NICHOLAS J. PAPANTONIOU *v.* COMMISSIONER OF CORRECTION (AC 46189)

Elgo, Seeley and Bishop, Js.

Syllabus

The respondent Commissioner of Correction appealed, on the granting of certification, from the habeas court's judgment granting in part the petitioner's petition for a writ of habeas corpus after concluding that the petitioner's sixth amendment right to the effective assistance of counsel had been violated due to an undisclosed, actual conflict of interest on the part of his criminal defense counsel, G. The respondent claimed, inter alia, that the court improperly concluded that the petitioner had established that G was burdened by an actual conflict of interest that adversely affected his representation of the petitioner. *Held*:

The habeas court's finding that G simultaneously represented both the petitioner at the time of the petitioner's criminal trial and S, a witness who testified on behalf of the state at the petitioner's criminal trial, was clearly erroneous, as it was undisputed that another attorney filed an appearance in place of G in S's criminal case before the commencement of the petitioner's criminal trial, and, thereafter, G did not file any appearances on behalf of S at any time prior to the conclusion of the petitioner's trial or his sentencing, nor was there any documentary or testimonial evidence in the record that G provided legal representation to S in any court proceeding or otherwise at the time of the petitioner's criminal trial.

The habeas court's finding that G represented S at a hearing six weeks prior to the start of the petitioner's criminal trial was clearly erroneous, as the relevant court files, considered in tandem with the unequivocal statements that S's defense counsel had filed an appearance in the unrelated criminal

case, which were included in conflicting transcripts from that hearing, convinced this court that a mistake had been made regarding G's alleged representation of S at the hearing in question.

The habeas court improperly concluded that G's representation of S and the petitioner for four months prior to the start of the petitioner's criminal trial created a conflict of interest with respect to G's representation of the petitioner in his criminal trial, as this court, having considered the facts of this case under the multifactored analysis set forth in *State* v. *Davis* (344 Conn. 122), concluded that there was no evidence that G's simultaneous representation of S and the petitioner in the early stages of the petitioner's criminal trial and S's unrelated criminal case was anything other than transient and insubstantial.

Even if this court were to conclude that a conflict of interest existed, the petitioner failed to satisfy his burden of demonstrating that the conflict of interest adversely affected G's representation of the petitioner, as G's failure to use S's prior convictions and pending cases to attack his credibility at trial actually demonstrated that G was acting in the petitioner's best interest with respect to S, who was the only witness to corroborate the petitioner's account of what transpired the night of the murder.

The habeas court improperly determined that the petitioner's sixth amendment right to the effective assistance of counsel was violated by G's failure to notify the petitioner in writing of his prior representation of S pursuant to rule 1.7 of the Rules of Professional Conduct, as a party must demonstrate that an actual conflict of interest adversely affected his attorney's performance, and proof that an attorney violated rule 1.7 was not sufficient to establish a violation of a client's sixth amendment right to the effective assistance of counsel.

Argued May 23, 2024—officially released October 14, 2025

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *M. Murphy, J.*; judgment granting the petition in part, from which the respondent, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Craig P. Nowak*, supervisory assistant state's attorney, for the appellant (respondent).

Vishal Garg, assigned counsel, for the appellee (petitioner).

Opinion

ELGO, J. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting in part the petition for a writ of habeas corpus filed by the petitioner, Nicholas J. Papantoniou. The court granted the petition after concluding that the petitioner's sixth amendment right to effective assistance of counsel was violated due to an undisclosed, actual conflict of interest on the part of his criminal trial counsel, Attorney Glenn Conway. On appeal, the respondent claims that the court (1) erroneously found that Conway simultaneously represented the petitioner and James Samperi, Jr., a witness who testified on behalf of the state, at or near the time of the petitioner's criminal trial, and (2) improperly concluded that the petitioner had established that Conway was burdened by an actual conflict of interest that adversely affected his representation of the petitioner at the petitioner's criminal trial. We agree and, accordingly, reverse in part the judgment of the habeas court. See footnote 2 of this opinion.

The following facts underlying the petitioner's criminal conviction were set forth in his direct appeal. "At approximately 12:30 p.m. on October 19, 2014, William Coutermash drove to 397 Circular Avenue in Hamden; the [petitioner] accompanied him. Larry Dildy, the victim, lived in the second floor apartment of a multifamily house located at 397 Circular Avenue with his wife, Vivian Dildy (Vivian), and their daughter, Ashante Dildy (Ashante). The victim was a known drug dealer, and according to Coutermash, he and the [petitioner] went to the victim's apartment with the intent to rob him. More specifically, Coutermash said the plan was to 'flash a gun in the [victim's] face' in an attempt to 'get either drugs or money' from him.

"When Coutermash and the [petitioner] arrived, Coutermash parked his vehicle—a black Jeep with New York license plates—near the victim's driveway and handed the [petitioner] gloves and a handgun. According to Coutermash, the [petitioner] then exited the vehicle 'to get drugs or money' and also was armed with a knife. The [petitioner], who was wearing a gray sweatshirt, a tan hat, and sunglasses, then proceeded to the back door of the victim's apartment. Coutermash testified that he stayed in his Jeep.

"Vivian was home at the time, and according to her, one 'intruder' entered the apartment through the apartment's locked back door after the force of his knocking opened it. She described the intruder as wearing a grey 'sweat jacket' and a yellow or beige hat. Shortly thereafter, Vivian saw the lone intruder pointing a gun at the victim, heard him say something that 'sounded like give it up,' and called 911 at her husband's request. Ashante, who was hiding in her room when the intruder entered the apartment, also heard a single, 'raspy' male voice say that 'he needed the $400 and the pill,' and overheard her father respond that '[he] didn't have it.' After the victim and the intruder argued for a period of time, a physical fight ensued, and the two men struggled over the intruder's gun. During the struggle, the victim pulled off the intruder's sweatshirt, and Vivian struck the intruder over the head with a broom handle before she ran to a separate room. Vivian then heard two gunshots, and the intruder quickly fled the apartment.

