had been approved in 2009 but remained unpaid, and the commissioner had failed to act on the plaintiff's remaining applications.

"In 2019, the plaintiff brought this action against the defendants, claiming that the commissioner has unduly and unreasonably delayed the processing and payment of its applications for reimbursement under the program." (Footnote in original.) *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 745–46. In this action, the plaintiff initially sought a writ of mandamus ordering the commissioner " 'to pay approved claims and to adjudicate those pending claims [that] have not been adjudicated.' " Id., 746. The plaintiff also sought monetary damages on the basis of its allegations that the commissioner "failed to reimburse it and failed to administer the program within a reasonably timely manner as required by the act . . . violated the equal protection clause under article first, § 20, of the Connecticut constitution . . . violated the due process clause under article first, § 10, of the Connecticut constitution . . . [and] violated the takings clause of article first, § 11, of the Connecticut constitution." Id., 746–47.

The defendants filed a motion to dismiss the action for lack of subject matter jurisdiction, asserting that the plaintiff's claims were barred by sovereign immunity. Id., 747. Following a hearing, the trial court granted the defendants' motion to dismiss as to all counts, and the plaintiff appealed to this court, which affirmed the judgment in part as to the dismissal, on the ground of sovereign immunity, of all counts except for count one seeking a writ of mandamus. With respect to the mandamus count, this court concluded that it was not barred by sovereign immunity and remanded the case for further proceedings on that count. Id., 743–44, 779.

Following our remand, the plaintiff filed a single count, amended complaint seeking a writ of mandamus "ordering the commissioner to request the [comptroller] to make payments for [the plaintiff's] approved claims . . . ."[4] In its amended complaint, the plaintiff alleges that, in response to the legislation encouraging those responsible for facilities with underground storage tanks to identify and remediate all such facilities, "[t]he plaintiff engaged in an aggressive program to identify its applicable facilities, proceed[ed] with remediation of such facilities, and filed applications for reimbursement of the costs for such remediation pursuant to the statute. At least one of the unpaid applications was approved as early as 2009 in the amount of $532,443.34, yet has not been paid. . . . Recently, all of the plaintiff's applications have been processed and approved for payment in the amount of $1,720,880.56; therefore, there remains $2,253,323.96 due and owing." The plaintiff further alleges in its amended complaint that the defendants have unduly and unreasonably delayed processing applications and making payments for approved ones, including those of the plaintiff, which, in response to the state's changes to the program in 2012, elected a 95 percent reimbursement rate.

A trial on the mandamus count was held before the court on February 15, 2023. Paula McDowell, an employee of the department to whom the commissioner had delegated authority to approve applications under the program, was the only witness who testified. The plaintiff submitted as full exhibits documentary evidence concerning the amount of money in the fund, as well as the status of unpaid or unapproved applications. The parties also submitted pretrial and posttrial briefs.

[4] After this court's decision in *Aldin I*, the commissioner approved the plaintiff's remaining applications for reimbursement in the amount of $2,253,323.96. Consequently, the plaintiff's amended complaint removed the request for a writ of mandamus ordering the commissioner to adjudicate its pending claims.

McDowell testified that she is the person who currently reviews applications and decides whether an application should be approved. The plaintiff's counsel questioned her extensively regarding the plaintiff's exhibit one, a document she had produced outlining the status of outstanding applications and available funds for the program. For each category of claimants, the document shows the number of existing claims that are deemed new, supplemental, tabled, or awarded but not paid, and for each of those types of claims, it shows the total dollar amount.[5] When asked about a number

[5] Specifically, for the first category, "municipalities and other applicants," there are no new claims, there are four supplemental claims totaling $137,260.59, there is one tabled claim in the amount of $21,984.97, and there are no awarded but not paid claims. With respect to the tabled claim, McDowell testified that it was a clerical error and that the claim should not have been listed. Thus, taking that into account, the total amount of outstanding claims for municipalities and other applicants is $137,260.59, as opposed to the $159,245.56 reflected on the document. For the second category, "small station owners," there are two new claims totaling $18,872.32, two supplemental claims totaling $46,674.82, thirteen tabled claims totaling $543,349.06, and two awarded but not paid claims totaling $12,855.46. The total amount of outstanding claims for small station owners is $621,751.66. As for the third category, "mid-size station owners," there are no new claims, fourteen supplemental claims totaling $577,041.30, five awarded but not paid claims totaling $552,114.54, and six tabled claims totaling $458,047.10, with a notation stating: "Alliance [Energy] claim for $342,163.16 has a reduce[d] ele[c]tion for [thirty-five] cents." The document lists the total amount of outstanding claims for mid-size station owners as $1,587,202.94, which, we note, is less than the $2,253,323.96 in approved claims for which the plaintiff is seeking payment. Finally, as for the fourth category, "large station owners," there are 51 new claims totaling $6,378,146.93, 1149 supplemental claims totaling $52,841,691.31, 87 tabled claims totaling $1,663,028.92, and 234 awarded but not paid claims totaling $3,194,687.31. The total amount of outstanding claims for large station owners is $64,077,554.47. In all, pursuant to exhibit one, there are 1570 claims across the categories seeking reimbursement from the fund, totaling more than $66 million.

The plaintiff also submitted into evidence exhibit eight, which McDowell had provided to the plaintiff as an update to the status of the various claims. Exhibit eight, however, does not include "awarded but not paid" claims, which McDowell testified were mistakenly omitted from the document. After accounting for that omission, there are no substantial differences between the amounts in the two documents. For municipalities and other

of the claims in the various categories, McDowell acknowledged that no action has been taken on many of them in the past ten years and that she has not done anything to follow up on any of the tabled or supplemental applications or to pursue any missing documentation in order to resolve any of those claims. She also testified that no other station owners in the various categories have brought an action seeking to recover on any of the outstanding applications and that there has been no action taken, other than by the plaintiff, in category three with respect to any of the outstanding applications. When asked whether there are "any other applicants in mid-size [category three] that have approved claims that weren't paid, with the exception of [a claim by a company called Alliance Energy]," she responded: "Yes, there's some claims that have bankruptcy issues that were awarded but not paid." She also testified regarding a number of claims by various companies for which "insurance issues" were noted, acknowledging that those issues have not been resolved.

At one point during the direct examination of McDowell, the plaintiff's counsel asked: "As of today, even though there's approximately $2.7 million available, you have not instructed the comptroller to pay [the plaintiff's] approved claims, correct?" McDowell responded that that was correct, and when asked further if she had any intention of doing so "unless the court orders it," she replied, "[t]here's no money available to pay them." On cross-examination, she testified that the total amount of unpaid claims is more than $65 million. She

applicants, after accounting for the previously mentioned clerical error as reflected in exhibit one, the amount for one tabled application is now $107,668.09. For small and mid-size station owners, the amounts have not changed. There is a new notation, however, stating: "[The plaintiff's] pending approved claims to be paid of $1,907,074.73 has a reduction of [ninety-five] cents." As for large station owners, there is one fewer tabled application, which reduced the total amount by $107,688.09. There still remains more than $65 million in outstanding claims.

further testified that the plaintiff is not first in line to be paid for mid-size station owners, which category has only $4310 remaining in the account for that category.

After the conclusion of the trial, the court issued a memorandum of decision in which it denied the plaintiff's request for a writ of mandamus. On the basis of the evidence presented, the court made the following findings. "The plaintiff [a mid-size applicant under the act] made multiple claims for reimbursement from the [fund] and received reimbursement for many such claims. The plaintiff made, and the commissioner approved, additional claims for reimbursement totaling $2,253,323.96. Those approved claims have not been paid.

"The total amount remaining in the [fund] is $2,750,953. That amount is allocated among the four categories of applicants established by the act as follows: $445,734.35 is allocated for municipal and other applicants; $1,853,003.[3]8 is allocated for large applicants; $447,904.69 is allocated for small applicants; [and] $4310.58 is allocated for mid-size applicants.

"Numerous claims, made by claimants other than the plaintiff, remain pending before the commissioner unadjudicated, tabled, or approved but not paid. The total of all such claims vastly exceeds the total amount remaining in the [fund].

"During 2019, [McDowell], an employee of [the department] to whom the commissioner has delegated substantial discretion to manage the processing and disposition of claims under the act, made the discretionary decision to reallocate funds from other categories into the mid-size category so that some approved claims of the plaintiff could be paid.[6] That reallocation was

[6] Specifically, McDowell testified that, in 2019, in her discretion she moved a little more than $7 million to the mid-size category specifically to pay many of the plaintiff's claims, which resulted in a payment to the plaintiff of $11 million. At oral argument before this court, the defendants' counsel explained that, prior to our decision in *Aldin I*, the commissioner believed

made notwithstanding that there were pending claims in at least some of the categories from which funds were taken that exceeded the amounts then allocated to those categories.

"Other than reallocating funds and paying some of the plaintiff's claims in 2019, the [commissioner] has taken little or no action to process, resolve or pay outstanding claims for more than ten years. None of the applicants, other than the plaintiff, has taken any action to pursue its applications or payment of its approved claims." (Footnote added; footnotes omitted.) The court also noted that it was unclear from the record "the extent to which the commissioner has taken any action at all to process claims, other than the plaintiff's claims, in the past ten years. McDowell, who has had responsibilities for the program since the program's inception, answered 'yes' when asked whether there had been processing to finalize claims in the large station category over the last ten years. Counsel did not inquire further and so there is no evidence that more completely explains McDowell's affirmative answer. In response to other questions, McDowell confirmed that . . . little or nothing [has been done] to process or resolve outstanding applications and claims. For example, she indicated that . . . nothing [has been done] to follow up on applications that were tabled, or supplemental claims that were filed, in 2012 or earlier, nothing [has been done] to pursue claims that were affected by

that she had discretion to manage the fund and to move funds between categories, despite the statutory language establishing the order in which claims must be paid. Counsel also acknowledged, however, that in light of this court's decision in *Aldin I*, no such discretion to manage the fund exists.

As a result of that payment in 2019, the plaintiff ultimately received $2 million more than the $9 million designated for mid-size station owners. In all, the plaintiff has filed 435 applications for reimbursement from the fund, of which 413 have been paid. In fact, the plaintiff has been paid $19 million in total from the fund to date and is the single largest payee of the fund since its closure.

the bankruptcy of claimants that occurred some ten years ago or more, and nothing [has been done] to resolve what McDowell described as 'insurance issues' relating to claims that date back more than ten years."

The court next addressed the parties' disagreement as to the scope of the remand from this court: "[T]he plaintiff argue[d] that the only issue for [the] court to determine [was] whether there are available funds to pay the plaintiff's approved claims," while "the defendants contend[ed] that the remand leaves open for determination more issues than just the availability of funds to pay approved claims . . . ." It concluded that, even under "the plaintiff's narrow interpretation of the remand order, the plaintiff ha[d] failed to establish entitlement to a writ of mandamus ordering the commissioner to request the comptroller to pay the plaintiff's approved claims." In reaching that determination, the court noted the plaintiff's reliance on § 22a-449r (a) (1), which allows for available funds to be divided among the four categories of claimants and provides in relevant part: "If at any time there is an amount remaining in one such category and if in such category there are no pending applications or applications for which payment or reimbursement has been ordered by the commissioner but has not been made . . . then such amount shall be redistributed for payment or reimbursement in the following order of priority . . . ." The court then stated: "The amount currently allocated to the mid-size category in which the plaintiff belongs is only $4310.58. The plaintiff acknowledges that, to pay the plaintiff's approved claims, the commissioner would have to move funds from other categories into the mid-size category. The evidence makes clear, and the court finds, that there are tens of millions of dollars in applications in some state of processing, including claims approved but unpaid, pending before the commissioner. The evidence

also demonstrates, and the court finds, that the plaintiff's claims are not first in line for payment under the 'reverse auction' protocol established for the mid-size category under the statute. The plaintiff's claim that there are available funds to pay its approved claims therefore rests on the proposition that, because the commissioner has dragged her feet in processing and resolving claims, and because other claimants have not pursued legal actions compelling the commissioner to act, all of the claims except those of the plaintiff must be deemed abandoned and no longer pending such that the commissioner is obligated to reallocate all the available funds to the mid-size category and to pay the plaintiff's claims, which, according to the plaintiff's theory, are the only pending claims.

"Accepting the plaintiff's theory would impermissibly extend mandamus beyond its well established limits. See *Wozniak* v. *Colchester*, 193 Conn. App. 842, 855, 220 A.3d 132, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). The plaintiff has not demonstrated that it has a complete and immediate right to be paid. See *Stewart* v. *Watertown*, 303 Conn. 699, 711, 38 A.3d 72 (2012). Rather, to succeed, the plaintiff requires the court to determine that its claims take priority over all other claims simply because the plaintiff has pursued legal action while other claimants have not. . . .

"The plaintiff fairly characterizes the commissioner's failure for more than ten years to take any significant step to administer the program in conformance with her statutory obligations as making a mockery of the program. To be sure, the Appellate Court's decision in [*Aldin I*] makes clear that the fact that the act does not impose a duty to pay approved applications within a specific time period does not relieve the commissioner of her mandatory duty to pay approved claims 'if . . . there are funds available . . . .' [*Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 771–72]. A

demand for a writ of mandamus ordering the commissioner to pay approved claims in accordance with the priorities and requirements established by the applicable statutes may well be appropriate on the record in this case. But that is not what the plaintiff seeks, perhaps because, if all pending claims were processed and paid in accordance with the act, it appears that the available funds would be largely, if not entirely, exhausted by payments to other claimants." The court therefore determined that the plaintiff did not meet its burden of demonstrating that it was entitled to a writ of mandamus ordering the commissioner to request the comptroller to pay the plaintiff's approved but unpaid claims and rendered judgment in favor of the defendants. This appeal followed.

I

Before we address the merits of the claims raised in this appeal, we briefly address the scope of our remand in *Aldin I*. In its principal appellate brief, the plaintiff asserts: "A claim for mandamus would generally require a court to determine whether the defendants have a mandatory, not discretionary, duty and whether the plaintiff has a clear legal right to have such duty performed. . . . Here, however, the Appellate Court already determined the scope of the defendants' duty in the prior appeal in this action, and the Appellate Court's decision controlled the scope of the proceedings before the trial court on remand . . . ." (Citation omitted.) The plaintiff, citing case law for the general principle that a "trial court cannot adjudicate rights and duties not within the scope of the remand"; (internal quotation marks omitted) *Jepsen* v. *Camassar*, 196 Conn. App. 97, 106, 228 A.3d 376, cert. denied, 335 Conn. 926, 234 A.3d 980 (2020); argues that, because this court "has already concluded that the defendants have a *mandatory duty* to pay the plaintiff's approved claims if there are available funds . . . the sole issue for the

trial court on remand was whether there were available funds in the [program] to pay the plaintiff." (Emphasis in original.) Thus, the plaintiff, in essence, is arguing that the trial court exceeded the scope of our remand in *Aldin I* when it determined that the plaintiff did not meet its burden of demonstrating that it was entitled to a writ of mandamus ordering the commissioner to request the comptroller to pay the plaintiff's approved but unpaid claims. We do not agree.

At issue in *Aldin I* was whether the trial court properly determined that, inter alia, the plaintiff's mandamus claim was barred by sovereign immunity. See *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 741. In reaching that conclusion, the trial court "determined that the plaintiff's request to compel the commissioner to adjudicate all pending applications satisfied the exception to sovereign immunity for actions by state officers in excess of their statutory authority. The court reasoned that [General Statutes] § 22a-449f (h) imposes a mandatory duty on the commissioner to 'render a decision as to whether . . . to order payment or reimbursement from the program not more than ninety days after receipt of an application . . . .' General Statutes § 22a-449f (h). The court, however, determined that the request to compel the commissioner to pay the plaintiff's approved 2009 application [was] barred by sovereign immunity because the act does not impose a duty on the commissioner to pay approved applications within a specific time frame. The court concluded that, although a portion of the first count is not barred by sovereign immunity, the plaintiff's requests for mandamus 'must rise and fall together.' Accordingly, the court dismissed the first count in its entirety." *Aldin Associates Ltd. Partnership* v. *State*, supra, 748.

On appeal, this court agreed with the trial court's determination that sovereign immunity did not bar the

plaintiff's claim that "the defendants' failure to act on its pending applications constituted actions in excess of the defendants' statutory authority." Id., 763. We disagreed, however, with the court's conclusion that, "because the act does not impose a duty to pay approved applications within a specific time period, the defendants' failure to reimburse the plaintiff is not an act in excess of their statutory authority." Id., 766. We concluded that "the relevant statutes are plain and unambiguous and create a mandatory duty to pay approved applications pursuant to the act." Id., 771. As we stated in *Aldin I*: "We . . . conclude that the court improperly determined that, in the absence of any requirement that the payment be made in a specific time period, the defendants' failure to do so could not be an act in excess of statutory authority. The act requires that approved applications for reimbursement be paid if certain conditions are met. General Statutes § 22a-449f (c). If those conditions are met, the fact that the statute does not specify a specific time period within which payment must be made does not affect the mandatory nature of the duty to pay. Indeed, § 22a-449r (a) (1) expressly provides that any amount available for purposes of paying applicants under the underground storage tank clean-up program *shall be distributed* . . . . Thus, if, as the plaintiff alleges, there are funds available for purposes of paying the plaintiff, the act imposes a mandatory duty on the defendants to pay the plaintiff. Accordingly, the first count of the plaintiff's complaint seeking a writ of mandamus ordering the defendants to pay its approved application is not barred by sovereign immunity." (Emphasis in original; internal quotation marks omitted.) Id., 771–72. Our rescript in *Aldin I* remanded the case "for further proceedings" on the mandamus count of the plaintiff's complaint. Id., 779.

Because the trial court had dismissed the mandamus count on jurisdictional grounds, it never addressed the

merits of the claim. This court simply determined that the court had jurisdiction over the mandamus count. Thus, our remand for further proceedings on that count necessarily was a remand for the mandamus claim to be considered on its merits. Even though this court concluded in *Aldin I* that the defendants have a mandatory duty to pay the plaintiff's claims under the statute as long as "certain conditions are met" and if "there are funds available for purposes of paying the plaintiff"; id., 771–72; on remand the plaintiff still had to demonstrate its entitlement to the remedy of a writ of mandamus directing the defendants to pay its claims. We conclude, therefore, that the court did not exceed the scope of our remand in *Aldin I* when it held the plaintiff to its burden of establishing its entitlement to a writ of mandamus. We now turn to the merits of the plaintiff's claims on appeal.

II

The plaintiff first claims that the court improperly concluded that it is not entitled to a writ of mandamus directing the defendants to pay the plaintiff's approved claims under the program. We disagree.

We first set forth the well settled requirements for the issuance of a writ of mandamus and our standard of review. See *AvalonBay Communities, Inc.* v. *Sewer Commission*, 270 Conn. 409, 416–17, 853 A.2d 497 (2004). "[T]he writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits." (Internal quotation marks omitted.) *Hennessey* v. *Bridgeport*, 213 Conn. 656, 659, 569 A.2d 1122 (1990). "[M]andamus neither gives nor defines rights which one does not already have. It enforces, it commands, performance of a duty. It acts at the instance of one having a complete and immediate legal right; it

cannot and it does not act upon a doubtful or a contested right . . . . Accordingly, [a] party seeking a writ of mandamus must establish: (1) that the plaintiff has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to the performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Citation omitted; internal quotation marks omitted.) *Wozniak* v. *Colchester*, supra, 193 Conn. App. 855–56. "Even satisfaction of this demanding test does not, however, automatically compel issuance of the requested writ of mandamus. . . . In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity." (Citation omitted.) *Hennessey* v. *Bridgeport*, supra, 659. "It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear legal right to have done that which he seeks." (Internal quotation marks omitted.) *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 827, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020).

In the present case, the plaintiff's claim for a writ of mandamus is grounded in the statutory scheme governing the underground storage tank petroleum clean-up program. Consequently, for this court to determine whether the plaintiff established a clear legal right to have its applications paid by the commissioner, we must examine the governing statutes and the requirements for the program set forth therein. "The construction of a statute is a question of law subject to de novo review. See *C. R. Klewin Northeast, LLC* v. *Fleming*, [284 Conn. 250, 260, 932 A.2d 1053 (2007)]. 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 767.

Therefore, to the extent we must examine the statutory language to determine whether the plaintiff has a clear legal right to payment, our review is plenary. Ultimately, however, we ''review the trial court's decision . . . to determine whether it abused its discretion in denying the writ.'' *AvalonBay Communities, Inc.* v. *Sewer Commission*, supra, 270 Conn. 417.