"Minutes after the [petitioner] had exited the Jeep, Coutermash observed emergency personnel arriving and decided to drive away from the area. As he did so, he encountered the [petitioner] on a nearby street, picked him up, and the two left the scene. The victim had been shot, cut, and stabbed multiple times during the altercation; he was taken to a hospital and died from his injuries.

"During the ensuing police investigation, investigators recovered various items located on the floor near the victim's body, including a grey hooded sweatshirt, a tan hat, sunglasses, and a knife. Subsequent scientific testing revealed that DNA evidence taken from the grey sweatshirt matched the [petitioner's] DNA profile, which was contained in a national database of DNA. That same testing eliminated Coutermash as a source of the DNA found on the grey sweatshirt. Scientific testing of the tan hat also revealed the presence of both the [petitioner's] and the victim's DNA. Finally, surveillance cameras near the victim's apartment captured the [petitioner] discarding gloves and a handgun shortly after the shooting." (Footnotes omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 96–98, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018). The state thereafter charged the petitioner, by way of an amended long form information, with felony murder in violation of General Statutes § 53a-54c, burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a) (1). At his criminal trial, "[t]he [petitioner] testified . . . and was the final witness called by the defense. His testimony, in certain respects, conflicted with Coutermash's testimony. According to Coutermash, the victim did not owe him money, and he remained in his Jeep when the [petitioner] went to the victim's apartment. The [petitioner] testified that, on October 19, 2014, Coutermash told him that he needed to 'collect some money' from someone. . . . In contrast to Coutermash, the [petitioner] claimed that when he and Coutermash arrived at 397 Circular Avenue, both of them entered the victim's apartment, and Coutermash demanded $400 from the victim. The [petitioner] testified that he entered the victim's apartment only after Coutermash and the victim began fighting and when

things were 'getting out of control . . . .' Upon entering the apartment, the [petitioner] told the victim: '[L]isten, just give [Coutermash] his money—you know—let me get the hell out of here, just give him what you owe him, it's gone far enough, it's out of control, just give him his money, you know.' The [petitioner] further testified that, immediately after he told the victim to give Coutermash money, Coutermash fled the apartment. At that point, the [petitioner] claimed that the victim charged at him, the two began to struggle over the gun in his hand, and the gun 'went off' twice during the struggle." (Citation omitted.) Id., 100–101.

"Additionally, Vivian and Ashante both testified that a lone intruder demanded money and pills from the victim before struggling with and shooting him. According to Vivian, the intruder wore a grey 'sweat jacket' and a yellow or beige hat. DNA evidence found on the grey sweatshirt and tan hat found next to the victim's body directly connected [the petitioner] to the shooting, and [the petitioner] even testified at trial that the gun discharged while he struggled with the victim. . . . All of this is compelling evidence that [the petitioner] was armed with a gun when he unlawfully entered the victim's apartment with the intent to rob the victim and that the victim died as a result of the incident. The state therefore presented a very strong case against the [petitioner]. . . . Moreover, Vivian and Ashante corroborated Coutermash's testimony that [the petitioner] entered the victim's apartment alone with the intent to take either drugs or money from the victim at gunpoint." (Citation omitted.) Id., 105–106.

Samperi testified as a witness on behalf of the state. In his testimony, Samperi stated that another individual, Jason Marini, had had a drug deal go bad with the victim and that Marini "had been plotting on him for a while." Samperi testified that Marini and Coutermash had multiple conversations in his presence about robbing the

victim, during which Samperi stated that he wanted nothing to do with it because he was on parole. Samperi testified that the petitioner was not present for those conversations.

Samperi also testified that he spoke to Coutermash the day after the victim's murder. At that time, Coutermash appeared nervous to Samperi and stated that "he had the fight with the guy . . . ." Samperi testified that Coutermash told him that he "fucked up" and "screwed up bad." On cross-examination, Samperi testified that "[Coutermash] told me that he went [to the victim's residence] to collect a debt, he had the fight with the guy . . . ."

In addition, Samperi testified that, at the time of the victim's murder, he had an extensive knife collection and had given a couple of knives to Coutermash. Samperi identified a photograph of the knife found at the crime scene, which was admitted into evidence at the petitioner's criminal trial, as one that looked like a knife he had given to Coutermash. Samperi also testified that he did not know the petitioner "to carry that knife."

At the conclusion of trial, the jury found the petitioner guilty on all counts.[1] The trial court rendered judgment accordingly and sentenced the petitioner to a term of imprisonment of forty-five years on the felony murder conviction, a concurrent sentence of twenty years of imprisonment on the burglary conviction, and a concurrent sentence of ten years of imprisonment on the criminal possession of a firearm conviction, for a total effective sentence of forty-five years of imprisonment. Id.,

[1] Coutermash subsequently pleaded guilty, on June 30, 2016, to manslaughter in the first degree as an accessory in violation of General Statutes § 53a-55 (a) (1) and burglary in the first degree as an accessory in violation of § 53a-101 (a) (1), for which he received a total effective sentence of eighteen years of imprisonment, execution suspended after twelve years, and five years of probation.

98. This court affirmed that judgment of conviction on direct appeal. Id., 118.

The petitioner commenced this habeas corpus action in 2017.[2] In count one of his operative petition, the petitioner alleged that "at the time of [the petitioner's criminal] trial . . . Conway was simultaneously representing the petitioner and [Samperi]." The petitioner alternatively alleged that, "[e]ven if [Conway] did not represent Samperi . . . at the time of [his] testimony [at the petitioner's criminal trial], Conway had a substantial and ongoing concurrent conflict of interest with Samperi" due to his representation of Samperi at a January 13, 2016 hearing. The petitioner alleged that "as a result of [Conway's] representation of [Samperi] . . . the petitioner's right to the effective assistance of counsel was violated" due to both Conway's failure to disclose this conflict of interest and his failure to impeach Samperi with either his motives for testifying or his various criminal charges. The petitioner also alleged that he had never been advised of the conflict of interest, much less waived his right to conflict free representation. In the second count of his petition, the petitioner claimed that, even if no conflict of interest existed, Conway rendered ineffective assistance due to his failure to cross-examine Samperi as to his pending criminal case and motive or interest in testifying for the state.