We now turn to the language of the relevant statutes, which this court set forth in *Aldin I*. ''Section 22a-449c (a) (2) provides in relevant part that '[t]he program shall provide money for reimbursement or payment pursuant to this section . . . within available appropriations, to responsible parties . . . .' Section 22a-449f (c) provides in relevant part that '[t]he commissioner *shall order reimbursement or payment* from the program for any cost paid or incurred, as the case may be,

[if all of the conditions for reimbursement are satisfied] . . . .' . . . In the event that an applicant files an administrative appeal from the commissioner's decision pursuant to § 22a-449g, 'any portion of the ordered reimbursement or payment that is approved and not the subject of such appeal, *shall be paid* by the commissioner, within available appropriations and subject to the provisions of section 22a-449r, notwithstanding the pendency of the appeal.' . . . General Statutes § 22a-449g.

"Section 22a-449r (a) (1) establishes the order of priority for payments from the program and directs that 'any amount available for purposes of paying applicants under the underground storage tank clean-up program *shall be distributed* as follows: (A) [o]ne-quarter for payment or reimbursement to municipal applicants and other applicants; (B) one-quarter for payment or reimbursement to small station applicants; (C) one-quarter for payment or reimbursement to mid-size station applicants; and (D) one-quarter for payment or reimbursement to large station applicants. If at any time there is an amount remaining in one such category and if in such category there are no pending applications or applications for which payment or reimbursement has been ordered by the commissioner but has not been made . . . then such amount *shall be redistributed* for payment or reimbursement in the following order of priority: (i) [f]irst to municipal applicants and other applicants, (ii) if after redistribution pursuant to subclause (i) of this subdivision there is an amount remaining, then to small station applicants, (iii) if after redistribution pursuant to subclauses (i) and (ii) of this subdivision there is an amount remaining, then to mid-size station applicants, and (iv) if after redistribution pursuant to subclauses (i), (ii) and (iii) of this subdivision there is an amount remaining, then to large station applicants.' . . .

"Section 22a-449r (c) (2) (A) provides in relevant part: 'In the fiscal year beginning July 1, 2012, no payment shall be made to mid-size station applicants in excess of thirty-five cents on each dollar the commissioner orders to be paid or reimbursed under the program. In the fiscal year beginning July 1, 2013, and each fiscal year thereafter, such amount shall increase by ten cents on each dollar per fiscal year and in such years no payment or reimbursement shall be made in excess of the amount in effect for such fiscal year. After such amount reaches one dollar, it shall no longer increase. . . .'

"Section 22a-449r (c) (4) provides in relevant part: 'Among mid-size station applicants . . . priority for payment or reimbursement shall be given to those applicants who . . . agree to accept the greatest reduction in the amount ordered for payment or reimbursement by the commissioner under the program, provided such payment shall not exceed the amount set forth in subparagraph (A) or (B) of subdivision (2) of this subsection, as applicable. . . . If there are insufficient funds to satisfy payment and reimbursement of mid-size and large station applicants, the prioritization established pursuant to this subsection shall carry over to the subsequent fiscal quarter, and if necessary, from year to year, provided such prioritization may change based upon a subsequent reduced payment election submitted pursuant to subparagraph (A) (ii) of subdivision (3) of this subsection.' " (Emphasis in original.) *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 769–70.

Our review of the relevant statutes demonstrates that they clearly and unambiguously establish an order of priorities for claims and set up a framework for how claims are to be paid. First, the $36 million allocated to fund the program has been divided equally among the four categories of claimants, as required per § 22a-449r (a) (1). Since the time of that funding, payments

have been made from the fund to applicants, leaving $445,734.35 for municipal and other applicants, $1,853,003.38 for large applicants, $447,904.69 for small applicants, and $4310.58 for mid-size applicants. Thus, there currently are funds remaining in each category for payment to claimants. Under the statutory scheme, "[i]f at any time there is an amount remaining in one such category *and* if in such category there are no *pending* applications or applications for which payment or reimbursement has been ordered by the commissioner but has not been made . . . then such amount shall be redistributed for payment or reimbursement" in a certain order of priority. (Emphasis added.) General Statutes § 22a-449r (a) (1). Only when those conditions are met can the amounts remaining in the various categories be redistributed to other categories for payment, first to municipal and other applicants and then to small station applicants. See General Statutes § 22a-449r (a) (1). Then, only after all claims in those categories are exhausted and there are leftover funds can any remaining funds be redistributed to mid-size applicants. See General Statutes § 22a-449r (a) (1). The plaintiff, therefore, has a significant hurdle to surmount to be able to demonstrate its entitlement to be paid; that is, contrary to the plaintiff's assertions, the funds in other categories cannot simply be redistributed into the mid-size category for payment to the plaintiff. The plaintiff must show that "there are no pending applications or applications for which payment or reimbursement has been ordered by the commissioner but has not been made" in each of the categories for municipal and other applicants and small station applicants before funds in those categories can be redistributed to the mid-size applicant category. See General Statutes § 22a-449r (a) (1).

Moreover, a reverse auction system has been established for mid-size station owners such as the plaintiff.

That means that "priority for payment or reimbursement shall be given to those applicants who . . . agree to accept the greatest reduction in the amount ordered for payment or reimbursement by the commissioner under the program . . . ." General Statutes § 22a-449r (c) (4). Thus, it follows that the order of priority of claims in the mid-size station applicant category can change if an applicant elects a reduction in the amount owed to it greater than other applicants in the category. In such a case, the applicant will take priority over any other applicants who have chosen a lesser reduction. As it stands presently, Alliance Energy, a mid-size station applicant, has elected a reduction in its claim for $342,163.16 to thirty-five cents on the dollar. Because the plaintiff has elected a reduction only to ninety-five cents on the dollar, Alliance Energy's claim takes priority over that of the plaintiff. With $4310.58 remaining in the fund for mid-size station applicants, there simply are not enough funds remaining in the mid-size category to pay the plaintiff after satisfaction of Alliance Energy's claim.[7]

Therefore, the viability of the plaintiff's assertion that there are sufficient funds to pay its approved applications is dependent on two conditions: first, funds have to be moved from other categories into the mid-size station applicant category, which the plaintiff acknowledges would need to be done, and second, in order for the commissioner to do that, there must be "no pending applications *or* applications for which payment or reimbursement has been ordered by the commissioner but has not been made . . . ."[8] (Emphasis added.) General

[7] Under the reverse auction system, the plaintiff's applications could take priority over Alliance Energy's application if the plaintiff agreed to accept a greater reduction in the amount ordered for payment or reimbursement by the commissioner than the reduction selected by Alliance Energy. The plaintiff has not done so.

[8] According to the plaintiff, "there are no applications for which payment or reimbursement has been ordered but not made." Specifically, the plaintiff argues that, although "some applications have been categorized by the defen-

Statutes 22a-449r (a) (1). Central to the plaintiff's claim is the issue of whether there are "pending" applications in any of the categories. The plaintiff asserts that "the unresolved applications on which the commissioner, through McDowell, has taken virtually no action for multiple years cannot be deemed to constitute 'pending' applications." Instead, the plaintiff argues that such applications should be treated as abandoned, as the evidence shows that they are not being, nor have they been, pursued by either the commissioner or any of the other applicants. Therefore, the plaintiff argues that when all other applications are deemed abandoned,[9]

dants as 'awarded not paid,' this merely means that the application has been adjudicated—no order of payment has been issued. Had any such order been issued, the comptroller would have issued a check. Thus, this court need only decide whether the other applications may properly be considered 'pending' pursuant to the statutory scheme." Even if we assume, without deciding, that the plaintiff is correct and we should limit our review to whether there are any "pending" applications, the plaintiff's claim that no pending applications exist fails for the reasons stated herein.

[9] In its appellate brief, the plaintiff relies on the language of § 22a-449f (h) requiring the commissioner to render a decision as to whether to order payment not more than ninety days after receipt of an application and asserts that "the statutory scheme indicates that an application should not be considered 'pending' for more than ninety days as after such period, it must either be denied or payment ordered. . . . Applications as to which no action has been taken for years cannot be considered 'pending' in the context of the . . . statutory scheme as it would lead to the absurd and unworkable result that the defendants could circumvent the statute and make no payments of available funds, by merely failing to act." This court noted in *Aldin I* that, "[a]t the time the plaintiff commenced this action, some of [its] applications had been approved and paid, at least one application had been approved in 2009 but remained unpaid, and the commissioner had failed to act on the plaintiff's remaining applications." *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 746. Thus, many of the plaintiff's own applications were not acted on within the ninety day period of § 22a-449f (h). The defendants assert in their appellate brief that "[b]y the plaintiff's own argument . . . those applications should have simply been deemed denied . . . ." In its appellate reply brief, however, the plaintiff clarifies that it is not claiming that "any application pending for more than ninety days is automatically deemed denied." Rather, the plaintiff contends that it has relied on the ninety day provision "to demonstrate the legislature's intention that applications be processed promptly and to indicate that applications as to which there has been no action by the applicant or the defen-

there are available funds to move to the mid-size applicant category to pay its claims. In support of this argument, the plaintiff argues that the term pending "in its common and ordinary usage implies an *ongoing* process." (Emphasis in original.)

The defendants counter that "the plaintiff's claim is premised on the fictional assertion that [its] applications are the only ones that exist before the [commissioner under the program]. It argues this despite there being tens of millions of dollars in applications still unapproved or unpaid, including many ahead of the plaintiff in line for payment. Because § 22a-449r does not support the wholesale elimination of those other applications—including applicants to be paid before the plaintiff—the plaintiff failed to demonstrate a clear, immediate right to mandamus . . . ." The defendants further argue that the plaintiff has not addressed the court's conclusions but, rather, is attempting "to relitigate the impact of the proffered evidence before this court."

With respect to the plaintiff's argument regarding abandonment, the defendants acknowledge that "many of the remaining applications have various issues requiring disentanglement" but argue that the commissioner does not have discretion under the statutory scheme to deem applications abandoned and that the plaintiff has provided no authority to support "its argument that any application not being actively pursued against the state through litigation or other means should be factually deemed 'abandoned.' " If this court were to do so, the defendants argue, we would be adding language to § 22a-449r that does not exist in the statute, in violation

dants for much, much longer than ninety days should be deemed abandoned." In making this argument, the plaintiff does not define "much longer than ninety days," other than to imply that its applications fall on the not too long side of the line, while everyone else's fall on the much too long side of the line.

of well established rules of statutory construction. We agree with the defendants.

The word "pending" is not defined in the statute. "When a statute does not define a term, General Statutes § 1-1 (a) directs that we construe the term according to its commonly approved usage, mindful of any peculiar or technical meaning it may have assumed in the law. We may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme." (Internal quotation marks omitted.) *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, 227 Conn. App. 347, 398, 322 A.3d 331 (2024), petition for cert. filed (Conn. November 1, 2024) (No. 240194), and cross petition for cert. filed (Conn. December 13, 2024) (No. 240229). Merriam-Webster's Collegiate Dictionary defines the word pending as "not yet decided: being in continuance . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 915. When that definition is applied to the facts of the present case, the inescapable conclusion is that there are pending applications in all four categories of applicants. As exhibits one and eight demonstrate, there are more than 1500 existing claims in various stages—new, supplemental, tabled, or awarded but not paid—across the four categories of applicants that seek reimbursement under the program. The total amount of those claims exceeds $65 million. A reasonable conclusion is that these claims, which, for various reasons, have not yet been finally decided, are pending.[10]

[10] Our interpretation of "pending" is consistent with how our Supreme Court defined the word in *Board of Education* v. *Freedom of Information Commission*, 217 Conn. 153, 161, 585 A.2d 82 (1991), on which the plaintiff relies. In that case, the court noted: " 'Pending' has been defined as '[b]egun, but not yet completed; before the conclusion of'; Black's Law Dictionary (5th Ed. 1979); and '[not] yet decided or settled; awaiting conclusion or confirmation.' American Heritage Dictionary (2d College Ed. 1985). From these definitions it may reasonably be inferred that a pending claim is one already in existence and in progress. . . . *We do not discern in the applicable definitions a requirement that a claim, to be 'pending,' must be formally*

The plaintiff argues that "pending" under the statute requires that the claim is being actively pursued, either by the commissioner or the applicant. The plaintiff, however, has failed to provide authority to support its position, nor is there any language in the statute that supports its interpretation. Moreover, the plaintiff's position operates on the assumption that, because the plaintiff is the only applicant to have pursued its application by way of a legal action, the other applicants must be deemed to have abandoned their claims for reimbursement under the program. That is, because the plaintiff has pursued legal action to obtain reimbursement for its claims pursuant to the program and other applicants have not done so, and because the commissioner has not taken any action with respect to those other applications, some of which have languished for ten years now, this court should not deem those other applications as "pending" for purposes of the statute. For this court to adopt the plaintiff's position, we would have to read provisions into the statute that do not exist, as there is no language in the relevant statutes that provides a means by which claims can be deemed abandoned, nor is there language requiring an applicant to take any particular action following its submission of an application seeking reimbursement. "We are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Rider* v. *Rider*, 210 Conn. App. 278, 288, 270 A.3d 206 (2022); see also *Jakobowski* v. *State*, 219 Conn. App. 839, 859, 296 A.3d 226 (2023) ("We are mindful that,

under adjudication." (Emphasis added.) Id. Similarly, in this case, the other applications that are an impediment to the plaintiff are pending despite the fact that none of those applicants appears to have pressed for a formal adjudication and the commissioner has not adjudicated all of those applications.

in the absence of ambiguity, courts cannot read into statutes, by construction, provisions which are not clearly stated . . . . Moreover, [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. . . . [O]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent . . . .'' (Citation omitted; internal quotation marks omitted.)); *Kruger* v. *Grauer*, 173 Conn. App. 539, 558, 164 A.3d 764 (''[our] . . . court[s] [are] precluded from substituting [their] own ideas of what might be a wise provision in place of a clear expression of legislative will'' (internal quotation marks omitted)), cert. denied, 327 Conn. 901, 169 A.3d 795 (2017).

This court is puzzled by the failure of the commissioner to administer the program in a timely manner, as the record demonstrates that the commissioner has taken no action on many of the hundreds of claims submitted under the program for as long as ten years now. We also understand the plaintiff's frustrations[11] over the defendants' inaction in approving and paying claims for station owners who remediated their properties pursuant to the program with the expectation of being reimbursed, at least to some extent. The statutory scheme, however, does not provide for a way in which claims that have not been acted on in nearly ten years, either by the commissioner or the claimant, can be deemed abandoned, as the plaintiff would have this court conclude. Not to mention, the plaintiff's position would require this court to deem more than 1500 claims abandoned, without any notice to the claimants, which

[11] As the plaintiff notes in its appellate brief: ''The defendants' position, as expressed in McDowell's testimony, is that so long as there are applications that remain unresolved, no funds will be available to pay the plaintiff's approved applications—regardless of whether the other applications remain unresolved for one year or for thirty years.''

raises due process concerns. See *In re Gabriel S.*, 347 Conn. 223, 233, 296 A.3d 829 (2023) ("[a]n elementary and fundamental requirement of due process in any proceeding [that] is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (internal quotation marks omitted)); *Khan* v. *Yale University*, 347 Conn. 1, 30, 295 A.3d 855 (2023) ("[t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice . . . and [an] opportunity to [be heard]" (internal quotation marks omitted)); *Romanelli* v. *Dept. of Social Services*, 226 Conn. App. 131, 142, 317 A.3d 807 (2024) ("[a] fundamental principle of due process is that each party has the right to receive notice . . . and the opportunity to be heard at a meaningful time and in a meaningful manner" (internal quotation marks omitted)). As long as there exist pending applications, those claimants are entitled to at least some kind of notice before any such application can be deemed abandoned, especially when the statute does not impose any requirement on a claimant, following submission of an application under the program, to undertake any particular actions concerning the claimant's application. We are constrained by the statutory language and cannot write provisions into statutes that do not exist. See *King* v. *Hubbard*, 217 Conn. App. 191, 210, 288 A.3d 218 (2023).

For the foregoing reasons, the plaintiff has not demonstrated the existence of a clear legal right to be paid the $2,253,323.96 it claims is due and owing from the commissioner under the program. The evidence in the record shows that, although $2,750,953 in funds remain in the program, those funds are allocated among the four categories of applicants, with $445,734.35 being allocated for municipal and other applicants, $1,853,003.38 for large applicants, $447,904.69 for small applicants,

and only $4310.58 for mid-size applicants. The plaintiff assumes that because the amount of the funds remaining in the program is greater than the total amount of its claims, it has established that there are sufficient funds for payment of its claims.[12] As we have indicated, however, under the statutory framework most of those funds are allocated to other categories, for which many claims remain pending. With respect to the plaintiff's mid-size category, there is a claimant with priority over the plaintiff with a claim that, if paid, will leave no remaining funds for the plaintiff to be paid.

We agree with the trial court that "[a] demand for a writ of mandamus ordering the commissioner to pay approved claims in accordance with the priorities and requirements established by the applicable statutes may well be appropriate on the record in this case." But, as the trial court noted, "that is not what the plaintiff seeks, perhaps because, if all pending claims were processed and paid in accordance with the act, it appears that the available funds would be largely, if not entirely, exhausted by payments to other claimants."

[12] The dissent, which appears to agree with this assumption, contends that, "it is undisputed that the program, although now discontinued, has funds remaining to satisfy the plaintiff's claims." We disagree. The dissent's contention overlooks the clear and unambiguous language of § 22a-449r (a) (1) setting forth the order of priorities for payment of claims and the reverse auction system set forth in § 22a-449r (c) (4). Under the system established pursuant to the relevant statutes, as the evidence presented to the court demonstrated, there are not sufficient funds in the plaintiff's category of claimants to pay the plaintiff's claims, there are many pending claims in other categories, and, under the reverse auction system, there is another claimant with priority for payment ahead of the plaintiff in the mid-size station category. Because there are numerous pending claims, many of which also have been approved, there is a substantial factual dispute as to whether there are funds to satisfy the plaintiff's claims. Moreover, we also disagree with the dissent's suggestion that "the state need not pay a deserving claim simply by asserting that there are other pending claims . . . ." The record in the present case demonstrates that the court's conclusion was based on evidence and testimony detailing all of the pending claims.

We conclude that the court properly determined that the plaintiff did not meet its burden of demonstrating that it is entitled to a writ of mandamus ordering the commissioner to request the comptroller to pay the plaintiff's approved but unpaid claims. Accordingly, the court did not abuse its discretion in denying the plaintiff's request for a writ of mandamus.

III

The plaintiff, in an effort to avoid the impact of the trial court's reasoning, next claims that, after it "made an initial showing that there [are] sufficient funds in the [program] to pay the plaintiff's approved claims . . . the trial court err[ed] in failing to shift the burden to the defendants to prove that there were other viable applications to the [program] that rendered such funds 'unavailable' to pay the plaintiff." In support of this claim, the plaintiff argues that neither this court's decision in *Aldin I* "nor the statutory scheme addresses which party should have the burden of proof to establish the existence (or nonexistence) of available funds." In such circumstances, the plaintiff argues that, in light of the purpose of the statute and equitable considerations, the burden should be on the defendants to demonstrate which claims are " 'pending,' " as they are the parties seeking to reduce the amount that would otherwise be awarded to the plaintiff by asserting that there are pending claims in the various categories of applicants. The plaintiff further asserts: "Shifting the burden to the defendants *after the plaintiff made an initial showing that there were sufficient funds in the* [*program*] *to pay its claims* would also avoid requiring the plaintiff to prove a negative—that there were no viable, nonabandoned claims by other applicants." (Emphasis added.) Otherwise, as the plaintiff argues, it would have had to "establish the status of over 1500 separate claims to the [program]." The plaintiff acknowledges that the statutory scheme does not provide for any such burden

shifting but argues, nonetheless, that this court should graft such a requirement onto the statutes. We do not agree with the plaintiff and decline to do so.

The plaintiff's burden shifting argument is premised on the presumption that the plaintiff made an initial showing that there are sufficient funds in the program to pay its claims. As we explained in part II of this opinion, we are not persuaded that the plaintiff has done so. The plaintiff presented evidence establishing that $2,750,953 in overall funds remain in the program and are available for payment. Of those funds, $445,734.35 is left in the category for municipal and other applicants, $1,853,003.38 for large applicants, $447,904.69 for small applicants, and only $4310.58 for mid-size applicants. The statutory scheme clearly limits how and when the funds in each category may be redistributed to another category and, further, establishes a priority for redistribution, which places two categories of applicants above the mid-size applicant category to which the plaintiff belongs. Accordingly, establishing that $2,750,953 in overall funds remain in the program for payment is not the same as establishing that those funds are available to pay the plaintiff. The plaintiff did not make an initial showing that there are sufficient funds in the program to pay its approved claims, and, therefore, its burden shifting argument necessarily fails. Moreover, the plaintiff has not pointed this court to any authority or legislative history of the statutory scheme that would support its position of imposing a burden shifting requirement onto the statutes.