[2] The petitioner acted in a self-represented capacity when he filed his original habeas corpus petition in June, 2017. He subsequently retained counsel and filed two amended petitions. The operative petition, his October 22, 2021 second amended petition for a writ of habeas corpus, alleged four counts. Counts one and two alleged ineffective assistance of counsel on the part of Conway. The claims set forth in the third and fourth counts of the operative petition—which alleged a *Brady* violation for failure to disclose Samperi's pending cases to defense counsel; see *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and structural error as a result of Conway's failure to disclose the conflict—were denied by the habeas court and are not at issue in this appeal.

At the three day habeas trial that followed, the petitioner testified and offered copies of various transcripts as evidence. The petitioner also presented the testimony of Samperi, Conway, former prosecutor Gary Nicholson, Supervisory Assistant State's Attorney Amy Bepko, Supervisory Assistant State's Attorney Stacy Miranda, and Assistant State's Attorney Karen Roberg. The respondent submitted two transcripts and a copy of an appearance form into evidence and also called Bepko as a witness. Both parties filed posttrial briefs.

In its memorandum of decision, the habeas court found that the "evidence demonstrates" that Conway had represented the petitioner and Samperi "at or near the time of [the petitioner's] criminal trial . . . ." The court also found that, "[e]ven if there were no simultaneous representation of both, then, Samperi was a former and ongoing client who warranted proper disclosure to [the petitioner], opposing counsel, and the trial court." The court continued: "Although Conway viewed Samperi as helpful to the [petitioner's] defense, Samperi also helped the state's case by linking [the petitioner] to Coutermash and Marini, connecting [the petitioner] to a knife, and identifying [the petitioner] in several videos." In addition, the court found that "Samperi was charged in the [weapons] case[3] with a weapons offense related to [a] burglary in Milford involving Marini and Coutermash. Conway represented Samperi in that case at the same time he represented [the petitioner]. Conway could not question Samperi about that conviction, which occurred shortly before [the petitioner's] trial began, without opening the door to the state to explore

[3] Throughout its memorandum of decision, the habeas court referred to criminal Docket No. CR-15-0088509-T as the "8509 case." We refer to that case in this opinion as the weapons case. The weapons case was resolved shortly before the petitioner's criminal trial commenced. See *State* v. *Samperi*, Superior Court, judicial district of Ansonia-Milford, Docket No. CR-15-0088509-T (January 13, 2016).

the connections between Marini, Coutermash, and Samperi." (Footnote added.)

The court further found that Conway was burdened by a conflict of interest that he failed to disclose to the petitioner, the prosecutors, or the court. Citing to rule 1.7 of the Rules of Professional Conduct, the court found that Conway "had a duty to [the petitioner] to disclose his conflict arising from simultaneously representing Samperi. Additionally, Conway had a duty to the court to disclose his conflict so that the court can make a record of the conflict, its disclosure, and determine whether [the petitioner] could consent to continuing with Conway." The court also found that Conway "was operating under an impaired duty of loyalty by simultaneously representing [the petitioner] and Samperi" and that "Conway's cross-examination of Samperi intentionally avoided questions that are routinely asked to attack a witness' credibility." The court thus concluded that the petitioner had proven ineffective assistance of counsel on the part of Conway and, accordingly, granted the petition for a writ of habeas corpus with respect to those claims. The respondent subsequently filed a petition for certification to appeal, which the court granted, and this appeal followed.

I

The respondent first claims that the court erroneously found that Conway simultaneously represented the petitioner and Samperi "at or near the time of [the petitioner's] criminal trial."[4] In his operative petition

[4] The petitioner argues that this claim is unreviewable because (1) it is unpreserved, (2) the respondent induced any error on the part of the habeas court, and (3) it is inadequately briefed. We do not agree. At the habeas trial, both parties submitted documentary and testimonial evidence regarding the extent of Conway's representation of Samperi, and the respondent on appeal has thoroughly briefed that issue by citing to relevant law and applying it to the present case. Moreover, the respondent specifically argued in his posttrial brief to the habeas court that Conway "was not actively representing conflicting interests between [Samperi] and the petitioner at the time of the petitioner's criminal trial."

for a writ of habeas corpus, the petitioner alleged that Conway simultaneously represented the petitioner and Samperi "at the time" of the petitioner's criminal trial. The petitioner then alternatively alleged that, "[e]ven if [Conway] did not represent Samperi" at the time of the petitioner's criminal trial, he had represented Samperi at a January 13, 2016 hearing six weeks prior to the start of the petitioner's criminal trial on February 24, 2016. In its memorandum of decision, the court found that Conway had represented the petitioner and Samperi "at *or* near the time of [the petitioner's] criminal trial . . . ." (Emphasis added.) To properly analyze the respondent's claim, we consider those two alternative findings independently.

At the outset, we note that we review the factual findings made by the trial court in connection with a sixth amendment ineffective assistance claim pursuant to the clearly erroneous standard. See *State* v. *Davis*, 344 Conn. 122, 132, 277 A.3d 1234 (2022). "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.) Id., 133.

For purposes of clarity, we begin by noting certain facts that are not in dispute and find support in the evidence presented at the habeas trial. In 2014, Samperi was arrested and charged in the weapons case for his role in a May, 2014 burglary in Milford.[5] In March, 2015,

[5] As the court found in its memorandum of decision, the weapons case related to a burglary that occurred in Milford in 2014, in which Samperi, Coutermash, and Marini all were implicated. As a result of his role in the burglary, which involved the theft of firearms, Coutermash pleaded guilty and was sentenced to one year of incarceration for conspiracy to commit carrying a dangerous weapon in violation of General Statutes §§ 53a-48 and 53-206 on January 15, 2016. On March 4, 2016, Marini also pleaded guilty to charges stemming from the burglary—namely, conspiracy to commit theft of a firearm in violation of General Statutes §§ 53a-48 and 53a-212, conspiracy to commit burglary in the third degree in violation of General Statutes §§ 53a-

Samperi hired Conway to represent him in the weapons case and Conway filed an appearance on his behalf.[6] At that time, Conway represented the petitioner in the criminal case underlying this habeas action.

When Conway learned that Samperi was a potential witness in the petitioner's criminal trial, Conway told Samperi that he had to withdraw his representation of Samperi.[7] Conway then turned Samperi's case over to Attorney Richard P. Silverstein, who the petitioner concedes "represented Samperi until . . . January of 2016." Silverstein filed an appearance on behalf of Samperi in the weapons case on June 29, 2015. At that time, Silverstein indicated that his appearance was "in place of the appearance" previously filed by Conway.[8]

In December, 2015, Samperi was arrested and charged with certain domestic violence offenses. At some point, Samperi reached out to Conway, who encouraged him to proceed without an attorney and work with family relations to resolve those charges. On February 24, 2016, Samperi was arrested and charged with new domestic related charges, including risk of injury to a child. It is undisputed that Conway did not file appearances or provide legal representation to Samperi in

48 and 53a-103, and conspiracy to commit larceny in the first degree in violation of General Statutes §§ 53a-48 and 53a-122. Marini received a sentence of five years imprisonment, execution suspended after two years, with five years of probation.

Samperi was charged in the weapons case with one count of conspiracy to commit theft of a firearm in violation of §§ 53a-48 and 53a-212. At a plea hearing held on January 8, 2016, Samperi entered a guilty plea, which was vacated on January 13, 2016, due to a technical error. On January 13, 2016, Samperi pleaded guilty to conspiracy to commit carrying a dangerous weapon in violation of General Statutes §§ 53a-48 and 53-206.

[6] At the habeas trial, Conway testified that he met Samperi in March, 2015, and filed an appearance in the weapons case.

[7] At the habeas trial, Conway explained that, although he "never saw [his representation of Samperi] as a conflict," he recognized that it "could . . . have the appearance of a conflict."

[8] In his appellate brief, the petitioner acknowledges that "Conway's representation of Samperi in [the weapons] case ended on or shortly before June 29, 2015."

those cases at any time prior to or during the petitioner's criminal trial.[9]

A

We begin with the court's finding that Conway simultaneously represented the petitioner and Samperi *at the time* of the petitioner's criminal trial. That issue requires little discussion. It is undisputed that Silverstein filed an appearance "in place of" Conway in the weapons case in June, 2015, and that Conway thereafter did not file any appearances on behalf of Samperi at any time prior to the conclusion of the petitioner's trial or his sentencing in June, 2016. There also is no documentary or testimonial evidence in the record before us that Conway provided legal representation

[9] On January 7, 2017, more than six months after the petitioner was sentenced in the criminal case giving rise to this habeas action, Samperi was arrested on additional criminal charges. Samperi hired Conway to represent him, and Conway subsequently negotiated a global plea offer that resolved all of Samperi's outstanding cases on August 1, 2017, in exchange for a four and one-half year sentence. That representation occurred subsequent to Conway's representation of the petitioner.

At the habeas trial, Samperi testified that Conway had acted as his lawyer in "all" of his cases between 2014 and 2017, with the exception of when Silverstein replaced Conway in the weapons case. The record before us contains evidence that Samperi had a total of four additional cases during that time period: (1) Docket No. A22M-CR-15-0090828-S, which pertained to his December, 2015 arrest on domestic violence offenses; (2) Docket No. A22M-CR-16-0091308-S, which concerned his February, 2016 arrest on new domestic related charges; (3) Docket No. A22M-CR-17-0093295-S, which concerned his January, 2017 arrest on, inter alia, burglary and forgery charges; and (4) Docket No. A22M-CR-17-0094425-S, which pertained to his January, 2017 arrest for violating a protective order, disorderly conduct, and assault in the third degree. To be clear, the undisputed evidence adduced at the habeas trial indicates that, in early 2017, Samperi retained Conway as counsel and Conway, at that time, negotiated a global settlement of those four cases. For that reason, Samperi's testimony that Conway acted as his lawyer in "all" of those cases is consistent with the other evidence presented at trial, which demonstrates that Conway helped Samperi resolve those cases after being retained by Samperi in 2017. There nevertheless is no evidence in the record that Conway filed an appearance or represented Samperi in any of those cases *prior* to the conclusion of the petitioner's criminal trial.

to Samperi in any court proceeding or otherwise at the time of the petitioner's trial.[10] Accordingly, the court's finding that Conway simultaneously represented the petitioner and Samperi at the time of the petitioner's trial is clearly erroneous. See, e.g., *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 344–46, 304 A.3d 431 (2023).

B

In his operative habeas petition, the petitioner also alleged that Conway represented Samperi at a January 13, 2016 proceeding in the weapons case six weeks prior to the start of the petitioner's criminal trial. In its memorandum of decision, the court found that Conway had represented Samperi at the January 13, 2016 proceeding in the weapons case. On appeal, the respondent concedes that there is evidence in the record to substantiate that finding in the form of a partial transcript of that proceeding, but nonetheless argues that this court should be left with a definite and firm conviction that a mistake has been made. We agree.