The dissent relies on a number of cases to support its position "that our Supreme Court has not hesitated to engraft a burden shifting scheme on a particular statute, or statutory scheme, in order to render the provisions of the statute under review both practical and reasonable." See *In re Zakai F.*, 336 Conn. 272, 276, 255 A.3d 767 (2020); *State* v. *Swebilius*, 325 Conn.

793, 801, 807–808, 159 A.3d 1099 (2017); *Craine* v. *Trinity College*, 259 Conn. 625, 636–37, 791 A.2d 518 (2002); *Ireland* v. *Ireland*, 246 Conn. 413, 419, 717 A.2d 676 (1998). Although we recognize that courts, at times, have engrafted burden shifting requirements onto statutes, we do not believe that the cases relied on by the dissent or the circumstances of the present case support doing so with respect to the statutory framework governing the program.[13]

First, the statutes governing the program provide explicit detail concerning how claims under the program are to be processed and what a claimant and the

[13] We note that the employment discrimination statute at issue in *Craine* and the statute at issue in *Swebilius*, which concerned a situation in which a criminal defendant alleged that an arrest warrant was not served timely on him, both lacked guidance on procedure, which was provided by our Supreme Court. See *State* v. *Swebilius*, supra, 325 Conn. 807–808; *Craine* v. *Trinity College*, supra, 259 Conn. 636–37. By contrast, the statutes at issue in the present case specifically and clearly lay out the procedure for paying claims submitted under the program. Our decision follows the procedure set forth by our legislature, as we are required to do. Moreover, in *In re Zakai F.*, supra, 336 Conn. 272, our Supreme Court decided that "there is a constitutional presumption that reinstatement of guardianship rights to a parent under General Statutes § 45a-611 is in the best interests of the child . . . ." (Footnote omitted.) Id., 275–76. In light of that presumption, the court also concluded "that the party opposing reinstatement must rebut this presumption by clear and convincing evidence." Id., 276. We do not agree that this provides support for imposing a "burden shifting" requirement onto the statutory scheme involved in this case, which involves no constitutional rights or presumptions. Finally, we note that in *Ireland*, our Supreme Court specifically stated that, "[u]nlike some of our sister states, Connecticut has no statute specifically governing situations in which a custodial parent wishes to relocate with his or her child," which was the issue in that case. *Ireland* v. *Ireland*, supra, 246 Conn. 419–20. The burden shifting scheme imposed in that case was not grafted onto a statute. Indeed, following *Ireland*, our legislature enacted General Statutes § 46b-56d, which establishes the analysis a court is to apply when deciding a postjudgment motion to relocate with a minor child and "adopted the factors set forth by our Supreme Court in *Ireland* . . . ." *N. R.* v. *M. P.*, 227 Conn. App. 698, 718, 323 A.3d 1142 (2024). Therefore, the dissent's reliance on these cases to support imposing a burden shifting scheme on the statutes at issue in the present case is misplaced.

commissioner must do. Significantly, the present case is not a situation in which the statutory framework does not work; rather, the plaintiff seeks to impose a burden shifting requirement because it is frustrated with how long the commissioner has taken in processing and paying claims. In other words, the plaintiff essentially is seeking to impose a burden shifting requirement as a sanction for the defendants' prolonged delays in administering the program. As we have stated and as was suggested by the trial court, the way to solve this problem is for the plaintiff to seek a writ of mandamus ordering the commissioner to resolve all of the "pending" claims, not by adding an ad hoc burden shifting requirement to a statutory framework that already provides in great detail how claims under the program are to be administered.

Additionally, we underscore the fact that the implications of imposing a burden shifting requirement onto the statutory framework extend far beyond the dispute at issue in the present case. As we have stated, there are more than 1500 existing claims in various stages—new, supplemental, tabled, or awarded but not paid—across the four categories of applicants that seek reimbursement under the program. If this court were to adopt the burden shifting scheme proposed by the plaintiff and the dissent and if the defendants did not meet that burden, numerous entities that are not parties to this action could be adversely impacted, without any notice or opportunity to be heard. This raises serious due process concerns, which we have outlined in this opinion and which have not been addressed by the dissent. We also must be mindful that the plaintiff here seeks a writ of mandamus. It is well established in our case law that the plaintiff, as the party seeking a writ of mandamus, bears the burden of establishing that it has a clear legal right to payment from the defendant. See *Wozniak* v. *Colchester*, supra, 193 Conn. App. 856;

see also *Stewart* v. *Watertown*, supra, 303 Conn. 711–12. Thus, the plaintiff unquestionably bore the burden of demonstrating that it had a clear legal right to be paid for its approved application, which it failed to do. As we previously noted, "[t]he writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits." (Internal quotation marks omitted.) *Hennessey* v. *Bridgeport*, supra, 213 Conn. 659. An applicant for the writ cannot achieve this extraordinary remedy by shifting the burden to the governmental official to prove that the applicant is *not* entitled to the writ. Sanctioning the burden shifting suggested by the plaintiff and the dissent would clearly expand the writ "beyond its well-established limits." (Internal quotation marks omitted.) Id.

We understand, as well, that it is the duty of a court to "construe a statute in a manner that will not frustrate its intended purpose or lead to an absurd result." (Internal quotation marks omitted.) *Mack* v. *LaValley*, 55 Conn. App. 150, 166, 738 A.2d 718, cert. denied, 251 Conn. 928, 742 A.2d 363 (1999). The plaintiff maintains that "[t]he contention that no funds are available to pay the plaintiff's approved applications so long as there are applications that remain unresolved, whether that lasts for one year or forty years, must be rejected as an absurd and unworkable interpretation of the statutory scheme. Instead, in order to satisfy the statutory purpose of the [program] and in order to avoid an absurd and unworkable result, the unresolved applications as to which the commissioner has taken virtually no action, often for over a decade, cannot be deemed to constitute 'pending' applications for determining available funds." This argument, like many others of the plaintiff, illustrates its frustration over the defendants' inaction in administering payments under the program.

This court is equally perplexed by the defendants' prolonged delays in addressing claims submitted under the program. Nonetheless, for the reasons stated herein, we do not believe that it is within the province of this court to add requirements to the statutory framework governing the program, whether they be time limitations, rules for deeming an application abandoned or a burden shifting scheme.[14] See *PPC Realty, LLC* v. *Hartford*, 350 Conn. 347, 358, 324 A.3d 780 (2024) (declining to graft language onto statutes that does not exist); *State* v. *Wilchinski*, 242 Conn. 211, 232, 700 A.2d 1 (1997) (same); *Rider* v. *Rider*, supra, 210 Conn. App. 288 (same); *In re Probate Appeal of Knott*, 190 Conn. App. 56, 60 n.8, 209 A.3d 690 (2019) ("[t]he role of the courts is not to rewrite statutes or graft exceptions onto the language existing therein; that is a function of the legislature"); *Asia M.* v. *Geoffrey M.*, 182 Conn. App. 22, 33, 188 A.3d 762 (2018) ("[I]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language. . . . Rather, [w]e are obligated to construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions . . . . It is axiomatic that the court itself cannot rewrite a statute . . . . That is a function of

[14] Our conclusion is not inconsistent with the public policy of the statutes governing the program, as the dissent suggests. In addition to the plaintiff, numerous other entities, encouraged by the program to remove potentially problematic underground storage tanks, have done so and submitted claims for reimbursement. In this majority opinion, we hold that claims by those entities cannot be disregarded simply because the plaintiff has decided to take a more aggressive approach to pursuing its claims through litigation. This majority opinion, therefore, cannot be construed as discouraging businesses from addressing the environmental concerns that prompted the enactment of the program, especially given that the program has long been discontinued. Moreover, the plaintiff could pursue a mandamus asking the court to order the commissioner to complete its evaluation of all claims under the program, which would be the fairest solution for all claimants who did their part under the program. As the trial court recognized, however, the plaintiff has chosen not to pursue that remedy, which likely would result in there being insufficient funds to pay the plaintiff's claims.

the legislature." (Citation omitted; internal quotation marks omitted.)).

In summary, the plaintiff, having failed to establish that it has a clear legal right to be paid $2,253,323.96 for its approved claims, has not demonstrated that the court abused its discretion in denying its request for a writ of mandamus ordering the commissioner to order the comptroller to pay the plaintiff's approved claims. Nor has the plaintiff persuaded us that we should impose onto the statutes governing the program a burden shifting requirement for the defendants to establish the existence of any "pending" claims.

The judgment is affirmed.

In this opinion BRIGHT, C. J., concurred.

BISHOP, J., concurring in part and dissenting in part. At the outset, I agree with the majority's well articulated history of the procedural and factual history of this challenging appeal, and I agree, as well, with the majority's conclusion that, given the current posture of this matter, the trial court correctly declined to issue a writ of mandamus. I respectfully disagree, however, with the majority's rejection of the alternative claim for relief requested by the plaintiff, Aldin Associates Limited Partnership, asking this court to engraft a burden shifting scheme on the statute in question, General Statutes § 22a-449c, in order to effectuate its purpose. I, therefore, would reverse the judgment of the trial court and remand the matter for a new trial in which the burden is placed on the defendants, the state of Connecticut and Katie Dykes, the Commissioner of Energy and Environmental Protection (commissioner), to prove that there are no other claims being actively pursued that, pursuant to the statutory scheme, would preclude the plaintiff's recovery.

In declining to adopt such a scheme, the majority noted initially that "the plaintiff has not pointed this court to any authority or legislative history of the statutory scheme that would support its position of imposing a burden shifting requirement onto the statutes." The majority appears to conclude that such an action would be beyond the ken of an appellate tribunal. I agree that it is generally improper for an appellate court to insert substantive statutory language or interpret a statute in such a manner that would alter its meaning. The burden shifting approach requested by the plaintiff, however, does not present such a scenario.

What the plaintiff in this matter has asked the court to do is neither unique nor invasive of the legislative prerogative. To the contrary, our judiciary historically has engrafted burden shifting requirements on statutes that are otherwise silent in that regard in order to make the statutes under examination more practical, workable, and consistent with public policy. Perhaps primary among such cases is the United States Supreme Court opinion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), in which the court imposed a burden shifting scheme on the civil rights statute relating to employment discrimination, namely, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. In *McDonnell Douglas Corp.*, the court set forth a burden shifting scheme on any employment related claims of discrimination requiring a claimant to first prove that he or she is a member of a protected class and that the claimant has suffered from an adverse employment action by the defendant. See *McDonnell Douglas Corp.* v. *Green*, supra, 802. Once that is proven, the defendant is then obligated to demonstrate that the action was taken for a nondiscriminatory purpose. Id. The burden then shifts back to the claimant to show that the defendant's claim is a pretext put

forward in order to defeat the claim of discrimination. Id., 804–805.

This burden shifting scheme adopted by the United States Supreme Court has been applied by our Supreme Court without any concern for invading the province of the legislative body, be it on separation of powers concerns or any other basis. For example, in *Craine* v. *Trinity College*, 259 Conn. 625, 791 A.2d 518 (2002), our Supreme Court opined: "When a plaintiff claims disparate treatment under a facially neutral employment policy, this court employs the burden-shifting analysis set out by the United States Supreme Court in *McDonnell Douglas Corp*. . . ." Id., 636. I find it particularly noteworthy that, in *Craine*, our Supreme Court followed the lead of the United States Supreme Court in a discrimination suit brought not only under federal civil rights legislation, 29 U.S.C. § 623 (age discrimination) and 42 U.S.C. § 2000e-2 (a) (sex discrimination), but also under an analogous Connecticut statute, General Statutes § 46a-60, prohibiting certain discriminatory practices. See id., 627.

While this burden shifting scheme is applied in the employment discrimination context in Connecticut, it is not limited to that subject matter. For example, in *Ireland* v. *Ireland*, 246 Conn. 413, 419, 717 A.2d 676 (1998), our Supreme Court imposed a burden shifting scheme upon the requirements of General Statutes § 46b-56, which authorizes the court to make custody decisions in family matters. According to the burden shifting scheme devised by the Supreme Court, a custodial parent who wishes to relocate with a child from Connecticut has the initial burden of showing that the intended move is for a legitimate purpose and the intended move is reasonable in light of that purpose. Id., 425. Once that is established, the burden then shifts to the noncustodial parent to demonstrate that the proposed move is not in the child's best interest. Id., 426.

A close review of *Ireland* indicates that the court's rationale for imposing such a burden shifting scheme was to render the custody statute at hand both workable and reasonable in promoting a child's best interest.

In the area of child protection, our Supreme Court, in the matter of *In re Zakai F.*, 336 Conn. 272, 276, 255 A.3d 767 (2020), engrafted a burden shifting scheme on General Statutes § 45a-611, pertaining to guardianship of minors. The court explained that "[t]he presumption we have adopted [as a matter of first impression] allows a parent to file a motion for reinstatement of guardianship, and, as long as the parent can show that the reasons that led to the transfer of guardianship have been ameliorated, the parent is entitled to a rebuttable presumption that reinstatement is in the best interests of the child." Id., 289. In that case, the court noted that neither § 45a-611, Practice Book § 35a-20 (d), or previous decisions had addressed whether a parent was entitled to a constitutional presumption that reinstatement was in the best interest of a child. Id., 285. Nevertheless, it concluded further that, pursuant to that presumption, the burden shifted to the nonparent to rebut the best interest presumption by clear and convincing evidence. Id., 289, 304.

Additionally, our Supreme Court in *State* v. *Swebilius*, 325 Conn. 793, 801, 807–808, 159 A.3d 1099 (2017), imposed a burden shifting scheme on General Statutes (Rev. to 2007) § 54-193 (b) in a situation in which a criminal defendant has alleged that an arrest warrant was not served timely upon him. The court opined: "Specifically, we hold that, once the defendant has demonstrated his availability for arrest, he has done all that is required to carry his burden; the burden then shifts to the state to demonstrate that any period of delay in executing the warrant was not unreasonable." Id., 804.

Respectfully, I believe this nonexhaustive elucidation of examples is adequate evidence that our Supreme

Court has not hesitated to engraft a burden shifting scheme on a particular statute, or statutory scheme, in order to render the provisions of the statute under review both practical and reasonable. See *Ireland* v. *Ireland*, supra, 246 Conn. 420–21 (courts have common-law adjudicatory authority to create burden shifting scheme). Such, I believe, is the situation we face.

"Lord Coke begins his First Institute of the Laws of England with the following: Reason is the life of the law, nay, the common law itself is nothing else but reason." (Internal quotation marks omitted.) *Prowant* v. *Kings-X, Inc.*, 184 Kan. 413, 417, 337 P.2d 1021 (Jackson, J., dissenting), rev'd on rehearing, 185 Kan. 602, 347 P.2d 254 (1959); see also *Peck* v. *Conder*, 540 S.W.2d 10, 12 (Ky. 1976) (Jones, J., dissenting) (same). In an often cited treatise, The Nature of the Judicial Process, Justice Benjamin N. Cardozo famously stated: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . [W]hen [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." B. Cardozo, The Nature of the Judicial Process (1921), pp. 66–67; see also *People* v. *Hickman*, 12 Ill. App. 3d 412, 417, 297 N.E.2d 582 (1973), aff'd, 59 Ill. 2d 89, 319 N.E.2d 511 (1974), cert. denied, 421 U.S. 913, 95 S. Ct. 1571, 43 L. Ed. 2d 779 (1975); *Commonwealth* v. *Redline*, 391 Pa. 486, 533–34, 137 A.2d 472 (1958) (Bell, J., dissenting).

I believe Cardozo's admonition is appropriate to the case before us. Here, the plaintiff has proven that it is entitled to payment of its claims under the underground storage tank program. For sure, its applications have been approved. Additionally, it is undisputed that the program, although now discontinued, has funds remaining to satisfy the plaintiff's claims. But, the majority holds the plaintiff is not entitled to require the state to pay

its claims in spite of the applicable statute's[1] direction that approved claims should be paid, simply because the state has indicated that other claims have been made that have a priority over the plaintiff's. As a consequence, the impact of the majority's opinion is that the state need not pay the plaintiff's valid claims and the parties are at an impasse.

In short, the consequence of the majority's opinion and the state's position is the anomalous result that the state need not pay a deserving claim simply by asserting that there are other pending claims with a priority over the plaintiff's claims regardless of whether any of those other claims are being pursued or are under active consideration by the state. Surely that is not the intent of this legislation, which, this court previously has stated, was to ameliorate the harm caused by deteriorating underground storage tanks leaking fuel into the ground.[2] Given those facts, I believe, respectfully, that the plaintiff's assertion that once it has established its entitlement for payment of its claims, the burden should shift to the state to show not only that other claims

[1] The statute in question specifically provides that "[t]he *program shall provide money for reimbursement or payment pursuant to this section* and sections 22a-449d to 22a-449i, inclusive, 22a-449p, 22a-449r and 22a-449t, within available appropriations, *to responsible parties* . . . for costs, expenses and other obligations paid or incurred . . . ." (Emphasis added.) General Statutes § 22a-449c (a) (2).

[2] In *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 269 A.3d 790 (2022), this court stated: "In 1989, the General Assembly enacted legislation titled 'An Act Concerning Underground Storage Tanks' (act), which established the underground storage tank petroleum clean-up fund (fund). See Public Acts 1989, No. 89-373 (P.A. 89-373), codified as amended at General Statutes (Rev. to 1991) § 22a-449a et seq. Initially, the act provided that the fund shall be credited one third of the tax imposed on gross earnings derived from the sale of petroleum products under General Statutes § 12-587 and that the fund is to be used by the commissioner to reimburse responsible parties for costs incurred in remediating leaking underground storage tanks. . . . The act was amended several times during the years following its enactment in 1989." (Citations omitted; footnote omitted.) *Aldin Associates Ltd. Partnership* v. *State*, supra, 744.

have been filed, but that there are other claims being pursued and under active consideration by the state that, if granted, would extinguish the program's remaining funds.

The majority's second basis for rejecting the plaintiff's claims relates to mandamus as a rare process only carefully employed. I have no disagreement with the majority's recital of decisional law demonstrating its point, but I do not agree with its conclusion. If this matter were to be remanded to the trial court with direction to the court to employ the burden shifting scheme on the statute at hand, the evidence may well make it plain that the plaintiff's claims, already approved, are the only viable claims before the commissioner. Additionally, since the program has been terminated, no further claims may be made. In that circumstance, an order from the court to the state to disburse the remaining funds would require no more than a ministerial act by the commissioner and is consistent with the statute's direction that payment be made on approved claims with priority over all others.

In the case at hand, the public policy of the act establishing the fund is based on environmental concerns and to encourage businesses to improve the safety of fuel storage tanks that risk polluting the soil. The plaintiff's claims would serve that purpose. Accordingly, I respectfully concur in part and dissent in part.

IN RE NICKOLA J. CUNHA
(AC 46813)

NICKOLA J. CUNHA *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
(AC 46890)

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

Syllabus

In these consolidated appeals, the respondent attorney appealed, in the first case, from the judgment of the trial court ordering a trustee to disburse

funds from the respondent's fiduciary accounts following her disbarment from the practice of law and, in a second case, from the judgment of the trial court dismissing as moot her action seeking a declaratory judgment regarding attorney's fees allegedly owed to her. The respondent claimed, inter alia, that the trial court lacked subject matter jurisdiction to have permitted third parties to intervene in the postdisbarment proceedings to settle a dispute over attorney's fees. *Held*:

Contrary to the respondent's claim that, because the underlying disciplinary proceedings against her were initiated pursuant to statute (§ 51-84) and the rule of practice (§ 2-45), the trial court's jurisdiction was exclusively limited to determining what discipline should be imposed on the respondent, the trial court, pursuant to the rule of practice (§ 2-64) and its inherent authority, had subject matter jurisdiction over the respondent's client files for the purpose of protecting the interests of her clients and unfettered power to act as situations may seem to require to achieve that purpose, including granting permissive intervention to third parties.

The trial court did not abuse its discretion in granting permissive intervention in the postdisbarment action to two former clients and an insurance company holding disputed funds, as the intervention was timely and likely to expedite the resolution of the underlying proceedings, the intervenors had a clear interest in the controversy, and the necessity and value of the intervention were apparent because the resolution of the intervenors' fee dispute was necessary before the court could completely determine the proper distribution of the respondent's funds to protect her former clients.