The following additional facts are relevant to this claim. As we have noted, Conway initially appeared on behalf of Samperi in the weapons case in March, 2015, and Silverstein filed an appearance in lieu of Conway in June, 2015. In addition, the habeas court found, and the record confirms, that, on January 8, 2016, Silverstein and Samperi appeared before the court, *Iannotti*, *J.*, and entered a plea in the weapons case under the *Alford* doctrine. See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Samperi returned to court five days later after a technical error with respect to that plea was discovered.[11]

[10] The weapons case was resolved before the petitioner's criminal trial began, as the habeas court found in its memorandum of decision.

[11] As the trial court noted in the weapons case and as Bepko testified at the habeas trial, the plea entered by Samperi on January 8, 2016, had to be vacated because it provided for a suspended sentence to a charge that carried a mandatory minimum. The court described that error as a "[t]hree-way oversight" on the part of the court and the parties.

At the habeas trial, the petitioner submitted a partial transcript of the January 13, 2016 proceeding in the weapons case, which was marked as the petitioner's exhibit 26. That transcript states that Conway appeared on behalf of Samperi and Attorney Kevin Lawlor appeared on behalf of the state. That transcript is one and one-half pages in length. It begins with Conway confirming that he has filed an appearance on behalf of Samperi and then concludes with Conway requesting, and the court and the state's attorney agreeing to, a continuance.[12]

The habeas court paradoxically was presented with a second transcript of the January 13, 2016 proceeding in the weapons case, which was admitted into evidence

[12] The transcript in exhibit 26 states in full:

"The Clerk: Your Honor, I think you might have an old docket, number three is James Samperi.

"The Court: Mr. Conway, have you filed your appearance with the clerk? It's not printing.

"[Conway]: It should be there. If not, I could certainly do it right now.

"The Clerk: I do have it, I don't know why it didn't print.

"The Court: All right. What are we doing today?

"[Conway]: Your Honor, we had initial discussions, I have provided some documentation to the [prosecutor]. There might be a couple of other documents which may or may not be dispositive, but will certainly be helpful in moving this along. Perhaps if we could get a new date in the interim? I could communicate with the [prosecutor] and we could come to some kind of understanding about some of the facts of this case at least. Could I please have February 12th, Your Honor?

"The Court: That's not a holiday. I think the holiday is the fifteenth and eighteenth.

"The Clerk: No, the twelfth.

"The Court: Twelfth and fifteenth, that's why you are blank.

"[Conway]: How about the eleventh, Your Honor?

"[Lawlor]: That's fine with the state.

"The Court: February 11.

"[Conway]: It's a Thursday. Would a Monday be preferable?

"[Lawlor]: No, no.

"The Court: February 11.

"[Conway]: Thank you, Your Honor.

"The Defendant: Thank you.

"[Conway]: May I approach?

"(Whereupon, the case concluded.)"

as the respondent's exhibit C. Unlike exhibit 26, the transcript in exhibit C states that Attorney Leo Ahern appeared on behalf of Samperi and that Bepko appeared on behalf of the state. The transcript in exhibit C is seven pages in length. Other than referring to Ahern and Bepko instead of Conway and Lawlor, the first one and one-half pages are identical to the transcript in exhibit 26 until the final sentence. Whereas the transcript in exhibit 26 ends with "[w]hereupon, the case concluded," the transcript in exhibit C states: "Whereupon, the case was recalled." The transcript in exhibit C then proceeds with a discussion of the technical error regarding Samperi's January 8, 2016 plea. See footnote 11 of this opinion. Ahern then moved to vacate that plea, which the court granted, and Samperi entered a new *Alford* plea to conspiracy to commit carrying a dangerous weapon in violation of General Statutes §§ 53a-48 (a) and 53-206, which the court accepted.

Both exhibit 26 and exhibit C purport to be transcripts of the January 13, 2016 proceeding in the weapons case. The transcripts both are authenticated and contain a certification page.[13] The certification date of the transcript in exhibit 26 is October 12, 2021; the certification date on the transcript in exhibit C is January 26, 2022. Both certification pages state that they are the "true and accurate" transcript of the proceedings held before the court, *Iannotti*, *J.*, on January 13, 2016. The only meaningful distinction between the transcript in exhibit 26 and the first one and one-half pages of the transcript in exhibit C is the identity of Samperi's counsel.

In its memorandum of decision, the court did not squarely resolve the question of precisely which transcript was an accurate depiction of the January 13, 2016 proceeding. Instead, it appears to have found both

[13] The transcript in exhibit 26 is signed by Jean Kindley, certified court reporter. The transcript in exhibit C contains Kindley's electronic certification.

transcripts credible. The court, in crediting the transcript in exhibit 26, specifically found that "Conway represented Samperi at that hearing." At the same time, the court, in crediting the transcript in exhibit C, found that "Ahern appeared for Samperi in the weapons case," at which time "Ahern moved to vacate the plea and Samperi pleaded guilty to conspiracy to commit carrying a dangerous weapon in violation of . . . §§ 53a-48 and 53-206."

In light of those conflicting transcripts, the respondent argues that this court should be left with a definite and firm conviction that a mistake has been made, as "two transcripts attributing the same words to two different persons cannot both be correct." In that regard, the respondent emphasizes that, although the factual findings of a habeas court are governed by the clearly erroneous standard, it remains the burden of a habeas petitioner to establish the facts underlying a purported constitutional violation by a fair preponderance of the evidence. See, e.g., *Parke* v. *Raley*, 506 U.S. 20, 34–35, 113 S. Ct. 517, 526, 121 L. Ed. 2d 391 (1993); *Johnson* v. *Zerbst*, 304 U.S. 458, 468–69, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Arey* v. *Warden*, 187 Conn. 324, 331, 445 A.2d 916 (1982).

We agree with the respondent that both of the certified transcripts admitted into evidence cannot be correct. If the habeas court had credited either transcript over the other, and made findings consistent with the representations contained therein, the deferential standard that governs our review of factual determinations would be dispositive. That is not the case here, as the court credited both transcripts in its memorandum of decision.