The trial court had subject matter jurisdiction, pursuant to Practice Book § 2-64 and its inherent authority, to resolve a dispute by former clients over the respondent's legal fees arising from a separate matter within the postdisbarment action.

Because this court affirmed the judgment of the trial court ordering the respondent's funds to be disbursed to her former clients, the appeal from the court's dismissal of the respondent's declaratory judgment action regarding a portion of those funds was moot, and, accordingly, dismissed.

Argued October 2, 2024—officially released January 21, 2025

Procedural History

Order, in the first case, appointing a trustee to oversee the respondent's fiduciary accounts following the disbarment of the respondent from the practice of law, in the Superior Court in the judicial district of Middlesex, where the court, *Moukawsher*, *J.*, granted the motions of John Skura et al. to intervene, and action, in the second case, seeking a declaratory judgment as to the

disbursement of certain attorney's fees allegedly owed to the plaintiff, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Patty J. Pittman*, judge trial referee, granted the motion of the defendant State Farm Mutual Automobile Insurance Company to transfer the action to the judicial district of Middlesex; thereafter, the court, *Moukawsher*, *J.*, in the first case, ordered the trustee to disburse certain funds and rendered judgment thereon, and, in the second case, rendered judgment dismissing the action as moot, from which the plaintiff filed separate appeals to this court; subsequently, this court consolidated the appeals. *Affirmed in first case*; *appeal dismissed in second case.*

Nickola J. Cunha, self-represented, the appellant in Docket Nos. AC 46813 and 46890 (respondent in first case, plaintiff in second case).

John Skura, self-represented, the appellee in Docket No. AC 46813 (intervenor).

Thomas A. Plotkin, for the appellee in Docket Nos. AC 46813 and 46890 (intervenor State Farm Mutual Automobile Insurance Company in first case, defendant in second case).

Brian B. Staines, chief disciplinary counsel, for the amicus curiae in Docket No. AC 46813 (Office of Chief Disciplinary Counsel).

Opinion

CRADLE, J. These consolidated appeals arise from disciplinary proceedings against the respondent,[1] Nickola J. Cunha, related to her disbarment from the practice of law. In Docket No. AC 46813, the respondent appeals from the judgment of the trial court ordering that funds she claimed as attorney's fees be disbursed to her former clients (postdisbarment action). In Docket No. AC

[1] Although Nickola J. Cunha is the plaintiff in the underlying action in Docket No. AC 46890, for the sake of clarity, she is referred to as the respondent throughout this opinion.

46890, the respondent appeals from the same judgment[2] and, additionally, the trial court's judgment of dismissal rendered in a separate action commenced by the respondent in which she sought a declaratory judgment with respect to attorney's fees related to her representation of former clients (declaratory judgment action).[3] On appeal, the respondent claims that the court (1) improperly permitted third parties to intervene in the postdisbarment action where the intervenors lacked standing to invoke the jurisdiction of the court, and (2) lacked subject matter jurisdiction to resolve the claims raised by the intervening parties and by a nonparty.[4] We affirm the judgment of the trial court in AC 46813 and consequently dismiss the appeal in AC 46890 as moot.

By way of background, the respondent, on January 25, 2022, was disbarred from the practice of law for

[2] On the appeal form that the respondent filed in AC 46813, she lists the trial court docket number of the postdisbarment action for the judgment from which she is appealing. On the appeal form that the respondent filed in AC 46890, she lists the trial court docket numbers of both the declaratory judgment and the postdisbarment actions for the judgments from which she is appealing. The preliminary statements of issues that she filed are identical in both appeals.

[3] On August 28, 2023, the respondent filed a motion for review of the court's disbursement decision and the court's judgment of dismissal in the declaratory judgment action. On December 13, 2023, this court denied the respondent's motion for review and sua sponte ordered the consolidation of the appeals in AC 46813 and AC 46890.

[4] The respondent also claims that certain court orders were ex post facto orders in violation of her due process rights. The respondent, however, fails to advance any substantive legal or factual analysis explaining how the orders were ex post facto or how they deprived the respondent of her due process rights. "[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. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). We therefore conclude that any such claims are inadequately briefed, and, accordingly, we decline to address them.

misconduct related to her representation of a party in a marriage dissolution matter. In *Ambrose* v. *Ambrose*, 223 Conn. App. 609, 637, 309 A.3d 305 (2024), this court affirmed the January 25, 2022 judgment of the trial court disbarring the respondent. The present appeals concern disciplinary proceedings ancillary to that judgment. The following facts, as set forth by the trial court, and procedural history are relevant to the resolution of the respondent's claims.

On January 28, 2022, the court, *Moukawsher*, *J.*, issued an order in the marriage dissolution matter setting forth procedures related to his order disbarring the respondent from the practice of law and, pursuant to Practice Book § 2-64,[5] appointed Attorney Corrine A. Boni-Vendola as trustee "to take such steps as are necessary to protect the interests of [the respondent's] clients' funds, [interest on lawyers' trust account (IOLTA account)], and all fiduciary accounts." The court's order further instructed the respondent not to withdraw any funds from those accounts and directed the respondent to provide the trustee, within seventy-two hours, a list of her clients, including their contact information and itemization of all billing identifying any balance remaining, all active or pending case files, and information regarding the respondent's financial accounts. The order stated that the respondent's failure to comply shall be considered misconduct and may subject her to punishment for contempt of court. Thereafter, the court established a separate docket for administrative purposes in connection with the winding up of the respondent's law practice.[6]

[5] Practice Book § 2-64 provides in relevant part: "(a) Whenever an attorney is placed upon inactive status, suspended, disbarred, or resigns, the court, upon such notice to him or her as the court may direct, shall appoint an attorney or attorneys to inventory the files of the inactive, suspended, disbarred or resigned attorney and to take such action as seems indicated to protect the interests of the attorney's clients. . . ."

[6] The court entered its January 25, 2022 memorandum of decision disbarring the respondent from the practice of law as the judgment in the postdisbarment action.

On February 8, 2022, the trustee filed a motion for advice, indicating that the respondent had yet to provide the required documents and information pursuant to the court's January 28, 2022 order. On the same date, the court issued an order instructing the trustee to file a motion for contempt against the respondent if she did not comply within seven days.[7] On February 10, 2022, the trustee notified the court that the respondent still had not turned over the required materials and, additionally, that the respondent's bank had informed the trustee that on February 2, 2022, the respondent had withdrawn $30,000 from her IOLTA account. The trustee, on February 16, 2022, again sought the advice of the court, indicating that because the bank is "unable to change the signer" on the respondent's IOLTA account, it needed a court order authorizing it to open a new IOLTA account and to transfer the funds from the respondent's account to the new account. On March 2, 2022, the court issued an order authorizing the bank to take such action and further ordered that the Office of Chief Disciplinary Counsel (disciplinary counsel) "is hereby authorized to file appropriate motions to enforce [the] court's orders and to participate in [the] proceedings to whatever extent may be needed to protect the public interest and the interest of [the respondent's] former clients." Two days later, on March 4, 2022, disciplinary counsel filed a motion for contempt against the respondent for her failure to comply with the court's January 28, 2022 order.

On April 27, 2022, following a hearing, the court granted disciplinary counsel's motion for contempt against the respondent, finding that she had not complied with the court's order in that she failed to provide the trustee with any of the required documentation

[7] The court's order further stated that, "[i]n the meantime, the trustee should attempt to determine through any public means the information she requires and begin carrying out her duties."

or information and that she had withdrawn, without authorization, $30,000 from her IOLTA account. The court noted that the respondent failed to offer any evidence to support her entitlement to the withdrawn funds and instead "gave a rambling account of having done a bunch of work for the client in question on various cases." Accordingly, the court further granted the request of disciplinary counsel to order an audit of the respondent's IOLTA account, stating that "[o]ne purpose of ordering the audit is to direct . . . disciplinary counsel—in cooperation with the trustee—to determine if [the respondent] stole her client's $30,000."[8]

On June 1, 2022, disciplinary counsel filed a motion to disburse funds, reporting therein that a limited audit of the respondent's IOLTA account revealed a single deposit in the amount of $290,421.65, reflecting the net proceeds of a personal injury settlement of Paula Moen, a former client of the respondent. Disciplinary counsel, on the basis of "[his] examination of the IOLTA account bank records, [his] discussions with the client Moen, and limited information from the respondent," stated that Moen was due a minimum of $179,723.85 as net proceeds from the settlement.[9] Disciplinary counsel fur-

[8] The court further ordered the respondent to appear in person before the court on May 11, 2022, and stated that, if the respondent failed to provide the trustee with the client information prior to that hearing, the court would consider "other steps to ensure compliance" with its January 28, 2022 order. On May 11, 2022, the respondent did not appear at the hearing and the trustee represented to the court that the respondent had not provided the client information. The court issued a capias for the respondent and, at the request of the trustee, stayed the capias until May 16, 2022. On May 16, 2022, the trustee reported that the respondent had delivered three case files but claimed that most of her former clients have possession of their files. The trustee indicated that she "is unable to contact many of [the respondent's] former clients to confirm [that claim] as she was not given phone numbers, email addresses, or mailing addresses for many of [the respondent's] former clients." The following day, on May 17, 2022, the court ordered the capias to be executed, and, on June 3, 2022, it was served on the respondent.

[9] Disciplinary counsel calculated the amount due to Moen by subtracting from the settlement proceeds the respondent's one-third contingency fee,

ther stated that it appeared that only a portion of the settlement proceeds, in the amount of $101,470.13, remained in the respondent's IOLTA account and that this amount should be paid to Moen, thereby leaving an outstanding balance of $78,253.72 due to Moen. In addition, disciplinary counsel asserted that its limited audit revealed that the respondent, on top of her one-third attorney's fee from the settlement, had taken, without authorization from the court, an additional $78,000, rather than the previously believed $30,000, from Moen's settlement proceeds. The court subsequently granted disciplinary counsel's motion to disburse the funds, and the trustee tendered a check payable to Moen in the amount of $101,470.13.

Thereafter, at the direction of the trustee and disciplinary counsel, Attorney Steven M. Lettick, the respondent's cocounsel in several prior matters, paid into the new IOLTA account several checks representing the respondent's earned attorney's fees from those matters. On November 7, 2022, the respondent filed a motion seeking immediate disbursement of her attorney's fees paid into the new IOLTA account by Lettick, asserting that the "trustee has not engaged in any legal services for the prior clients of the [respondent] that would entitle [the trustee] to a proportionate share of the legal fees earned by the [respondent]." The court denied the respondent's motion, stating: "When the court disbarred [the respondent], it set up a process to account for what she is owed and what she owes her clients. [The respondent] has not cooperated with that process thus frustrating attempts to know what she may be owed. Additionally, some of [the respondent's] clients are disputing her right to the money she seeks in her motion. The court can't grant her motion when her right to the money is either disputed or unknown. The court orders

pursuant to the attorney fee agreement with Moen, as well as costs and expenses.

the trustee to consult with disciplinary counsel and any other necessary persons to form an opinion on who has a right to the money."

Thereafter, on March 21, 2023, disciplinary counsel notified the court that John Skura and his wife, Lie Tjun Lim Skura, former clients of the respondent, had settled their claims for uninsured motorist coverage with State Farm Mutual Automobile Insurance Company (State Farm) directly. Disciplinary counsel stated that the Skuras had contacted him claiming that the respondent was not entitled to attorney's fees from their settlements due to "misconduct" and informed the court that State Farm was holding the disputed fees, in the total amount of $17,499.99, while awaiting instructions as to whom the money should be disbursed. Accordingly, disciplinary counsel filed a motion for order "requesting the court's guidance in determining the proper forum for resolving [the Skuras'] claim[s]." Meanwhile, the respondent commenced the declaratory judgment action against State Farm, seeking a declaratory judgment that she was entitled to the disputed $17,499.99 as her attorney's fees arising from her representation of the Skuras.

On April 5, 2023, the court in the postdisbarment action issued an order stating in relevant part: "[T]he court received notice that State Farm . . . is holding $8333.32 related to the claim of one former client [John Skura] and $9166.66 for another [Lie Tjun Lim Skura]. . . . The clients apparently claim [that the respondent] should forfeit these sums for misconduct and State Farm wants to know what to do with the money. To resolve this dispute, the court orders the trustee . . . to invite State Farm to move in this case to interplead these sums into court for disposition. The trustee is to invite the former clients to move to intervene in this case for the purpose of claiming these sums. . . . [U]nder Practice Book § 2-64, this court has jurisdiction

over all funds associated with the winding up of [the respondent's] practice. The parties to any such litigation may move to consolidate them with this matter." Thereafter, the Skuras and State Farm filed motions to intervene in the postdisbarment action. The respondent moved to dismiss the motions to intervene on the ground that the prospective intervenors lacked standing to intervene, thereby depriving the court of subject matter jurisdiction to resolve their claims. Following a hearing, on June 23, 2023, the court denied the respondent's motions to dismiss, reasoning that § 2-64 provided the court with jurisdiction over the disputed funds in that it was required "to protect [the respondent's] clients by making sure monies that may be due to them are collected under the protection of the trustee and disbursed in accordance with law." The court therefore granted State Farm's motion to intervene for the purpose of interpleading the disputed funds into the court and granted the Skuras' motions to intervene "for the sole purpose of asserting their claim to money held by the trustee." Subsequently, on June 26, 2023, upon motion by State Farm and over the respondent's objection, the declaratory judgment action was transferred to the same judicial district as the postdisbarment action.[10]

On July 21, 2023, the court held a hearing, at which it heard testimony from Moen and John Skura, regarding the disbursement of the attorney's fees related to the Skuras' settlements and the remaining balance of the respondent's IOLTA account in the amount of $34,601.20, which was funded entirely by the respondent's earned attorney's fees from prior matters paid into the new account by Lettick.[11] Thereafter, on August

[10] We note that, although the declaratory judgment action was transferred to the same judicial district as the postdisbarment action, the two matters were never consolidated by the trial court.

[11] The respondent, chief disciplinary counsel, the trustee, and counsel for State Farm were present at the hearing.

15, 2023, the court rendered a judgment of dismissal in the declaratory judgment action against State Farm, stating that it had "entered orders disposing of the money and, consequently, of this claim" on the basis of its June 23, 2023 order directing State Farm to interplead the disputed funds into the postdisbarment action. The following day, on August 16, 2023, the court issued a memorandum of decision in the postdisbarment action, ordering the trustee to pay to John Skura the funds, in the amount of $17,499.99, that otherwise would have been the respondent's attorney's fees related to his and his wife's settlements.[12] In addition, the court, finding that the respondent "had no legal right to take the $78,000 [from the settlement proceeds] she held in trust for [Moen]," ordered the trustee to pay Moen the remaining balance of the respondent's IOLTA account in the amount of $34,601.20. This consolidated appeal followed.[13]

I

The respondent first claims that intervention by the Skuras and State Farm was improper in that the intervenors "lacked standing to invoke the jurisdiction of the trial court."[14] Specifically, the respondent argues that,

[12] Lie Tjun Lim Skura was not present at the hearing. The court, noting that John Skura was "the only Skura to press his claims at the hearing," thus awarded him the respondent's attorney's fees relating to both his and his wife's settlements. Neither the respondent nor Lie Tjun Lim Skura has challenged on appeal the manner in which the court disbursed the monies to the Skuras.

[13] Disciplinary counsel filed an application to appear as amicus curiae on the basis that he had participated as a "friend of the court" in the underlying disciplinary proceedings. On May 15, 2024, this court granted disciplinary counsel's application to file an amicus brief, and, on September 9, 2024, we granted disciplinary counsel's request to participate in oral argument.

[14] The respondent advances the same claim with respect to Moen. We note, however, that Moen never attempted to intervene, nor did she independently attempt to invoke the jurisdiction of the court otherwise. Rather, she appeared only as a witness at a hearing related to the reconciliation of the respondent's IOLTA account. Accordingly, we address the respondent's claim that intervention was improper only with respect to the intervening parties—specifically, the Skuras and State Farm.

because the underlying disciplinary proceedings were initiated pursuant to General Statutes § 51-84[15] and Practice Book § 2-45,[16] "the sole purpose [of the underlying proceedings was] the protection of the court." Accordingly, she asserts that the Skuras and State Farm had no "direct or immediate interest in the discipline of the [respondent] solely instituted to protect the court" and, therefore, could not establish standing to intervene as a matter of right. Conversely, State Farm argues that it and the Skuras joined the underlying proceedings by way of permissive intervention, rather than intervention as of right, and, accordingly, that the court did not abuse its discretion in granting their motions to intervene. We agree with State Farm.

The following legal principles are relevant to the resolution of the respondent's claim. When a controversy is before a court, "if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in." General Statutes § 52-107. This statute "provide[s] for both permissive intervention and intervention as a matter of right." *BNY Western Trust* v. *Roman*, 295 Conn. 194, 203–204, 990 A.2d 853 (2010). "Intervention as of right provides a legal right to be a party to the proceeding that may not be properly denied by the exercise of judicial discretion. Permissive intervention means that,

[15] General Statutes § 51-84 provides "(a) Attorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act.

"(b) Any such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause."

[16] Practice Book § 2-45 provides: "If [cause for attorney discipline] occurs in the actual presence of the court, the [disciplinary] order may be summary, and without complaint or hearing; but a record shall be made of such order, reciting the ground thereof. Without limiting the inherent powers of the court, if attorney misconduct occurs in the actual presence of the court, the Statewide Grievance Committee and the grievance panels shall defer to the court if the court chooses to exercise its jurisdiction."

although the person may not have the legal right to intervene, the court may, in its discretion, permit him or her to intervene, depending on the circumstances." Id., 204 n.8.

In the present case, the court, after being made aware of the Skuras' claim to the funds being held by State Farm, directed the trustee to invite the relevant third parties, State Farm and the Skuras, to move to intervene in the postdisbarment action. The court indicated that, once the respective motions were filed, it would determine whether "interpleader and intervention are allowed." State Farm and the Skuras subsequently moved to intervene, and the court, following a hearing, granted their motions "for the sole purpose" of resolving the Skuras' fee dispute, characterizing the matter as "adjunct to the process of protecting the interests of [the respondent's] former clients" pursuant to Practice Book § 2-64. Specifically, the court stated that "State Farm *wishes* to pay the [disputed funds] to the trustee," that "the Skuras *ask to intervene* to make a claim on [those funds]," and that "[t]he court *grants the requests*." (Emphasis added.) State Farm and the Skuras thus joined the underlying matter by way of permissive intervention. Accordingly, because the Skuras and State Farm did not, as the respondent claims, intervene as of right, the respondent's claim misstates the applicable law.[17]

[17] We note that the respondent further argues that State Farm and the Skuras lacked standing to invoke the jurisdiction of the court through intervention because they were neither statutorily nor classically aggrieved. In so arguing, the respondent relies on *D'Attilo* v. *Statewide Grievance Committee*, 329 Conn. 624, 188 A.3d 727 (2018), in which our Supreme Court affirmed the trial court's judgment of dismissal for lack of standing where the plaintiffs sought to invoke the jurisdiction of the trial court by way of a writ of mandamus challenging the Statewide Grievance Committee's dismissal of their grievance complaints against several attorneys. Id., 631–33. Because the issue in *D'Attilo* was whether the plaintiffs had a *legal right* to judicial intervention for purposes of *overturning* the disciplinary decisions of a grievance body, it is inapposite to the present case, in which the court granted third parties permissive intervention in disbarment proceedings for the purpose of protecting the interests of a disbarred attorney's clients pursuant to Practice Book § 2-64.

"Cases involving permissive intervention . . . do not involve standing or aggrievement but whether a trial court abused its discretion in [allowing or] failing to allow intervention." *In re Ryan V.*, 46 Conn. App. 69, 72 n.6, 698 A.2d 371 (1997); see also *Franco* v. *East Shore Development, Inc.*, 271 Conn. 623, 630, 858 A.2d 703 (2004) ("[T]here is no requirement that a prospective intervenor, in its motion to intervene, assert the *same* claim as the plaintiff in the original action. . . . The whole point of intervention is to allow the participation of persons with interests distinct from those of the original parties; it is therefore to be expected that an intervenor's standing will have a somewhat different basis from that of the original plaintiffs." (Emphasis in original; internal quotation marks omitted.)). Accordingly, "[p]ermissive intervention, which is entrusted to the trial court's discretion, depends on a balancing of factors, and the court's determination will only be disturbed for an abuse of discretion." *Common Condominium Assns., Inc.* v. *Common Associates*, 5 Conn. App. 288, 290–91, 497 A.2d 780 (1985).

"In deciding whether to grant a request for permissive intervention, a trial court should consider: the timeliness of the intervention; the [prospective] intervenor's interest in the controversy; the adequacy of representation of such interests by other parties; the delay in the proceedings or other prejudice to the existing parties the intervention may cause; and the necessity for or value of the intervention in resolving the controversy." (Internal quotation marks omitted.) *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 664, 81 A.3d 200 (2013).

In light of the relevant factors that guide a trial court's decision with respect to permissive intervention, and, in turn, our determination of whether the court abused its discretion, it is helpful to first clarify the nature of the controversy that was before the court. Contrary to

the respondent's claim, although the underlying disciplinary proceedings against her were initiated under General Statutes § 51-84 and Practice Book § 2-45, the court's jurisdiction was not limited exclusively to determining what discipline should be imposed on the respondent. "The proceeding to disbar [or suspend] an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 238, 558 A.2d 986 (1989). Once disciplinary proceedings are initiated, however, "the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require." (Internal quotation marks omitted.) Id., 238–39. "There are three possible sources for the authority of courts to sanction counsel . . . . These are inherent power, statutory power, and the power conferred by published rules of the court. . . . That power may be expressly recognized by rule or statute but it exists independently of either and arises because of the control that must necessarily be vested in courts in order for them to be able to manage their own affairs so as to achieve an orderly and expeditious disposition of cases." (Citations omitted; internal quotation marks omitted.) *In re Presnick*, 19 Conn. App. 340, 347, 563 A.2d 299, cert. denied, 213 Conn. 801, 567 A.2d 833 (1989). In such proceedings, "[t]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rozbicki*, supra, 239.

The court, in setting forth procedures related to the disbarment order and in appointing Boni-Vendola as

trustee, expressly stated that it was exercising its jurisdiction under Practice Book § 2-64, which required the court to appoint a trustee to "inventory the files of the [the respondent] and to take such action as seems indicated to protect the interests of the [respondent's] clients."[18] Our rules of practice thus expressly provided the court with jurisdiction over the respondent's client files for the purpose of protecting the interests of her clients, and, moreover, pursuant to the court's inherent authority, it had "unfettered [power] to act as situations, as they may arise, may seem to require" to achieve that purpose. (Internal quotation marks omitted.) See *Statewide Grievance Committee* v. *Rozbicki*, supra, 211 Conn. 239.

With this context in mind, we consider whether the court abused its discretion in granting the Skuras' and State Farm's motions for permissive intervention. We begin with the first factor, timeliness. "[T]here are no absolute ways to measure timeliness . . . ." (Internal quotation marks omitted.) *Austin-Casares* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 649. "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances." (Internal quotation marks omitted.) Id., 651. The court, while attempting to satisfy its mandate to protect the interests of the respondent's clients, learned that the Skuras were claiming an interest in funds related to matters in which the respondent represented them. Under such circumstances, we conclude that intervention was timely in that the sole underlying purpose was to assist the court with resolving a controversy presently before it—namely, whether the Skuras had an interest in the respondent's funds. With respect to

[18] Although the respondent summarily asserts that the court "mistakenly relie[d] on Practice Book § 2-64 as a basis for jurisdiction" over the underlying proceedings, she fails to set forth any legal basis to support this claim. (Footnote omitted.)

the remaining factors, the Skuras, former clients of the respondent claiming interest in funds related to her representation, had a clear interest in the controversy. State Farm, as it indicated in its motion to intervene, also had an interest in the controversy by virtue of its possession of those disputed funds in that it "require[d] advice and direction [from the court] as to the proper distribution of the funds." Additionally, the intervenors' interests were not likely to be adequately represented by the existing parties where the respondent was maintaining a separate, ongoing action against State Farm and the respondent's claim to the disputed funds was in direct conflict with the Skuras' claim to the funds.[19] We further conclude that the intervention was likely to expedite, rather than delay, the resolution of the underlying proceedings. At the time the motions to intervene were filed, the interests of the respondent's clients had remained unresolved for nearly seventeen months. Significantly, during the June 23, 2023 hearing on the motions to intervene, the court largely attributed the delay in the underlying proceedings to the respondent's lack of cooperation and expressly stated that its reason for directing the Skuras and State Farm to intervene was because the court was "trying now to move as quickly as [it could]" to wind up the respondent's practice.[20] Finally, the necessity and value of the

[19] We further note that, although Boni-Vendola's role as trustee was to protect the interests of the respondent's clients, the Skuras' interest in the disputed funds was premised on the respondent's alleged misconduct during her representation on their behalf in a previous matter unrelated to the underlying proceedings. Accordingly, Boni-Vendola's ability to adequately represent their interests likely would have been limited because she had no direct involvement in the circumstances underlying the Skuras' claimed interest.

[20] The court's concerns with the respondent's compliance with its orders actually dated back to early 2022. As stated herein, on April 27, 2022, the court held the respondent in contempt for her failure to comply with its January 28, 2022 order, and, on May 17, 2022, the court executed a capias for the respondent for her continued failure to comply with its order.

With respect to the Skuras' claims specifically, the court, on December 22, 2022, denied the respondent's November 7, 2022 motion requesting, inter

intervention is apparent because the resolution of the Skuras' fee dispute was necessary before the court could completely determine the controversy before it—that is, the proper distribution of the respondent's funds so as to protect the interests of her former clients, which included the Skuras.

Accordingly, we conclude that the court did not abuse its discretion in granting permissive intervention to the Skuras and State Farm in the postdisbarment action.

II

The respondent next claims that the trial court lacked subject matter jurisdiction to resolve the fee disputes raised by the Skuras and by Moen.[21] Specifically, the respondent argues that, because neither General Statutes § 51-84 nor Practice Book §§ 2-45 and 2-64 authorize the court to "award a remedy [or] consider the

alia, that it order State Farm to release the disputed funds directly to her, stating: "When the court disbarred [the respondent] it set up a process to account for what she is owed and what she owes her clients. [The respondent] has not cooperated with that process thus frustrating attempts to know what she may be owed. . . . The court can't grant her motion when her right to the money is either disputed or unknown."

Additionally, during the June 23, 2023 hearing on the motions to intervene, the court expressly attributed the lack of resolution to the respondent's failure to comply with court orders, stating that "the process of trying to find out who [the Skuras] were and what claim [they] might have was difficult because [the court] hadn't gotten access to documents that were subpoenaed by the court and that had been requested and that there was a long process to discover that [the Skuras] even existed."

[21] With respect to Moen, the respondent appeals only from the court's August 16, 2023 decision ordering the trustee to disburse to Moen the remaining balance of the respondent's IOLTA account in the amount of $34,601.20. The respondent did not appeal from the court's July 13, 2022 order granting disciplinary counsel's motion to disburse to Moen $101,470.13, which represented the remaining balance of Moen's settlement funds. During oral argument before this court, the respondent clarified that she is challenging the court's subject matter jurisdiction to disburse funds to Moen only to the extent that the funds came from the respondent's earned attorney's fees from prior, unrelated matters rather than from Moen's settlement proceeds.

rights, interests, or benefits" of Moen or the Skuras, the court lacked subject matter jurisdiction over their claims.[22] We disagree.

We begin by setting forth the relevant legal principles. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Connor* v. *Statewide Grievance Committee*, 260 Conn. 435, 442–43, 797 A.2d 1081 (2002). "The issue of subject matter jurisdiction is a question of law over which our review is plenary." *Chief Disciplinary Counsel* v. *Rozbicki*, 150 Conn. App. 472, 480, 91 A.3d 932, cert. denied, 314 Conn. 931, 102 A.3d 83 (2014).

The respondent's arguments in support of this claim are belied by the relevant statutes and rules of practice. In particular, she asserts that "[t]here is absolutely no language in [Practice Book] § 2-64 authorizing the court to award a remedy nor [to] consider the rights, interests or benefits of an individual." As stated previously, § 2-64 not only authorizes the court to consider the rights and interests of a disbarred attorney's clients but it expressly requires the court to inventory such rights and interests and to appoint a trustee authorized to take any actions necessary for the protection thereof.

[22] On appeal, the respondent challenges the court's disbursement decision only on the ground that the court lacked subject matter jurisdiction. She does not challenge the merits of the decision, nor does she challenge the court's factual findings.

The language of § 2-64 thus plainly conferred subject matter jurisdiction on the court over the rights, interests, and benefits of the Skuras and Moen as former clients of the respondent.

Again, "it bears emphasizing that attorney disciplinary proceedings are sui generis, that it is the exclusive duty of the Judicial Branch to regulate attorneys . . . ." *Disciplinary Counsel* v. *Hickey*, 328 Conn. 688, 702, 182 A.3d 1180 (2018). Once initiated, "the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require. . . . [T]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership. Such statutes [and rules of practice] as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, 267 Conn. 1, 26, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

With respect to the Skuras, because their claimed interest to the respondent's attorney's fees implicated the court's subject matter jurisdiction under Practice Book § 2-64, we conclude that the court, notwithstanding the respondent's ongoing declaratory judgment action, had subject matter jurisdiction to resolve the dispute within the disbarment proceedings pursuant to its inherent powers. Specifically, the inherent power of courts to manage their dockets is well established, particularly when, as we conclude here, such action is related to preventing undue delays.[23] See, e.g., *Miller* v. *Appellate Court*, 320 Conn. 759, 771, 136 A.3d 1198 (2016) (courts have inherent power "to manage [their]

[23] See footnote 20 of this opinion.

dockets and cases . . . to prevent undue delays in the disposition of pending cases" (internal quotation marks omitted)); see also *Disciplinary Counsel* v. *Hickey*, supra, 328 Conn. 704–705 (concluding that, although applicable rule of practice did not specify procedural vehicle for raising claim that attorney is ineligible to apply for reinstatement, trial court had authority to entertain motion to dismiss application for reinstatement pursuant to "inherent power to craft procedures by which it may entertain threshold issues in order to avoid unnecessary delays and to conserve judicial resources").

With respect to Moen, it is clear to us, and the respondent does not challenge, that Practice Book § 2-64 provided the court with subject matter jurisdiction over the funds arising from Moen's personal injury settlement.[24] Notably, the court found that Moen never received her full interest in settlement proceeds because the respondent "decided to take for herself . . . $78,000 [of Moen's money]." Moreover, the court concluded that the respondent had no legal right to that money and, accordingly, that "Moen has a legal right to be paid $78,000 by [the respondent]." Under such circumstances, we conclude that the court's subject matter jurisdiction extends to the respondent's earned legal fees arising from separate matters, namely, by way of its "unfettered" inherent power "to act as situations, as they arise, may seem to require" to protect Moen's

[24] We note that, although the respondent herself asked the court to determine distribution of the funds collected from Lettick by way of her motion for immediate disbursement of such funds, her motion advanced the same jurisdictional arguments she raises on appeal. Specifically, she argued that disciplinary counsel and the trustee, in collecting the funds, had "unilaterally engag[ed] in actions beyond any authority of [the] court and absent any authority by statute or . . . the rules of practice," and, accordingly, requested that the court immediately distribute the funds to her on the basis that the court had no authority to withhold such funds and, therefore, lacked subject matter jurisdiction to resolve any dispute to the funds.

interests. See *Statewide Grievance Committee* v. *Rozbicki*, supra, 211 Conn. 239.

Because we affirm the judgment of the trial court ordering the respondent's funds to be disbursed to her former clients, the appeal from the court's dismissal of the respondent's declaratory judgment action regarding a portion of those funds is moot.[25] "It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *M&T Bank* v. *Lewis*, 349 Conn. 9, 20, 312 A.3d 1040 (2024).

The judgment in AC 46813 is affirmed; the appeal in AC 46890 is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* NICOLAE MARCU (AC 46988)

Elgo, Moll and Clark, Js.

Syllabus

Convicted of misconduct with a motor vehicle in violation of statute (§ 53a-57), the defendant appealed. He claimed, inter alia, that there was insufficient evidence to prove that he acted with criminal negligence as required by § 53a-57. *Held*:

[25] Because we affirm the disbursement decision of the trial court in AC 46813, the respondent's appeal from that judgment in AC 46890 is also moot.

The trial court reasonably concluded that the evidence demonstrated beyond a reasonable doubt that the defendant acted with criminal negligence pursuant to § 53a-57 because, on the basis of the evidence before it, it was reasonable for the court to infer that the defendant was distracted for a prolonged period of time while driving, that he consequently failed to perceive the substantial and unjustifiable risk that the manner in which he was operating his vehicle would cause the death of the victim, and that such failure was a gross deviation from the standard of care that a reasonable driver would observe in that situation.

Argued November 21, 2024—officially released January 21, 2025

Procedural History

Information charging the defendant with the crimes of misconduct with a motor vehicle and negligent homicide with a motor vehicle or commercial motor vehicle, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the case was tried to the court, *K. Murphy*, *J.*; judgment of guilty of misconduct with a motor vehicle; thereafter, the state entered a nolle prosequi as to the remaining charge, and the defendant appealed to this court. *Affirmed.*

Jeremy A. Kemp, with whom, on the brief, was *J. Patten Brown III*, for the appellant (defendant).

Jessica DellaRatta, certified legal intern, with whom were *Timothy F. Costello*, supervisory assistant state's attorney, and, on the brief, *Paul Narducci*, state's attorney, and *David J. Smith*, supervisory assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Nicolae Marcu, appeals from the judgment of conviction, rendered after a trial to the court, of misconduct with a motor vehicle in violation of General Statutes § 53a-57.[1] On appeal, the defendant

[1] General Statutes § 53a-57 provides: "(a) A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person.

"(b) Misconduct with a motor vehicle is a class D felony."

claims that (1) there was insufficient evidence to demonstrate that his conduct was committed with the mens rea of criminal negligence, and (2) the finding that he was criminally negligent was not supported by the trial court's factual findings.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth in the trial court's decision rendered from the bench, and procedural history are relevant to our decision. "[O]n December 1, 2016, the defendant . . . was driving a vehicle, a tractor trailer truck, on [Interstate 95] south in . . . New London county . . . when he hit a vehicle which had been driven by Ashley Ferguson . . . [and] Ferguson was outside her vehicle with the back door open on the driver's side. [The defendant] hit . . . Ferguson's vehicle and hit . . . Ferguson and killed her . . . . [T]he defendant's vehicle, prior to impact with . . . Ferguson's vehicle, veered to the right over the fog line, hitting the rear portion of the driver's side quarter panel, scraping the side of . . . Ferguson's vehicle. . . . Ferguson's vehicle was off the travel portion of the highway, but just barely.

* * *

"[The defendant] actually applied the brakes either as he was hitting . . . Ferguson or maybe shortly before, but really almost instantaneously."

On October 11, 2017, the defendant was arrested and subsequently charged by way of a long form information, dated May 22, 2023, with misconduct with a motor vehicle in violation of § 53a-57 (count one). The defendant also was charged with the lesser included offense

[2] Because we consider these claims to be analytically related, we address them together.

of negligent homicide with a motor vehicle or commercial motor vehicle in violation of General Statutes (Rev. to 2015) § 14-222a (b)[3] (count two).

A bench trial took place on May 30 and 31, 2023. Several witnesses testified and several exhibits were admitted into evidence. On May 30, 2023, after the close of the state's case-in-chief, the defendant made an oral motion for a judgment of acquittal on the ground that "[t]he state ha[d] presented insufficient evidence to establish criminal negligence with respect to [count one]" because the state did not present evidence showing more than a slight or moderate deviation from the standard of care that would have been exercised by a reasonable truck driver in the defendant's situation. The state opposed the motion, arguing that "the evidence is that the defendant left the lane of traffic. Other people—another person that saw it, moved over. The defendant chose not to, for whatever reason . . . [and he] went into a portion of the lane that is specifically not a travel lane, struck and killed [Ferguson]. I think based on the totality of the evidence presented at this point in time, I think we've met the state's burden to move forward with the rest of the trial, and the state would object to the defendant's motion." The court, *K. Murphy*, *J.*, deferred its ruling on the motion for a judgment of acquittal until after closing arguments and subsequently denied the motion on the record on May 31, 2023.[4]

On that same day, the court found the defendant guilty of misconduct with a motor vehicle in violation of § 53a-57.[5] With specific regard to the third element of

[3] General Statutes (Rev. to 2015) § 14-222a (b) provides: "Any person who, in consequence of the negligent operation of a commercial motor vehicle, causes the death of another person shall be fined not more than two thousand five hundred dollars or imprisoned not more than six months, or both."

[4] The defendant did not put on a case-in-chief.

[5] On May 26, 2023, the defendant filed a motion to dismiss count two. The defendant argued that charging him with a violation of General Statutes (Rev. to 2015) § 14-222a (b) was a violation of (1) the ex post facto clause of the constitution of the United States, article one, § 10, (2) the implied ex

§ 53a-57 (a) (i.e., criminal negligence), the court stated: "The last sentence of the reasonable doubt [criminal jury] instruction indicates proof [of] reasonable doubt is proof that precludes every reasonable hypothesis except guilt and is inconsistent with any other rational conclusion. It was my judgment, based on reviewing [all of] the evidence, that there is no other explanation for what happened here, other than the criminal negligence on the part of the defendant . . . . [T]here was no other explanation except criminal negligence for the fact that [the defendant] is driving on [Interstate 95] . . . [and] the defendant had this long view of [Ferguson] prior to hitting her.[6] And the truth is, the fact that [Ferguson], and I think the evidence indicates that [Ferguson] was in the roadway, either right before or as [the defendant] is approaching, and [the defendant] takes no action to avoid her. That is what I view as the criminal negligence. . . .

"I want to point out that there's obviously no indication of any alcohol or illegal drug use; there's no indication that the cell phone was a distraction; it's not really clear what the distraction was, but it is clear that [the defendant] did not respond to an obvious problem on the road. There's no indication he was speeding, there's no indication of any other erratic driving. So, the court's decision is based on the fact that he has a clear and unobstructed view of [Ferguson's] vehicle and . . . [of Ferguson] and yet takes no action whatsoever to avoid hitting her . . . . [W]hen you look carefully at the evidence in this case, and especially this fact that [the

post facto provision in the constitution of Connecticut, article first, §§ 8 and 9, and (3) the statute of limitations set forth in General Statutes § 54-193.

The court incorporated its decision regarding the motion to dismiss into the judgment rendered from the bench, stating that the court would not consider count two because it is a lesser included offense. The record reflects that count two was later nolled.

[6] The court stated that there was testimony in the record indicating that there was a length of "at least two football fields . . . before you [got] to the point of impact . . . ."

defendant] is driving a tractor trailer truck sixty miles per hour, going down [Interstate 95] and takes no action to avoid the striking of . . . Ferguson and her vehicle . . . [t]o me . . . there's really no other explanation, other than [the defendant] is guilty of [violating § 53a-57]." (Footnote added.)

On August 31, 2023, the court sentenced the defendant to five years of incarceration, execution fully suspended, with five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the applicable standard of review and legal principles that are relevant to our resolution of the defendant's claim. "Our standard of review for a sufficiency of the evidence claim is well established. In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . In conducting this review, the probative force of the evidence is not diminished where the evidence, in whole or in part, is circumstantial rather than direct." (Citation omitted; internal quotation marks omitted.) *State* v. *Carter*, 64 Conn. App. 631, 636, 781 A.2d 376, cert. denied, 258 Conn. 914, 782 A.2d 1247 (2001).

"We note that the [fact finder] must find every element proven beyond a reasonable doubt in order to

find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [fact finder] to conclude that a basic fact or an inferred fact is true, the [fact finder] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 246–47, 856 A.2d 917 (2004).

Section 53a-57 (a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person." Criminal negligence is defined in General Statutes § 53a-3 (14)[7] as follows: "A person acts with 'criminal negligence' with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . ."

"To convict [a] defendant under § 53a-57, the state [has] the burden of proving the following three elements beyond a reasonable doubt: (1) the defendant was operating a motor vehicle; (2) the defendant caused the death of another person; and (3) the defendant possessed the mental state for criminal negligence." *State* v. *Carter*, supra, 64 Conn. App. 637. To meet its burden of proof as to the third element of § 53a-57, which is the subject of this appeal, "the state was required to prove that the defendant failed to perceive a substantial and unjustifiable risk that the manner in which he was operating his vehicle would cause the death of another. The state also had to prove that the defendant's failure to perceive that risk constituted a gross deviation from the standard of care that a reasonable person would observe in the situation." Id. "The defendant, as an operator of a motor vehicle, [is] under a duty to exercise reasonable care . . . and to keep a

[7] Since the events underlying this appeal, § 53a-3 has been the subject of several amendments. See Public Acts 2019, No. 19-108, § 1; Public Acts 2021, No. 21-31, § 4; Public Acts 2022, No. 22-117, § 8; Public Acts 2023, No. 23-53, § 36. Those amendments, however, have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

reasonable lookout for persons or traffic that . . . [he is] likely to encounter." (Internal quotation marks omitted.) *State* v. *Luna*, 208 Conn. App. 45, 52, 262 A.3d 942, cert. denied, 340 Conn. 917, 266 A.3d 146 (2021).