Moreover, both transcripts begin with the court inquiring as to whether the counsel who represented

Samperi had filed an appearance with the clerk.[14] In both transcripts, counsel responds by saying "[i]t should be" in the court file and the clerk, in both transcripts, confirms that "I do have it . . . ." Plainly, then, whomever appeared before the court on behalf of Samperi when the January 13, 2016 proceeding commenced had filed an appearance with the court.

Under the anomalous and extraordinary circumstances of the present case, we agree with the respondent that it is appropriate to take judicial notice of certain filings in the court file for the weapons case.[15] That court file contains an appearance filed by Ahern on behalf of Samperi on January 13, 2016.[16] In addition, the court file contains a copy of a substitute information

[14] We reiterate that it is undisputed that Silverstein represented Samperi in the weapons case from the time that he filed his appearance on June 29, 2015, until the January 13, 2016 proceeding.

[15] It is well established that an appellate court may take judicial notice of court files in other cases. See, e.g., *Drabik* v. *East Lyme*, 234 Conn. 390, 398, 662 A.2d 118 (1995) ("[t]here is no question that the trial court may take judicial notice of the file in another case, whether or not the other case is between the same parties" (internal quotation marks omitted)); *State* v. *Allen*, 205 Conn. 370, 382, 533 A.2d 559 (1987) ("judicial notice can be taken at any stage of the proceedings including on appeal"); see also *State* v. *Gaines*, 257 Conn. 695, 705 n.7, 778 A.2d 919 (2001) (taking judicial notice, in context of conflict of interest claim, of transcript from another defendant's case and other court files not referenced in trial court); *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 306 n.5, 175 A.3d 46 (2017) (taking judicial notice of contents of court file in petitioner's second habeas action even though "neither party submitted to the habeas court in the present action any portion of the pleadings or decision in the second habeas action"), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

The contents of a court file are fundamentally distinct from other extrajudicial materials of which judicial notice properly may be taken. As our Supreme Court has observed, court files are "matters of established fact, the accuracy of which cannot be questioned . . . ." *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977). For that reason, "[t]here is no question . . . concerning [an appellate court's] power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise." *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972).

[16] That appearance indicates that it was filed "in addition to an appearance already on file." The only other appearances in the weapons case file are Conway's March 2, 2015 appearance and Silverstein's June 29, 2015 appearance in place of Conway.

dated January 13, 2016, to which Samperi pleaded guilty to conspiracy to commit carrying a dangerous weapon in violation of §§ 53a-48 and 53-206. That document contains a handwritten note in the lower left corner that states in relevant part: "1-13-16 Attorney Leo Ahern filed appearance in addition to Rick Silverstein. . . ." Judge Iannotti's name appears in parentheses at the conclusion of that handwritten note. The court file for the weapons case does not contain an appearance or other filing from Conway at any point subsequent to Silverstein's June, 2015 appearance in lieu of him.

Those court files, considered in tandem with the unequivocal statement in both exhibit 26 and exhibit C that counsel for Samperi had filed an appearance in the weapons case, convince us that the court's finding that Conway represented Samperi at the January 13, 2016 hearing cannot stand. This is the rare case in which we are left with a definite and firm conviction that a mistake has been made. See *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 327, 193 A.3d 1192 (2018) ("we will not uphold a factual determination if we are left with the definite and firm conviction that a mistake has been made" (internal quotation marks omitted)). We therefore conclude that the court's finding that Conway represented Samperi at the January 13, 2016 hearing is clearly erroneous.

II

The respondent also contends that the court improperly concluded that the petitioner had established that Conway was burdened by an actual conflict of interest that adversely affected his representation of the petitioner at his criminal trial. We agree.

"It is axiomatic that a criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to counsel that is free from conflicts of interest. . . . It is a fundamental principle . . . that

an attorney owes an overarching duty of undivided loyalty to his [or her] client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel's duties. . . . Loyalty of a lawyer to his [or her] client's cause is the sine qua non of the [s]ixth [a]mendment's guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel's undivided loyalty." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Davis*, 338 Conn. 458, 469–70, 258 A.3d 633 (2021).

The parties submit, and we agree, that the standard propounded in *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), applies to the respondent's claim. In *Sullivan*, the United States Supreme Court explained that "multiple representation does not violate the [s]ixth [a]mendment unless it gives rise to a conflict of interest." Id., 348. It then held that, to establish a sixth amendment violation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. The court further observed that, "until a [petitioner] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id., 350.

The United States Supreme Court clarified that standard in *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). In *Mickens*, the court rejected the contention that, to establish a sixth amendment violation, a petitioner "need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance." Id., 170. As the court stated: "[W]e think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*—as opposed to a

mere theoretical division of loyalties. [That phraseology] was shorthand for the statement in *Sullivan* that a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief." (Emphasis in original; internal quotation marks omitted.) Id., 171; see also *Diaz* v. *Commissioner of Correction*, 344 Conn. 365, 377, 279 A.3d 147 (2022) (citing *Mickens* for proposition that "[a]n actual conflict, for [s]ixth [a]mendment purposes, is a conflict of interest that adversely affects counsel's performance" (internal quotation marks omitted)).

As the United States Court of Appeals for the Fifth Circuit has observed, "[r]egardless of this clarification of the terminology, the relevant questions remain the same, and we must ask whether [counsel] labored under a conflict of interest, which was not merely hypothetical, and whether that conflict adversely affected the representation (i.e., whether it was an actual conflict)." *United States* v. *Infante*, 404 F.3d 376, 392 (5th Cir. 2005); see also *McFarland* v. *Yukins*, 356 F.3d 688, 706 (6th Cir. 2004) (noting that *Mickens* "changed the terminology, but not the substance" of test under *Sullivan*); *Moss* v. *United States*, 323 F.3d 445, 467 n.23 (6th Cir.) ("In *Mickens*, the Supreme Court clarified its prior definition of the term 'actual conflict of interest' as comprising both requirements of the *Sullivan* test—a conflict of interest and adverse effect. . . . An 'actual conflict of interest' therefore is a term of art requiring a conflict of interest and adverse effect. . . . [T]he 'actual conflict of interest' required in the first prong of the court's test requires only that the petitioner demonstrate a real or genuine, as opposed to a hypothetical, conflict of interest." (Citation omitted.)), cert. denied, 540 U.S. 879, 124 S. Ct. 303, 157 L. Ed. 2d 144 (2003).