With these legal principles in mind, we turn to the merits of the defendant's claim on appeal. The defendant does not challenge the court's findings that (1) he was operating the motor vehicle that struck Ferguson, and (2) he caused Ferguson's death. The defendant's sole claim on appeal pertains to the third element of § 53a-57, as he argues that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he acted with criminal negligence. In support of this claim, the defendant argues that the court could not have found that the requisite criminal negligence existed because (1) the court did not find that he was speeding, intoxicated, using a cell phone, or driving erratically, and (2) although the court found that he was distracted prior to the collision, he was "distracted for a mere moment by an unknown cause," such that the distraction did not amount to criminal negligence. We disagree.

As we previously iterated, the court found that the defendant, while driving on a major highway, veered across the fog line and "applied the brakes either as he was hitting . . . Ferguson or maybe shortly before . . . ." There was also testimony that another driver on the road at the time of the incident perceived Ferguson and her vehicle from a significant distance away and safely moved her vehicle to the left lane to avoid hitting Ferguson. The evidence was sufficient to support the court's inference that, regardless of what the actual distraction was, the "defendant failed to perceive a substantial and unjustifiable risk that the manner in which he was operating his vehicle would cause the death of [Ferguson]" and this failure was clearly "a

gross deviation from the standard of care that a reasonable person would observe in the situation." *State* v. *Carter*, supra, 64 Conn. App. 637.

The state argues, and we agree, that proof of the defendant's exact distraction or the cause of the defendant's veering across the fog line is not required under § 53a-57. See id., 640 (cause of defendant's distraction is "of little consequence to [the] analysis" and "[t]he state was not required to prove exactly what caused the defendant's impairment"). Regardless of whatever distraction actually occurred in the case at hand, the defendant's "failure to appreciate, or his decision to ignore, such a substantial risk to others demonstrates more than ordinary negligence. An operator of a motor vehicle is always under a duty to exercise reasonable care . . . and to keep a reasonable lookout for persons or traffic that he or she is likely to encounter. . . . If an operator of a motor vehicle encounters an impairment or distraction affecting his or her ability to exercise that duty of reasonable care, the disregard or failure to perceive the risk that he or she thereby creates by continuing to drive may surpass ordinary negligence." (Citations omitted.) Id., 642. The court's factual findings that the defendant had a clear and unobstructed view of Ferguson and her vehicle, yet nonetheless veered across the fog line and into the breakdown lane where Ferguson was standing are sufficient to support the court's determination that the defendant's conduct surpassed ordinary negligence. See *State* v. *Gonsalves*, 137 Conn. App. 237, 244–45, 47 A.3d 923, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012).

Moreover, the absence of factors such as cell phone use, intoxication, speeding, or erratic driving does not preclude a finding that the defendant was criminally negligent, as the defendant suggests. See, e.g., *State* v. *Ortiz*, 29 Conn. App. 825, 835, 618 A.2d 547 (1993) ("in a prosecution for misconduct with a motor vehicle in

violation of . . . § 53a-57, proof that the driver was under the influence of intoxicating liquor is neither necessary nor sufficient to warrant conviction because it is the driver's mental state that is in issue"). Although the defendant argues that the present case is distinguishable from other cases affirming a finding of criminal negligence because he was not intoxicated; id.; bending over while driving; *State* v. *Carter*, supra, 64 Conn. App. 637–38; using a cell phone; *State* v. *Luna*, supra, 208 Conn. App. 52–53; or racing; *State* v. *Jones*, 92 Conn. App. 1, 9, 882 A.2d 1277 (2005); nor did he cross a double yellow line when driving conditions were poor; *State* v. *Gonsalves*, supra, 137 Conn. App. 244–45; direct evidence of such an impairment, distraction, or dangerous behavior is not necessary for a finding of criminal negligence, and, therefore, the defendant's argument is unavailing. From the evidence that was before the court, including that (1) Ferguson was visible to the defendant from the length of approximately two football fields away and (2) the defendant did not brake until he was crossing the fog line, it was reasonable for the court to infer that the defendant was distracted for a prolonged period of time and, therefore, failed to perceive the substantial and unjustifiable risk that veering across the fog line toward Ferguson would cause her death, and that this failure grossly deviated from the standard of care that a reasonable driver would observe in that situation. See *State* v. *Perkins*, supra, 271 Conn. 246–47 ("[t]he [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical" (internal quotation marks omitted)).

The defendant's argument that he was distracted for only a "mere moment by an unknown cause" such that the distraction did not amount to criminal negligence is likewise unavailing. The defendant cites to no evidence in the record to support this assertion, which is

belied by the evidence that (1) Ferguson was visible from the length of two football fields away, (2) another driver on the road at the time of the incident was able to move across lanes safely to avoid Ferguson, (3) the defendant's brakes were not applied until the defendant made contact with Ferguson or just before he did so, and (4) the impact occurred in the breakdown lane. Thus, viewing the evidence in the light most favorable to sustaining the judgment, we do not accept the defendant's argument that the court could not have found him to be criminally negligent on the basis of the purported brevity of his distraction.

In sum, we conclude that the court reasonably concluded that the evidence demonstrated beyond a reasonable doubt that the defendant acted with criminal negligence pursuant to § 53a-57.

The judgment is affirmed.

In this opinion the other judges concurred.

SAADIA BOUAZZA *v.* GEICO GENERAL INSURANCE COMPANY (AC 46494)

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

Syllabus

The plaintiff appealed from the judgment of the trial court with respect to its dismissal of the count of her complaint alleging bad faith against the defendant insurance company. She claimed, inter alia, that the court improperly concluded that the litigation privilege applied and deprived the court of subject matter jurisdiction. *Held*:

The trial court improperly granted the defendant's motion to dismiss the plaintiff's bad faith claim for lack of subject matter jurisdiction as the allegations of bad faith for conduct that occurred outside the judicial proceeding and prior to the commencement of the underlying litigation had no connection or logical relation to any ongoing judicial proceeding and, therefore, were not covered by the litigation privilege.

Argued October 15, 2024—officially released January 21, 2025

Procedural History

Action to recover underinsured motorist benefits allegedly due under a certain automobile insurance policy issued by the defendant, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Morgan*, *J.*, granted the plaintiff's request for leave to amend her complaint to add a second count alleging bad faith; thereafter, the court granted the defendant's request to bifurcate the trial, and the case was tried to the jury before *Morgan*, *J.*, on the first count of the complaint; verdict for the plaintiff; subsequently, the court granted the defendant's motion for remittitur; thereafter, the court granted the defendant's motion to dismiss the second count of the complaint for lack of subject matter jurisdiction; subsequently, the court rendered judgment in part for the plaintiff, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Kevin C. Ferry, with whom was *Monique Foley*, for the appellant (plaintiff).

Karen L. Dowd, with whom were *Michael A. Lanza* and, on the brief, *Joseph M. Busher*, *Jr.*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Saadia Bouazza, appeals from the judgment of the trial court with respect to its dismissal of her claim of bad faith against the defendant, Geico General Insurance Company. On appeal, the plaintiff claims that the trial court improperly concluded that the litigation privilege applied and deprived the court of subject matter jurisdiction and, therefore, improperly dismissed her claim of bad faith. Specifically, the plaintiff claims that (1) the litigation privilege was not applicable in this case, (2) the parties should have had an opportunity to conduct discovery prior to

the court ruling on this issue, (3) the court's ruling fails to articulate how the test set forth in *Dorfman* v. *Smith*, 342 Conn. 582, 271 A.3d 53 (2022), for determining whether the litigation privilege applies, was met in this case, and (4) the court improperly considered the offer of compromise filed by the plaintiff in support of its decision. We conclude that the court improperly granted the defendant's motion to dismiss based on the litigation privilege and, accordingly, reverse in part the judgment of the trial court.[1]

The following facts, either as set forth in the court's memorandum of decision or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On February 4, 2017, the plaintiff was a passenger in a motor vehicle that was involved in an accident with another vehicle. The driver of the vehicle who caused the accident (tortfeasor) was insured under a liability policy that provided coverage of $20,000 per person/$40,000 per accident. The plaintiff settled with the tortfeasor for all available limits of coverage under the tortfeasor's policy. At the time of the accident, the plaintiff was insured under an automobile liability policy issued by the defendant that provided uninsured and underinsured motorist benefits in the amount of $100,000 per person/$300,000 per occurrence.

On November 8, 2019, the plaintiff commenced a single count action against the defendant seeking money damages under her uninsured/underinsured motorist policy with the defendant. On June 30, 2020, the plaintiff filed an offer of compromise indicating that she was willing to settle her claims against the defendant for $50,000. This offer was not accepted by the defendant. On April 5, 2022, the defendant filed an offer of compromise in the amount of $20,000. This offer was not accepted by the plaintiff.

[1] Because our resolution of this issue is dispositive of this appeal, we need not address the merits of the plaintiff's related claims.

On May 3, 2022, the day before jury selection was scheduled to commence, the plaintiff filed a request for leave to file an amended complaint seeking to add a second count alleging bad faith. The court bifurcated the trial, allowing the underinsured motorist claim to proceed to trial as scheduled, and thereafter permitted the plaintiff to amend her complaint over the defendant's objection. On May 13, 2022, the jury returned a verdict in favor of the plaintiff in the amount of $2,262,000. On July 12, 2022, the trial court granted the defendant's motion for remittitur, reducing the verdict to $79,000 in accordance with the express terms of the underinsured motorist policy and General Statutes § 38a-336 (b).

On August 22, 2022, the defendant filed a motion to dismiss the second count of the plaintiff's complaint for lack of subject matter jurisdiction. In its motion and accompanying memorandum of law, the defendant argued that it was entitled to immunity from suit with respect to the plaintiff's claim for breach of the implied covenant of good faith and fair dealing under the litigation privilege. On October 19, 2022, the plaintiff filed an objection to the defendant's motion to dismiss in which she contended that the litigation privilege did not apply and that she properly had raised allegations of bad faith in count two of her complaint.

On March 27, 2023, following a hearing, the trial court granted the defendant's motion. In its decision, the court stated that the allegations in the second count of the amended complaint "all stem from the defendant's communications and conduct in negotiating the settlement of the plaintiff's [underinsured motorist] claim in the course of and related to a judicial proceeding. Thus, the plaintiff's claim does not challenge the purpose of any underlying litigation, but rather the defendant's conduct in negotiating the settlement of the plaintiff's [underinsured motorist] claim." Accordingly, the court

concluded that, pursuant to *Dorfman* v. *Smith*, supra, 342 Conn. 582, the litigation privilege provided the defendant with absolute immunity from the plaintiff's claim of bad faith/breach of the implied covenant of good faith and fair dealing.[2] Following the denial of the plaintiff's motion to reargue, the plaintiff filed the present appeal.[3]

On appeal, the plaintiff claims that the court improperly granted the defendant's motion to dismiss on the ground that it lacked subject matter jurisdiction. Specifically, the plaintiff contends that, on the basis of the facts alleged in the second count of the amended complaint, the litigation privilege does not apply and, therefore, the defendant is not immune from the plaintiff's claim of bad faith. The plaintiff argues, as she did in her opposition to the motion to dismiss, that her claims are premised on an abuse of process, an exemption to the litigation privilege. She also contends that she has properly raised a claim of bad faith, outside of the litigation privilege context, based on the allegations in the amended complaint regarding the defendant's dilatory and unscrupulous behavior in the handling of her claim. In response, the defendant contends that the trial court correctly concluded that the plaintiff's claim of bad faith is barred by the litigation privilege.[4]

[2] "'[Our Supreme Court] has tended to use the terms "bad faith," "lack of good faith" and "breach of the covenant of good faith and fair dealing" interchangeably' . . . and applies the same analysis to claims brought under each of these terms." (Citation omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794 n.34, 67 A.3d 961 (2013).

[3] The trial court also denied the plaintiff's motions for articulation asking the trial court to articulate and to clarify its ruling granting the defendant's motion to dismiss. The plaintiff did not seek review in this court of the trial court's denial.

[4] In its brief, the defendant has moved to strike pages 284 through 395 of the plaintiff's appendix, as well as any discussion in the plaintiff's brief regarding these pages, as these pages include items such as a deposition transcript, medical records, and a medical special damages summary, which were not submitted to the trial court in connection with the motion to dismiss or referenced in the plaintiff's opposition to the motion to dismiss. Because we limit our review to the allegations in the plaintiff's amended

We initially set forth the standard of review applicable to the plaintiff's claim on appeal. "The litigation privilege provides absolute immunity from suit and, therefore, implicates the court's subject matter jurisdiction. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it . . . 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. . . . Whether the litigation privilege applies in a given case is a question of law subject to de novo review. . . . When deciding whether the privilege applies, every presumption in favor of the court's jurisdiction should be indulged. . . .

"The litigation privilege is a long-standing [common-law] rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . The privilege . . . applies to every step of the proceeding until [its] final disposition . . . including to statements made in pleadings or other documents prepared in connection with [the] proceeding. . . . The privilege originated in response to the need to bar persons accused of crimes from suing their accusers for defamation. . . . [It] then developed to encompass and bar defamation claims against all participants in judicial proceedings, including judges, attorneys, parties, and witnesses. . . . Subsequently, the privilege was expanded to bar a variety of retaliatory civil claims arising from communications or communicative acts occurring in the course of a judicial or quasi-judicial proceeding, including, but not

complaint that the trial court considered in ruling on the motion to dismiss, we take no action with regard to the motion to strike raised in the defendant's brief. We likewise take no action with regard to the defendant's motion to strike statements of fact in the plaintiff's brief that are not supported by references to the record.

limited to, claims for tortious interference, intentional infliction of emotional distress, fraud, and violations of [the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.] . . .

"The policy underlying the [litigation] privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of defamation [or other retaliatory litigation]. . . . [In] determining whether a statement is made in the course of a judicial proceeding . . . the court must decide as a matter of law whether the [alleged statement is] sufficiently relevant to the issues involved in . . . [the] proceeding, so as to qualify for the privilege. . . . The test for relevancy is generous, and judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials. . . .

"[Our Supreme Court] has recognized a distinction between attempting to impose liability [on] a participant in a judicial proceeding for the words used therein and attempting to impose liability [on] a litigant for his improper use of the judicial system itself. . . . In this regard, we have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system. . . . Thus, we have held that the litigation privilege does not bar claims for abuse of process, vexatious litigation, and malicious prosecution. . . . We have done so because these claims seek to hold an individual liable for . . . the improper use of the judicial process for an illegitimate purpose, namely, to inflict injury [on] another individual in the form of unfounded actions. . . . We have treated these claims differently in part because of restraints built into [them] by virtue of [their] stringent requirements." (Citations omitted; internal

quotation marks omitted.) *Deutsche Bank AG* v. *Vik*, 349 Conn. 120, 136–39, 314 A.3d 583 (2024).

Mindful of the foregoing principles, we consider whether the trial court in the present case properly concluded that the litigation privilege provided the defendant with absolute immunity from the plaintiff's claim of bad faith. In considering this issue, we initially note that our Supreme Court has "recognize[d] an independent cause of action in tort arising from an insurer's common law duty of good faith. . . . An implied covenant of good faith and fair dealing has been applied by this court in a variety of contractual relationships, including . . . insurance contracts . . . ." (Citations omitted; internal quotation marks omitted.) *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 170, 530 A.2d 596 (1987); see also *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794 n.33, 67 A.3d 961 (2013) ("[a]n independent cause of action for a bad faith denial of policy benefits is well established").

In *Dorfman* v. *Smith*, supra, 342 Conn. 582, our Supreme Court considered the scope of the litigation privilege in relation to alleged misconduct by an insurance company. Id., 585. The court in that case concluded that the plaintiff's action against her insurance company, Liberty Mutual Fire Insurance Company (Liberty Mutual), to compel payment of underinsured motorist benefits, in which she alleged, inter alia, that Liberty Mutual had breached the implied covenant of good faith and fair dealing, was barred by the litigation privilege.[5]

[5] In *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, 227 Conn. App. 347, 322 A.3d 331 (2024), this court later determined that the plaintiff's allegations in a subsequent lawsuit concerning Liberty Mutual's alleged bad faith pleading in *Dorfman* v. *Smith*, supra, 342 Conn. 582, properly asserted a cause of action for vexatious litigation under the common law and pursuant to General Statutes § 52-568. See *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, supra, 406. Thus, this court "reject[ed] the defendant's claim that an action for vexatious litigation, whether under the common law or § 52-568, cannot be based on allegedly false answers to a complaint in a prior action." Id.

Id., 585–86. In granting the defendant's motion to dismiss in the present case, the trial court concluded that "[t]his case falls squarely within the majority's decision in *Dorfman*."[6] Our analysis, therefore, must begin with a review of the facts alleged in *Dorfman* and the Supreme Court's conclusion that the plaintiff's claims in that case were barred by the litigation privilege. We also must consider *Dorfman* in light of our Supreme Court's subsequent decision in *Deutsche Bank AG* v. *Vik*, supra, 349 Conn. 120, in which it declined to apply the litigation privilege to conduct that occurred outside of a judicial proceeding.[7] Id., 140–41.

In *Dorfman*, the plaintiff alleged that she was involved in a motor vehicle accident with an underinsured tortfeasor, Joscelyn M. Smith. See *Dorfman* v. *Smith*, supra, 342 Conn. 586. The plaintiff thereafter filed a claim with Liberty Mutual under the underinsured motorist provision of her insurance contract. Id. As part of its investigation into the claim, Liberty Mutual acquired the police report regarding the collision, the plaintiff's recorded statement and the recorded statement of a witness to the accident who was not listed in the police report; these materials all noted Smith's failure to stop at a stop sign. Id. Liberty Mutual's investigation into this claim revealed that Smith was 100 percent liable for the accident, a fact that was noted in the claim file. Id.

After Liberty Mutual notified the plaintiff that she was required to submit an affidavit of no excess insurance, the plaintiff commenced a breach of contract

[6] Justice Ecker authored a separate opinion concurring in part and dissenting in part from the majority opinion. See *Dorfman* v. *Smith*, supra, 342 Conn. 620 (*Ecker*, *J.*, dissenting).

[7] *Deutsche Bank AG* v. *Vik*, supra, 349 Conn. 120, was decided by our Supreme Court after the trial court in the present case issued its decision dismissing count two of the plaintiff's amended complaint. It is cited by the plaintiff in her reply brief.

action against Liberty Mutual to compel payment of the underinsured motorist benefits. Id., 586–87. Liberty Mutual hired attorneys to represent it in the action but deliberately withheld from the attorneys its file notes regarding the claim as well as the name, existence, and recorded statement of the witness, even though it knew that this information was necessary for the attorneys to prepare accurate responses to the plaintiff's complaint and discovery requests. Id., 587. Liberty Mutual pleaded in its answer to the complaint that it denied or did not have sufficient information to admit the plaintiff's allegations regarding the cause of the collision and her injuries and asserted a special defense of contributory negligence, even though it knew this to be false. Id. Liberty Mutual also provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of any witnesses not listed in the police report and whether any recorded statement existed. Id.

Upon learning of Liberty Mutual's conduct,[8] the trial court granted the plaintiff permission to amend her complaint to include, inter alia, a claim of breach of the implied covenant of good faith and fair dealing. Id., 588. The trial court thereafter granted Liberty Mutual's motion to dismiss the breach of the implied covenant of good faith and fair dealing count, concluding that, because the claim was predicated on communications and statements made in the course of and related to a judicial proceeding, the litigation privilege applied and barred this claim. Id., 589.

[8] Liberty Mutual's corporate designee admitted at a deposition that " '[t]here was no basis in fact for [Liberty Mutual's] accusation that [the plaintiff] was in any way responsible for causing the accident' and that [Liberty Mutual] 'had known that there was nothing [the plaintiff] could have done to avoid the accident . . . .' " *Dorfman* v. *Smith*, supra, 342 Conn. 587–88. The designee also admitted that Liberty Mutual was aware that there was a witness to the accident who had made a recorded statement but failed to disclose this information in its interrogatory responses. Id., 588.