In 2022, our Supreme Court released two opinions in short succession that pertained to the applicable test

under *Sullivan*. In *State* v. *Davis*, supra, 344 Conn. 122, the court, quoting the decision of the Fifth Circuit in *United States* v. *Infante*, supra, 404 F.3d 392, explained that "[*w*]*hether a conflict of interest exists* depends on a number of factors, including, but not limited to, whether the attorney has confidential information that is helpful to one client but harmful to another; whether and how closely the subject matter of the multiple representations is related; how close in time the multiple representations are related; and whether the prior representation has been unambiguously terminated. . . . This question is highly [fact sensitive]." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Davis*, supra, 344 Conn. 133–34. As *Infante* makes clear, that multifactored analysis pertains to the first prong of the test under *Sullivan*. See *United States* v. *Infante*, supra, 392. In *Davis*, our Supreme Court also elaborated on the sort of evidence that is required to establish that an attorney's conflict of interest adversely affected the representation of a client. See *State* v. *Davis*, supra, 344 Conn. 134–35 ("there is simply no evidence that [the interests of counsel and the client] ever diverged with respect to any material factual or legal issue, or to a course of action, or that [counsel's] representation of the defendant was otherwise impaired as a result of [counsel's] loyalty to [another client]").

Three weeks after *Davis* was released, our Supreme Court released its decision in *Diaz* v. *Commissioner of Correction*, supra, 344 Conn. 365. In *Diaz*, the court noted that "[t]he *Sullivan* standard is often framed as a two part test: [i]n order to establish a violation of the sixth amendment right to counsel based on defense counsel's actual, undisclosed conflict of interest, a petitioner must establish (1) that counsel actively represented conflicting interests and (2) that [the] actual conflict of interest adversely affected his [counsel's] performance." (Internal quotation marks omitted.) Id.,

376–77. Citing to federal case law, the court then noted that, "[a]lthough framed as a two part test . . . in practice, [t]hese components are considered in a single, integrated inquiry. . . . That is to say, the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An actual conflict, for [s]ixth [a]mendment purposes, is a conflict of interest that adversely affects counsel's performance." (Citation omitted; internal quotation marks omitted.) Id., 377. In *Diaz*, the court did not reference its recent decision in *State* v. *Davis*, supra, 344 Conn. 122, or the multifactored analysis set forth therein regarding the first prong of the test under *Sullivan.* The court has not since addressed the applicable standard for claims that an attorney was burdened by an actual conflict of interest that adversely affected his representation of a client.

We are mindful that, "[a]s an intermediate appellate tribunal, this court is not at liberty to modify, reconsider, or overrule the precedent of our Supreme Court." *State* v. *Siler*, 204 Conn. App. 171, 178, 253 A.3d 995, cert. denied, 343 Conn. 912, 273 A. 3d 694 (2021). Our obligation is to reconcile and harmonize the various precedents of our Supreme Court to the extent practicable. In our view, *State* v. *Davis*, 344 Conn. 122, and *Diaz* are not incongruous but, rather, reflect commentary on distinct aspects of *Sullivan* and its progeny, as developed in federal law. In *Diaz*, the court emphasized, consistent with *Mickens* v. *Taylor*, supra, 535 U.S. 172 n.5, that an actual conflict of interest is one "that adversely affects counsel's performance." (Internal quotation marks omitted.) In *Davis*, consistent with *United States* v. *Infante*, supra, 404 F.3d 376, on which it relied, the court articulated a multifactored analysis to determine "[w]hether a conflict of interest exists . . . ." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 344 Conn. 133. The court in *Davis* also

set forth and applied various factors to determine whether an attorney's conflict of interest adversely affected the representation of a client. Id., 133–35. Read together, *State* v. *Davis*, supra, 344 Conn. 122, and *Diaz* are consistent with the observation of the United States Court of Appeals for the Sixth Circuit that *Mickens* "changed the terminology, but not the substance" of the test under *Sullivan*. *McFarland* v. *Yukins*, supra, 356 F.3d 706; see also *United States* v. *Infante*, supra, 392 ("[r]egardless of [*Mickens*'] clarification of the terminology [used in *Sullivan*], the relevant questions remain the same").

In light of the foregoing, we first consider whether Conway's prior representation of Samperi created a conflict of interest in his representation of the petitioner at trial. That inquiry is guided by the multifactored analysis set forth in *State* v. *Davis*, supra, 344 Conn. 133–34. We then consider whether any conflict of interest adversely affected Conway's representation of the petitioner at trial. Both questions involve mixed questions of law and fact. See id., 132–33; see also *United States* v. *Infante*, supra, 404 F.3d 391 ("[t]he determinations whether a conflict existed and whether the conflict had an adverse effect are mixed questions of law and fact"). Under the particular facts of this case, we conclude that no conflict of interest existed due to Conway's prior representation of Samperi and that, even if one did exist, it did not adversely affect Conway's representation of the petitioner at his criminal trial.

A

We begin with the question of whether a conflict existed due to Conway's representation of the petitioner and Samperi. In resolving that question, we consider "whether the attorney has confidential information that is helpful to one client but harmful to another; whether

and how closely the subject matter of the multiple representations is related; how close in time the multiple representations are related; and whether the prior representation has been unambiguously terminated." (Internal quotation marks omitted.) *State* v. *Davis*, supra, 344 Conn. 133–34. In its memorandum of decision, the court stated that it was "unclear whether Conway had confidential information that was helpful to Samperi but harmful to [the petitioner], or vice versa . . . ." The court then stated that "the other [*Davis*] factors have been clearly established."