On appeal, the plaintiff argued that her claim was not barred by the litigation privilege because it was premised on Liberty Mutual's improper use of the courts, which was the functional equivalent of a claim of vexatious litigation, to which absolute immunity does not apply. Id., 594. The plaintiff further contended that her claim for breach of the implied covenant of good faith and fair dealing alleged conduct showing that Liberty Mutual systematically abused the judicial process and thereby improperly used the courts. Id., 596. In considering whether the plaintiff's claim was more akin to claims of vexatious litigation[9] and abuse of process,[10] to which the court had not afforded absolute immunity, or to claims of fraud and defamation, to which the court had afforded absolute immunity, our Supreme Court stated that "[w]e have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system but have applied immunity to claims premised on factual allegations that challenge the defendant's conduct in a properly brought judicial proceeding when the cause of action does not require the

[9] "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Internal quotation marks omitted.) *Northeast Building Supply, LLC* v. *Morrill*, 224 Conn. App. 137, 150, 312 A.3d 138 (2024).

[10] "An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987).

plaintiff to challenge either the purpose of the underlying litigation or the purpose of a particular judicial procedure." (Internal quotation marks omitted.) Id. For immunity to apply, the court explained, "it is not enough for the plaintiff to allege that the misconduct at issue constituted an improper use of the judicial system, but, rather, the cause of action itself must challenge the *purpose* of the underlying litigation or litigation conduct." (Emphasis in original.) Id., 596–97.

The court next indicated that, to determine the purpose of an underlying judicial proceeding, it is necessary to look at the elements of the claim itself. In this regard, it noted that "[t]o constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted.) Id., 597. Upon review of these elements, the court concluded that the plaintiff's claim did not challenge the purpose of any underlying litigation. Id. It challenged, rather, Liberty Mutual's conduct in defending against her underinsured motorist claim. Id. After examining the case law and relevant public policies in light of the allegations in the plaintiff's complaint, the Supreme Court concluded that, because the "plaintiff's claim for breach of the implied covenant of good faith and fair dealing [was] premised on false communications, [did] not challenge the purpose underlying a judicial proceeding, [was] more akin to a claim for defamation or fraud, and may be addressed by other remedies . . . the trial court properly [had] applied the litigation privilege." Id., 612.[11]

[11] In its decision, the court noted that, unlike a claim of vexatious litigation or abuse of process, a claim of breach of the implied covenant of good faith and fair dealing in general does not challenge the purpose of an underlying judicial proceeding; see *Dorfman* v. *Smith*, supra, 342 Conn. 597–98; and that the plaintiff's claim was "not designed to hold an individual liable for the improper use of the judicial system but, rather, [was] designed to hold

The Supreme Court considered the application of the litigation privilege again in *Deutsche Bank AG* v. *Vik*, supra, 349 Conn. 120, an action brought by the plaintiff, Deutsche Bank AG (Deutsche Bank), against the defendants, Alexander Vik (Alexander) and his daughter Caroline Vik (Caroline), seeking damages resulting from its efforts to collect an approximately $243 million foreign judgment from a nonparty, Sebastian Holdings, Inc. (SHI), which the plaintiff claimed was a shell company controlled by Alexander. Id., 123. The plaintiff alleged tortious interference with a business expectancy and violation of CUTPA based on the defendants' alleged efforts to interfere with the order of a Norwegian court requiring the sale of SHI's shares in a Norwegian software company (Confirmit) in partial satisfaction of SHI's debt to the plaintiff. Id. The trial court denied the defendants' motion to dismiss the action, in which they argued that the action was barred by the litigation privilege. Id. This court reversed the judgment of the trial court and directed that the action be dismissed in its entirety. Id. Upon the granting of Deutsche Bank's petition for certification to appeal, our Supreme Court

an individual liable for improper conduct in fulfilling contractual obligations." Id., 598. The court stated that the plaintiff's claim "[had] more in common with a defamation claim than with an abuse of process, vexatious litigation, or malicious prosecution claim, thereby militating in favor of applying the privilege." Id., 600.

The court in *Dorfman* further noted that, in the context of a claim of breach of the implied covenant of good faith and fair dealing, "[b]ad faith in general implies . . . actual or constructive *fraud*, or a design to *mislead or deceive* another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Emphasis in original; internal quotation marks omitted.) Id., 606. The court stated that this definition of bad faith demonstrated that the plaintiff's claim was more akin to a claim of fraud, to which the litigation privilege applies, stating: "If a claim of breach of the implied covenant of good faith and fair dealing may be premised on fraud in relation to a contract, and claims of fraud are afforded absolute immunity, it is logical that the immunity likewise extends to claims of breach of the implied covenant of good faith and fair dealing." Id.

reversed the judgment of this court, concluding that Deutsche Bank's action was not barred by the litigation privilege. Id., 124.

In its decision, the Supreme Court, citing *Dorfman* v. *Smith*, supra, 342 Conn. 597 n.6, noted that "[t]he litigation privilege does not apply to conduct [or communications] not made in the course of a judicial proceeding . . . ." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Vik*, supra, 349 Conn. 140. It further stated in relevant part that "[t]he complaint describes a multifaceted campaign by Alexander, undertaken between 2016 and 2020, to prevent the sale of the Confirmit shares or, failing that, to depress the sale price of the shares. As the plaintiff argues, many of the tactics allegedly employed by him to accomplish these goals *occurred outside the context of any judicial proceeding and are therefore not covered by the litigation privilege*. . . . The claimed extrajudicial tactics include installing family members and other close associates on Confirmit's board of directors, allegedly to deplete the company's assets; submitting a disingenuous bid to acquire the Confirmit shares, allegedly to deter other bidders; coordinating with [his father] to have the plaintiff's execution lien deregistered from the VPS registry, allegedly to disrupt the sales process; and forging and backdating a document purporting to grant Caroline a right of first refusal to acquire the Confirmit shares, allegedly to inject doubt and uncertainty into the sales process, to deter bidders, and to drive down the sale price. *Because these activities have no connection or logical relation to any ongoing judicial proceeding, they are not covered by the litigation privilege*." (Citations omitted; emphasis added.) Id., 140.

With this background in mind, we now consider the allegations of bad faith as set forth in the second count of the plaintiff's amended complaint in the present case to determine whether they are barred by the litigation

privilege. The second count incorporated paragraphs 1 through 22 of the underinsured motorist claim set forth in the first count. The first count set forth allegations regarding the accident on February 4, 2017, the negligence of the tortfeasor in causing the accident and the injuries that the plaintiff sustained in the accident, as well as the damages incurred as a result of the accident. It also contained allegations that the plaintiff had settled for all available limits of coverage against the tortfeasor, that the settlement was inadequate to compensate the plaintiff, and that her injuries and losses were the responsibility of the defendant pursuant to an automobile liability policy issued by the defendant that provided uninsured and underinsured motorist benefits.

After incorporating these allegations, the second count added new allegations of bad faith on the part of the defendant.[12] The new allegations included the

[12] The second count contained the following new allegations:

"27. On or about June 30, 2020, the plaintiff . . . filed an offer of compromise for $50,000. That offer was not accepted by [the defendant] within thirty days as [prescribed] by law.

"28. On or about February 17, 2021, the plaintiff . . . sent the [defendant's] counsel a letter notifying it that the plaintiff's claims far exceed the defendant's policy limits and her intent to pursue bad faith as well as recover all amounts due and owe[d] her above the policy pursuant to law.

"29. On various dates thereafter from February 17, 2021, through the present, the plaintiff . . . continually attempted to receive full payment for the plaintiff's underinsured motorist claim.

"30. To date, the defendant has failed, refused and/or neglected to make a reasonable offer on the plaintiff's underlying underinsured motorist claim all for cost saving measures to save money to the detriment of its unsured.

"31. The plaintiff made diligent efforts to provide [the defendant] with all of the medical records, bills, reports and other documentation the defendant requested in order to properly evaluate the plaintiff's claims. Upon information and belief, the plaintiff complied with all of the defendant's requests for the information sought to evaluate the plaintiff's claims.

"32. Despite repeated demand, [the defendant] repeatedly refused to offer a reasonable sum. This is despite the plaintiff's repeated efforts to continually furnish the defendant with all of the materials requested.

"33. On or about November 20, 2019, [the plaintiff] was forced to file a formal lawsuit against [the defendant].

"34. At all times herein, [the defendant] has intentionally refused to promptly adjust the [plaintiff's] claims.

defendant's refusal to accept the plaintiff's offer of compromise filed on June 30, 2020, and the defendant's refusal to make a reasonable offer on the plaintiff's underinsured motorist claim, despite repeated demands and the plaintiff's diligent efforts to provide the defendant with all of the medical records, bills, reports, and other documentation that the defendant requested in order to properly evaluate the plaintiff's claims. This count alleged that, on November 20, 2019, the plaintiff was forced to file a formal lawsuit against the defendant.

In paragraphs 34 through 39 of the amended complaint, the plaintiff alleged that, "[*a*]*t all times herein*"; (emphasis added); the defendant intentionally refused to promptly adjust the plaintiff's claims, evaluated the plaintiff's claims in the same manner that it would adjust all claims, despite its contractual obligations to her as an insured under the policy, delayed the resolution of the plaintiff's claims and harassed her in an effort to deny full liability for this matter, refused to settle the plaintiff's claims for a reasonable value, refused to negotiate the plaintiff's claims in good faith when the policy

"35. At all times herein, [the defendant] evaluated the plaintiff's claims in the same manner and method it would adjust all claims, despite its contractual obligations to the plaintiff, to deal with her in a full faith and fair dealing as an insured under its policy.

"36. At all times herein, [the defendant] delayed the resolution of the [plaintiff's] claims and harassed her in an effort to deny full liability for this matter.

"37. At all times herein, [the defendant] has refused to settle the [plaintiff's] claims for a reasonable value.

"38. At all times herein, [the defendant] has refused to negotiate the [plaintiff's] claims in good faith when the policy clearly provided coverage under the facts of these claims and instead is offering less than a fair value based on unjustified positions.

"39. At all times herein, [the defendant] delayed the resolution of the plaintiff's claims and harassed the plaintiff in an effort to force her to accept a sum less than was fair in settlement of her claim and to profit from the plaintiff's vulnerable position.

"40. By the aforesaid conduct, [the defendant] has breached an implied contractual covenant of good faith and fair dealing, contrary to [its] obligations to deal with the plaintiff in a fair and reasonable manner."

clearly provided coverage and offered less than a fair value based on unjustified positions, and delayed resolution of the plaintiff's claims and harassed her in an effort to force her to accept less than was fair and to profit from the plaintiff's vulnerable position. Paragraph 40 of the amended complaint alleged that "[*b*]*y the aforesaid conduct*, [the defendant] has breached an implied contractual covenant of good faith and fair dealing, contrary to [its] obligations to deal with the plaintiff in a fair and reasonable manner." (Emphasis added.)

We agree with the trial court that *some* of these allegations relate to the defendant's communications and conduct made during a judicial proceeding, such as the allegations pertaining to the defendant's refusals to accept the plaintiff's offer of compromise[13] and to make a reasonable offer on the plaintiff's underlying underinsured motorist claim once the litigation had commenced. As in *Dorfman*, we conclude that these allegations challenge the defendant's conduct in defending against the plaintiff's underinsured motorist claim and do not challenge the purpose of any underlying litigation. See *Dorfman* v. *Smith*, supra, 342 Conn. 597. Pursuant to *Dorfman*, therefore, we conclude that any such conduct and communications made during the course of a judicial proceeding are protected by the litigation privilege.

We disagree, however, that *all* of the allegations in the second count, construed in the light most favorable

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

to the plaintiff, involved conduct or communications made during the course of a judicial proceeding. Although we recognize that the litigation privilege "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*, 196 Conn. App. 773, 783, 230 A.3d 795 (2020); it is not clear that the allegation regarding the defendant's refusal to adjust the plaintiff's claim promptly, or the allegation regarding the defendant's evaluation of the plaintiff's claim in the same manner that it would adjust all claims, involved conduct during the course of a judicial proceeding. The same is true for the allegations that the defendant delayed resolution of the plaintiff's claim and harassed her in an effort to force her to accept a sum less than was fair and to profit from the plaintiff's vulnerable position. Rather, these allegations extend beyond communications made during litigation and include allegations pertaining to the defendant's conduct during the claim evaluation process prior to the initiation of the present action. This conclusion is further supported by the allegation in paragraph 33 of the amended complaint that the plaintiff "was forced to file" the present action, which implies that she was forced to do so due to the defendant's prelitigation bad faith.

Furthermore, it is difficult to discern whether the reference to "[a]t all times herein" in paragraphs 34 through 39 of the amended complaint and the "aforesaid conduct" referenced in paragraph 40 of the amended complaint refer to conduct that took place as part of a judicial proceeding or if the allegations refer to conduct that occurred prior to the commencement of the judicial proceeding. This is so because the second count of the amended complaint incorporates paragraphs 1 through 22 of the underinsured motorist claim set forth in the first count, in which the plaintiff alleges facts that

occurred prior to the commencement of the underlying litigation. Viewed in this light, we disagree with the defendant that the plaintiff's allegations are grounded solely in a disagreement that occurred during the litigation over settlement negotiations and fair value. Instead, construing the allegations in the manner most favorable to the plaintiff, and keeping in mind that every presumption in favor of the court's jurisdiction should be indulged; see *Deutsche Bank AG* v. *Vik*, supra, 349 Conn. 137; we conclude that the allegations regarding the defendant's refusal to adjust the plaintiff's claim promptly and the allegation regarding the defendant's evaluation of the plaintiff's claim in the same manner that it would adjust all other claims, as well as the allegations regarding the defendant's delay and harassment of the plaintiff, "have no connection or logical relation to any ongoing judicial proceeding [and, therefore] are not covered by the litigation privilege." Id., 140; see also *Nardozzi* v. *Perez*, 212 Conn. App. 546, 555, 276 A.3d 441 (2022) ("we see no reason to disregard this court's precedent and extend a privilege that exists expressly to foster candor during the litigation process to conduct that occurred separately from the parties' . . . litigation"); *Fiondella* v. *Meriden*, 186 Conn. App. 552, 562–63, 200 A.3d 196 (2018) (litigation privilege is not applicable to allegations not predicated on statements made during course of litigation but based on defendants' intentional conduct that did not occur during judicial proceeding), cert. denied, 330 Conn. 961, 199 A.3d 20 (2019).

Finally, in concluding that the plaintiff's allegations regarding the breach of the implied covenant of good faith and fair dealing were barred by the litigation privilege in *Dorfman* v. *Smith*, supra, 342 Conn. 582, the court made clear that the plaintiff's claim was premised on the communication of false statements *during litigation*. The court stated that "the plaintiff never argued to the trial court—and has not argued before this

court—that she premised any of her claims on conduct that occurred outside the course of a judicial proceeding. Rather, she consistently has argued that, *during the underlying litigation*, the defendant made recovery as difficult as possible and improperly used the courts to avoid paying her the full amount of benefits owed." (Emphasis added.) Id., 597 n.6. The court further stated that "[t]he plaintiff's claim for breach of the implied covenant of good faith and fair dealing, like a defamation claim, is premised on the communication of false statements *during litigation*"; (emphasis added) id., 600; and that "[t]he plaintiff clearly premises her claim in this action on false statements made in pleadings and other documents filed in relation to the breach of contract claim in the underlying action." Id., 601.

In the present case, by contrast, in addition to claiming that her allegations were premised on an abuse of process, the plaintiff argued in her opposition to the defendant's motion to dismiss that she had "properly brought a bad faith claim for the invidious motive and actions of the defendant in withholding the plaintiff's funds rightfully due and owing her under the policy of insurance with the defendant."[14] In her brief to this court, the plaintiff points out that this case does not involve improper communications, pleadings or conduct throughout trial but, rather, "systemic abuse of the plaintiff's claim, *forcing her into the judicial system* and all the way through an arduous trial."[15] (Emphasis

[14] The plaintiff also contended, in part, that "[the defendant] deliberately employed delay tactics and refused to expeditiously evaluate her claims despite knowledge that she had suffered permanent injuries and would need substantial future care . . . . Its deliberate delay in adjusting the claim followed by numerous attempts to offer the plaintiff less than the value rightly due and owed to her under the policy she paid premiums to the defendant for were based on money saving/profit maximizing and self-interested motives. These actions by the defendant constitute the ways the defendant breached its covenant of fair dealing to its insured, the plaintiff."

[15] In *Dorfman* v. *Smith*, supra, 342 Conn. 582, the plaintiff similarly claimed that the defendant's conduct, inter alia, "compelled the plaintiff to resort to litigation to obtain her benefits . . . ." Id., 595. The conduct referenced in

added.) She contends that she "has properly raised a claim for bad faith, outside of the litigation privilege context, based on the allegations surrounding the defendant's dilatory and unscrupulous behavior in the handling of her claim." Unlike the plaintiff in *Dorfman*, therefore, the plaintiff in the present case clearly argued, in both the trial court and to this court, that the allegations of bad faith involved conduct that occurred outside the course of a judicial proceeding.

In light of the foregoing and considering the applicable case law and policies underlying the litigation privilege, we disagree with the trial court's determination that, with regard to the allegations of bad faith for conduct that occurred outside the judicial proceeding and prior to the commencement of this litigation, the defendant was immune from this action. We conclude, rather, that these allegations are not covered by the litigation privilege and, therefore, that the trial court improperly granted the defendant's motion to dismiss for lack of subject matter jurisdiction.

The judgment is reversed only with respect to the granting of the defendant's motion to dismiss and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

Dorfman, however, was clearly related to the underlying judicial proceeding. Specifically, the court stated: "The plaintiff alleged that the defendant falsely responded to the complaint, including by asserting a special defense the defendant knew had no basis in fact, as well as falsely responding to interrogatories and discovery requests. As a result, [the plaintiff alleged that] the defendant used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and *violated established rules of conduct in litigation*, and knowingly and intentionally engaged in *dishonest and sinister litigation practices* by taking legal positions that were without factual support in order to further frustrate [the plaintiff's] ability to receive benefits due [to her] under her contract." (Emphasis added; internal quotation marks omitted.) Id.

CHRISTOPHER TIERINNI *v.* COMMISSIONER OF CORRECTION (AC 46591)

Alvord, Cradle and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with his relationship with a fifteen year old child, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claimed that the court abused its discretion in denying his petition for certification to appeal and improperly sustained three evidentiary objections made during the habeas trial by the respondent, the Commissioner of Correction. *Held*:

The habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, as the resolution of the petitioner's evidentiary claims did not involve issues that were debatable among jurists of reason, were adequate to deserve encouragement to proceed further or could be resolved by a court in a different manner.

This court declined to review, as unpreserved, the petition's claim that the habeas court improperly sustained two hearsay objections made by the respondent.

This court, assuming without deciding that the habeas court improperly sustained the respondent's relevance objection to certain testimony by the petitioner regarding a plea offer, concluded that the petitioner failed to prove that he was harmed by the alleged evidentiary error.

Argued September 16, 2024—officially released January 21, 2025

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *M. Murphy, J.*; judgment denying the petition; thereafter, the court 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).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *Matthew Gedansky*, state's attorney,

and *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Christopher Tierinni, appeals following the denial of his petition for certification to appeal from the habeas court's judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly sustained three evidentiary objections made by the respondent, the Commissioner of Correction. We dismiss the appeal.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. "The victim met the [petitioner] in the spring of 2011. At that time, the [petitioner] was twenty-eight years old and the victim was fifteen years old. Near the end of May, 2011, the [petitioner] kissed the victim. The [petitioner] told the victim that he loved her and eventually they engaged in sexual activity at his apartment on several occasions. The victim started missing school and stayed at the [petitioner's] apartment for extended periods.

"On June 17, 2011, the victim called the [petitioner] and asked him to pick her up at a fast food restaurant near her home. The [petitioner] arrived at the restaurant in his green minivan, which the victim entered. Police officers, who had been investigating the nature of the relationship between the [petitioner] and the victim, effectuated a traffic stop and found the victim crouched in the back seat. Although the victim initially denied having a physical relationship with the [petitioner], she eventually disclosed the sexual activity to law enforcement personnel." (Footnote omitted.) *State* v. *Tierinni*,

165 Conn. App. 839, 841–42, 140 A.3d 377 (2016), aff'd, 329 Conn. 289, 185 A.3d 591 (2018).

The following additional facts were found by the habeas court. On the basis of the aforementioned facts, "[o]n November 2, 2011, [the petitioner] was arrested and charged in *State* v. *Tierinni*, Superior Court, judicial district of Hartford, Docket No. CR-11-0236933-S (Manchester case). On January 10, 2012, [the petitioner] was arrested and charged in *State* v. *Tierinni*, Superior Court, judicial district of Tolland, Docket No. CR-12-0100519-S (Rockville case). Attorney [Kirstin B.] Coffin represented [the petitioner] in both the Manchester and Rockville cases. . . .

"On or about April 17, 2012, the state offered to resolve the cases in both jurisdictions via a global resolution. The state offered two consecutive sentences of eight years, execution suspended after three years, followed by ten years of probation, for a total effective sentence of sixteen years, execution suspended after six years, followed by ten years of probation. [The petitioner] did not accept the offer that would have resolved both the Manchester and Rockville cases.

"On August 27, 2013, [the petitioner] pleaded guilty [under the *Alford* doctrine[1]] in the Manchester case to one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). [The petitioner] was sentenced the same day in accordance with the plea agreement to a total effective sentence of five years, execution suspended after nine months, followed by five years of probation.

"Several days later, on August 30, 2013, the court, *Solomon*, *J.*, extended a court-indicated offer to [the petitioner] in the Rockville case. In exchange for plead-

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

ing guilty to one count of risk of injury to a [child] in violation of . . . § 53-21 (a) (2),[2] [the petitioner] could receive either a sentence of eight years, execution suspended after three years, followed by ten years of probation, or a sentence of ten years, execution suspended after two years and six months, followed by ten years of probation. [The petitioner] rejected both options and proceeded to trial." (Footnotes added.)

"In an amended substitute information, the state charged the [petitioner] with five counts of sexual assault in the second degree in violation of [General Statutes] § 53a-71 (a) (1) and four counts of risk of injury to a child in violation of § 53-21 (a) (2). Following a trial, the jury returned a not guilty verdict with respect to counts one and two of the information alleging, respectively, sexual assault in the second degree and risk of injury to a [child] for the time period of May 20, 2011, through May 31, 2011. The jury returned guilty verdicts for the remaining charges for conduct that occurred on June 6, 2011, June 7, 2011, and June 15, 2011. The court accepted the verdict, rendered judgment thereon, and sentenced the [petitioner] to an effective term of eighteen years of incarceration and forty-two years of special parole."[3] *State* v. *Tierinni*, supra, 165 Conn. App. 842.

[2] The habeas court's memorandum of decision states that the sentence offered was in exchange for pleading guilty to one count of risk of injury to a child. However, the petition alleges, and the respondent admitted in the return, that the offered sentence was in exchange for pleading guilty to one count each of risk of injury to a child and sexual assault in the second degree.

[3] This court affirmed the judgment of conviction on appeal, rejecting the petitioner's claims that "(1) he was denied his federal and state constitutional rights to due process and a fair trial when he was excluded from critical stages of the proceedings and (2) the court improperly instructed the jury." *State* v. *Tierinni*, supra, 165 Conn. App. 841. Following the granting of certification, our Supreme Court considered "whether [this court] properly concluded that the [petitioner] had waived any claim regarding his presence at sidebar conferences," and concluded that he had waived any such claim. *State* v. *Tierinni*, 329 Conn. 289, 292–93, 185 A.3d 591 (2018). Accordingly, our Supreme Court affirmed the judgment of this court.

The petitioner filed a petition for a writ of habeas corpus on May 7, 2014, and filed the operative amended petition on August 30, 2021.[4] The petitioner claimed in a single count that Coffin rendered ineffective assistance of counsel during plea negotiations. Specifically, he alleged that Coffin "failed to adequately conduct legal research . . . failed to adequately investigate the facts and circumstances . . . failed to adequately advise the petitioner regarding pursuing a plea agreement with the prosecuting authority; and . . . failed to adequately pursue a plea bargain for the petitioner." The respondent filed a return on September 30, 2021, asserting a lack of sufficient information to admit or deny the petitioner's allegations with respect to the legal research and investigation and denying the allegations regarding the failure to adequately advise and pursue a plea bargain for the petitioner.

The habeas court, *M. Murphy*, *J.*, held a trial on the petition on July 6, 2022, and January 12, 2023, at which the petitioner testified and presented the testimony of Coffin and Attorney Brian Carlow, an expert witness. The respondent did not present any witnesses. The petitioner submitted eight exhibits, and the respondent submitted one exhibit, all of which were admitted into evidence. The parties presented oral argument in lieu of posttrial briefs.

On April 18, 2023, the court issued a memorandum of decision in which it rejected the petitioner's ineffective assistance of counsel claim. The court made the following findings from the evidence presented at the habeas trial. "Attorney Coffin testified that she initially represented [the petitioner] only in the Manchester case, in which he was also charged with sexual assault and risk of injury to a [child] involving the same complainant.

[4] The petitioner had filed another petition, which was consolidated into the present matter.

[The petitioner] was represented by a public defender in the Rockville case. However, a few months later Attorney Coffin replaced the public defender and represented [the petitioner] in both jurisdictions. [The petitioner] faced a greater number and more serious charges in Rockville. Close to trial, the state amended the information and added more counts, which prompted [the petitioner] to have Attorney Coffin talk to the prosecutor and continue plea negotiations. The state, however, was no longer considering plea offers. Attorney Coffin was well aware that the state, should sufficient facts exist for the prosecution of additional counts, could add charges by amending the information. Attorney Coffin advised [the petitioner] that the state could amend the information and add charges.

"Attorney Coffin reviewed witness statements [and] police reports and spoke with [the petitioner]. The defense theory she developed in this case was that the incidents never occurred and that the complainant made them up to protect family members whom she had also accused of similar conduct. Attorney Coffin informed [the petitioner] of his sentence exposure as to all the charges, as well as what the state would need to prove for each offense. For example, Attorney Coffin advised [the petitioner] that the state did not have to prove force as an element of sexual assault in the second degree, just that the alleged incident occurred. Attorney Coffin advised [the petitioner] of his potential sentence exposures in correspondence communicating plea offers.

"In a letter dated April 18, 2013, Attorney Coffin reviewed the Rockville and Manchester offers for [the petitioner]. The original offer in the Rockville case was eight years to serve, execution suspended after three years, followed by ten years of probation. The offer in Manchester was eight years to serve, execution suspended after three years, consecutive to the Rockville

sentence. The total effective sentence [the petitioner] would receive for both the Rockville and Manchester cases would be sixteen years to serve, execution suspended after six years, followed by probation. In August of 2012, [the state] increased its offer [in the Manchester case] to ten years to serve.

"The April 18 letter also informed [the petitioner] that [in] a pretrial on April 11, 2013, Judge Solomon had indicated if he could get [the state] to agree to it, [the petitioner] would receive an offer of fifteen years to serve, execution suspended after five years, followed by ten years of probation to resolve both the cases in Rockville and Manchester. Judge Solomon was also willing to terminate . . . [the petitioner's] probation in a prior Hartford case. Although the letter noted that weaknesses in the complainant's story that could be challenged at trial, Attorney Coffin advised [the petitioner] that a trial was very risky because of his prior conviction for sexual assault and statements to the police might come into evidence despite counsel's efforts to suppress such evidence. [The petitioner] had until May 16 to accept or reject the court indicated offer. Attorney Coffin concluded the letter by informing [the petitioner] that she had received some new materials in the case and was sending them separately to him.

"In a second letter to [the petitioner] dated August 28, 2013, Attorney Coffin discussed his decision to resolve the Manchester case with an *Alford* plea by accepting the state's offer of five years to serve, execution suspended after nine months, followed by five years of probation. Attorney Coffin again described going to trial as risky given the anticipated evidence and arguments by the state. Attorney Coffin informed [the petitioner] that she had called the caseflow coordinator in Rockville to schedule a pretrial there on August 30 with Judge Solomon. Although she did not know

what plea offer [the petitioner] could expect in Rockville, Attorney Coffin would make the same arguments she made in Manchester and strive to obtain the lowest sentence possible. Attorney Coffin told [the petitioner] he should expect the state to introduce the recent Manchester conviction into evidence if the Rockville case proceeded to trial. The *Alford* plea to the charge of risk of injury to a [child], which was less damaging than a conviction for sexual assault in the second degree, did not involve [the petitioner] admitting to any sexual misconduct.

"According to Attorney Coffin, the Rockville pretrial she arranged after [the petitioner's] guilty plea in Manchester resulted in a court-indicated sentence of ten years to serve, execution suspended after two and one-half years, to run consecutive to the Manchester sentence. Attorney Coffin strongly recommended that [the petitioner] accept that final and best offer in Rockville. However, [the petitioner] was not interested in consecutive time, did not accept the offer, and proceeded to trial. Attorney Coffin knew a court could impose restrictions or additional consequences (e.g., probation, sex offender registration, and special parole) after a jury trial, but could not specifically recall if she told [the petitioner] about special parole.

"[The petitioner] testified at the habeas trial that Attorney Coffin communicated regularly with him in writing and visited him in prison. Attorney Coffin reviewed police reports with [the petitioner] and sent him copies of the reports. According to [the petitioner], Attorney Coffin did not explain to him what the state needed to prove to convict [him] of the charged offenses. [The petitioner] testified that he neither understood that the state had enough evidence to convict him nor that the state had a very strong case against him. Finally, [the petitioner] testified Attorney Coffin did not explain his sentence exposure correctly and

[he] did not understand that the court had sentencing options such as special parole.

"[The petitioner] recalled that there were several plea offers. The first plea offer was for eight years to serve, execution suspended after three years, followed by ten years of probation. The second plea offer was for fifteen years to serve, execution suspended after five years, followed by ten years of probation, to resolve both the Manchester and Rockville cases. The third plea offer was for ten years to serve, execution suspended after two and one-half years, followed by ten years of probation. [The petitioner] later became aware of a fourth plea offer. According to [the petitioner], he was not aware that the state could amend the information and add charges, thereby increasing his total sentence exposure to 180 years for all nine counts, if he rejected the plea offers. [The petitioner] would have tried to resuscitate Judge Solomon's offer had he known the state could amend the information and add charges prior to trial. Furthermore, [the petitioner] would have accepted that offer had he known about the potential of additional charges.

"Attorney Carlow, [the petitioner's] expert witness regarding the standards for representation, provided testimony about defense counsel's considerations when advising a client on a plea offer. Counsel should review materials such as police reports, witness statements, and other items provided through discovery. Additionally, counsel must investigate the case and communicate with the client to determine if additional information needs to be developed. Critical components are accurately advising a client about the sentence exposures and the strength of the state's case. All this information is used to effectively advise a client about plea offers and, if those fail, proceeding to trial with the best possible defense strategy. According to Attorney Carlow, reasonably competent defense counsel should

advise a client about the likely consequences or results if a plea agreement is rejected, including that the state may file a substitute information adding more charges." (Footnotes omitted.)

The habeas court determined that the petitioner had failed to substantiate his ineffective assistance of counsel claim with credible evidence. The court found that Attorney Coffin "obtained multiple offers in both Manchester and Rockville, including an early offer that would have resolved all charges in both jurisdictions with an advantageous global resolution. [The petitioner] did not accept that offer. Subsequently, Attorney Coffin was able to negotiate a good plea agreement in the Manchester case. [The petitioner] thereafter had several opportunities to resolve the Rockville case, including with an offer that Attorney Coffin strongly suggested he accept, but he was unwilling to accept it because it involved a sentence that would run consecutive to the Manchester sentence." The court found the petitioner not credible with respect to his testimony that Attorney Coffin failed to explain or inform him of certain aspects of his case. The court found the petitioner "familiar with the criminal and plea agreement processes from several prior convictions," noting that the Manchester case was resolved by way of a highly favorable plea agreement and that the Rockville best and final offer presented the petitioner with two highly favorable options. The court found that the petitioner's "failure to accept one of the alternative offers did not result from deficient performance by Attorney Coffin."

The court found Attorney Coffin's performance "more than reasonably competent and well within the bounds of effective representation." Crediting Attorney Coffin's testimony, the court found that she negotiated multiple plea offers, communicated them to the petitioner, and strongly recommended to the petitioner that he accept the offered sentence. The court found that

the petitioner "rejected both options and proceeded to trial despite Attorney Coffin's strong recommendation that he accept a plea offer." Accordingly, the court denied the petition for a writ of habeas corpus and thereafter denied the petitioner's petition for certification to appeal. This appeal followed. Additional procedural history will be set forth as necessary.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court. . . .

"The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. 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. 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. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Citation omitted; internal quotation marks omitted.) *Roman* v. *Commissioner of Correction*, 229 Conn. App. 219, 224–25, 325 A.3d 1208 (2024).

The petitioner's sole claim on appeal is that the habeas court improperly sustained three evidentiary objections made by the respondent. "The applicable standard of review for evidentiary challenges is well established. Unless an evidentiary ruling involves a clear misconception of the law, the [t]rial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 602–603, 940 A.2d 789 (2008).

The following additional procedural history is relevant to the petitioner's claim. During the petitioner's testimony on direct examination at the habeas trial, the following colloquy occurred:

"[The Petitioner's Counsel]: [D]id [Attorney Coffin] discuss . . . a statement from the [victim]?

"[The Petitioner]: Yes. Two different statements.

"[The Petitioner's Counsel]: Okay. And . . . do you recall generally what she told you about those statements? . . .

"[The Respondent's Counsel]: Objection. Hearsay.

"The Court: All right. So, so yeah, I'm gonna sustain the objection as to you can't tell me what Attorney Coffin said to him.

"[The Petitioner's Counsel]: Right. Okay.

"The Court: That's hearsay.

"[The Petitioner's Counsel]: Okay. Okay."

The respondent raised a second hearsay objection during the following colloquy:

"[The Petitioner's Counsel]: And so, did [Attorney Coffin] explain what the state needed to prove in order to, in order to convict you of [sexual assault in the second degree]?

"[The Petitioner]: All she told me is that—

"[The Respondent's Counsel]: Objection. (Indiscernible.)

"The Court: I'm sorry. I didn't hear the objection.

"[The Respondent's Counsel]: Hearsay.

"The Court: Okay. I'm gonna sustain the objection.

"[The Petitioner's Counsel]: Okay."

Third, the petitioner was asked by his habeas counsel whether he had filed a complaint against Attorney Coffin with the Statewide Grievance Committee. When asked what the result of the grievance was, the petitioner testified that he could not remember without looking at it. The petitioner's counsel asked whether reviewing a copy of the grievance would refresh his recollection, and the petitioner responded that it would.

The respondent's counsel objected on the basis of relevance, stating, "Whether or not he filed a grievance against her has nothing to do with whether or not she adequately advised him regarding pursuing a plea bargain offer and adequately pursued a plea bargain offer." The petitioner's counsel responded that the petitioner "testified that, in the response to the grievance, there was some, there was some mention of a plea offer that was not given to him. Thus, the grievance proceeding is relevant on, on those grounds." The court heard from the petitioner's counsel again, and counsel explained, "I'm trying to lay the foundation to how he found out about this fourth plea offer that Attorney Coffin did not convey. I'm trying to lay the foundation for that." The court stated: "I'm gonna sustain the objection as to relevance. I mean, if he can testify from it, you know, from, you know, but as to bringing in the grievance I just don't find that relevant." Accordingly, the court sustained the respondent's objection.

We first consider the petitioner's claim that the court improperly sustained the respondent's two hearsay objections "[b]ecause the petitioner was not seeking to admit the statements of trial counsel for their truth . . . ." The respondent argues that the petitioner's claim is unpreserved. Specifically, he argues that the petitioner "made no offer of proof as to why the challenged testimony was not hearsay, nor did he explain how a particular exception applied under the rules of evidence." We agree with the respondent that the petitioner's claim is unpreserved.

"The theory of admissibility is germane to our consideration of whether the court properly exercised its discretion to exclude the proffered testimony on the basis of a correct view of the law. An appellant who challenges on appeal a trial court's exclusion of evidence is limited to the theory of admissibility that was raised before and ruled upon by the trial court. A court cannot

be said to have refused improperly to admit evidence during a trial if the specific grounds for admission on which the proponent relies never were presented to the court when the evidence was offered. . . . Error does not lie in the exclusion of evidence claimed on an inadmissible ground even though it might have been admissible had it been claimed on another and different ground [at trial]." (Internal quotation marks omitted.) *Glen S.* v. *Commissioner of Correction*, 223 Conn. App. 152, 154 n.1, 307 A.3d 951, cert. denied, 348 Conn. 951, 308 A.3d 1038 (2024).

In the present case, the court sustained the respondent's objections on the basis of hearsay.[5] The petitioner's counsel responded, "Okay," and did not offer a nonhearsay purpose or identify an exception to the rule against hearsay. On appeal, the petitioner claims that the testimony was not hearsay because it was not introduced to establish the truth of the matter asserted but rather that it "was designed to establish the effect of trial counsel's advice on the petitioner." This reasoning was not advanced to the habeas court and, thus, was not preserved for review. See *Bennett* v. *Commissioner of Correction*, 182 Conn. App. 541, 554, 190 A.3d 877 (declining to review as unpreserved argument that transcript should have been admitted into evidence as full exhibit pursuant to residual exception to hearsay rule because such argument was not made to habeas court), cert. denied, 330 Conn. 910, 193 A.3d 50 (2018); see also *Glen S.* v. *Commissioner of Correction*, supra, 223 Conn. App. 154 n.1 (declining to review as unpreserved

[5] "An out-of-court statement offered to establish the truth of the matter asserted is hearsay. . . . As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule. . . . The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay." (Citation omitted; internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 284, 248 A.3d 4 (2021).

additional admissibility arguments that were not raised before habeas court). Accordingly, we decline to review as unpreserved the petitioner's claim that the court improperly sustained the two hearsay objections made by the respondent.

We next consider the petitioner's claim that the court improperly sustained the respondent's relevance objection.[6] The petitioner argues that "[t]he testimony that was excluded by the habeas court establishes the petitioner's belief that there was a fourth plea offer and, thus, is relevant to the issue of whether the petitioner was properly advised by trial counsel during plea negotiations, which is one of his claims of error in his habeas petition. Further, the excluded testimony was necessary for the petitioner to establish whether he would have accepted the plea offer instead of pursuing a trial." The respondent maintains that the court acted within its discretion in excluding the testimony on relevance grounds and further argues that the petitioner has failed to prove that he was harmed by the alleged evidentiary error. We assume without deciding that the court improperly excluded the challenged evidence, and we conclude that the petitioner failed to sustain his burden of showing that any such impropriety was harmful.

"Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Under the current and long-standing state of

[6] "Evidence that is not relevant is inadmissible. . . . Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 576, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

the law in Connecticut, the burden to prove the harmfulness of [a nonconstitutional] improper evidentiary ruling is borne by the [petitioner]. The [petitioner] must show that it is more probable than not that the erroneous action of the court affected the result." (Citation omitted; internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 285–86, 248 A.3d 4 (2021).

Central to our evaluation of the potential harm of the claimed evidentiary error is a careful consideration of the rationale underlying the court's determination that the petitioner had failed to prove his claim of ineffective assistance of counsel. The court stated in its memorandum of decision that "[the petitioner] recalled that there were several plea offers." After restating the terms of those offers, the court noted that "[the petitioner] later became aware of a fourth plea offer." As the petitioner recognizes, the court's decision substantially was based on its credibility findings as to the petitioner and Coffin. Specifically, the court found the petitioner not credible as to his contentions that Coffin did not "explain to him what the state needed to prove to convict him of the charged offenses, inform him that the state had a strong case and enough evidence to convict him, explain his sentence exposure correctly, and amend the information to add charges." The court credited Coffin's testimony that she "negotiated multiple plea offers and communicated them to [the petitioner], as well as that she strongly recommended to [the petitioner] that he accept the offered sentence . . . ." The court found that the petitioner proceeded to trial "despite Attorney Coffin's strong recommendation that he accept a plea offer." These credibility findings are unassailable on appeal; see *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017); and we are not persuaded that the additional evidence that the petitioner sought to introduce would have affected the

court's conclusion that the petitioner had failed to prove that Coffin rendered ineffective assistance of counsel. Thus, we conclude that the petitioner has failed to meet his burden to prove that the exclusion of his testimony as to the fourth plea offer harmed him "in a way that makes it more probable than not that the decision of the habeas court would have been different." (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, supra, 203 Conn. App. 288.

On the basis of our review of the record and the relevant legal principles, we cannot conclude that the resolution of the petitioner's claim involves issues that are debatable among jurists of reason, are adequate to deserve encouragement to proceed further or that a court could resolve in a different manner. Accordingly, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.