There is nothing in the record before us to indicate that Conway possessed confidential information that was helpful to the petitioner but harmful to Samperi or vice versa, and the court did not make such a finding in its memorandum of decision.[17] See, e.g., *Hall* v. *United States*, 371 F.3d 969, 973 (7th Cir. 2004) (conflict of interest existed where counsel's representation of another client "enabled him to learn confidential information pertaining directly to [his client's] case"). Moreover, Samperi's testimony at the habeas trial suggests that he did not provide confidential information to Conway.[18]

[17] The January 8, 2016 transcript of the plea hearing in the weapons case was admitted into evidence at the habeas trial. During the canvass conducted by the court, the prosecutor acknowledged that the state was "okay" with an *Alford* plea because, while the two individuals who committed the burglary in that matter "gave up" Samperi, they admitted that they were the ones who had masterminded the conspiracy and that Samperi had been taken "along for the ride." The prosecutor also admitted that the case against Samperi was weak. For those reasons, the state sought no incarceration or probation and simply requested a conditional discharge. We further note that, because Silverstein's appearance in place of Conway occurred relatively early in a case in which the state's evidence was weak, it is not surprising that there would be a dearth of confidential information that would have any bearing on Conway's representation of the petitioner.

[18] On direct examination by the petitioner's counsel at the habeas trial, Samperi was asked whether "[a]t any time prior to you taking the witness stand [in the petitioner's criminal trial] . . . Conway ask[ed] you about what you know about [the petitioner's] case," whether Conway "ever discuss[ed] with you what he would ask you if you testified at [the petitioner's criminal] trial," and whether Conway "ever [told] you what he would not

With respect to the second factor, the subject matter of Conway's representation of Samperi and the subject matter of his representation of the petitioner were somewhat related, as they involved firearms and Coutermash, a common accomplice.[19] We nevertheless disagree with the court that they were "closely related," as this is not a case in which the subject matter of Conway's representation of the petitioner and Samperi pertained to "the same alleged conspiracy"; *United States* v. *Infante*, supra, 404 F.3d 392; or the same criminal conduct. See, e.g., *Perillo* v. *Johnson*, 205 F.3d 775, 782–86 (5th Cir. 2000) (defense counsel represented two defendants in separate criminal trials arising from same acts and same capital murder charge); *Armstrong* v. *People*, 701 P.2d 17, 18–22 (Colo. 1985) (en banc) (conflict of interest existed where counsel represented husband and wife involved in same armed robbery incident); *State* v. *Galaviz*, 296 Kan. 168, 178–79, 291 P.3d 62 (2012) (counsel's representation of victim of underlying offense as guardian ad litem constituted conflict of interest in representing defendant in subsequent probation revocation proceeding regarding that underlying offense).

Samperi was charged in the weapons case with one count of conspiracy to commit theft of a firearm in

ask you if you testified at [the petitioner's criminal] trial"; Samperi responded in the negative to each of those queries. In addition, Samperi was asked on cross-examination by the respondent's counsel if he had spoken to Conway about his testimony prior to the petitioner's criminal trial. Samperi replied, "[n]o, we didn't speak about—he said it was confidential, can't speak about it. You know, there's nothing—no."

[19] At the petitioner's criminal trial, Samperi testified that the gun used in the victim's murder was the gun that Marini sold to Coutermash "from a burglary that [Marini] did in Milford, I believe." On direct examination, Marini identified the firearm in question as the one he had sold to Coutermash and testified that it had been procured through a burglary in Milford. At the habeas trial, Conway acknowledged that there was evidence presented at the petitioner's criminal trial that the gun used in the victim's murder was one that Coutermash had acquired as a result of the Milford robbery at issue in the weapons case.

violation of General Statutes §§ 53a-48 and 53a-212 stemming from a burglary incident that transpired in Milford in May, 2014. The petitioner, by contrast, was charged in the criminal matter underlying this habeas action with felony murder in violation of § 53a-54c, burglary in the first degree in violation of § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217 (a) (1) following the murder of the victim in his home in Hamden on October 19, 2014. There is no evidence in the record, and the petitioner has not argued, that Samperi was in any way involved in that October 19, 2014 incident.

As to the third factor, the court found that "Conway's representation of Samperi and the petitioner were simultaneous or, at best, extremely close in time." That determination was predicated, in part, on the court's finding that Conway represented Samperi at the January 13, 2016 proceeding in the weapons case. In part I of this opinion, we concluded that this finding, as well as the court's finding that Conway represented Samperi at the time of the petitioner's criminal trial, are clearly erroneous. To be sure, the record indicates that Conway represented both Samperi and the petitioner from March to June, 2015, at which time Silverstein appeared in place of Conway in the weapons case.[20] See footnote 8 of this opinion. Nothing in the record indicates that Conway subsequently filed an appearance or provided legal representation to Samperi until more than six months after the petitioner's criminal proceeding concluded. See footnote 9 of this opinion. As the petitioner acknowledges in his appellate brief, Silverstein "represented Samperi [in the weapons case] until . . . January of 2016."

With respect to the fourth factor, the court found that Conway's representation of Samperi "was not

[20] The petitioner's criminal trial began approximately eight months after Silverstein replaced Conway as Samperi's counsel.

unambiguously terminated . . . prior to and during [the petitioner's] criminal trial." It is undisputed that, when Conway learned that Samperi was a potential witness in the petitioner's criminal trial, Conway told Samperi that he had to withdraw his representation of Samperi. It also is undisputed that, on June 29, 2015, Silverstein appeared in place of Conway as Samperi's counsel in the weapons case. As discussed in part I of this opinion, the record contains no evidence that Conway thereafter represented Samperi in any legal proceeding prior, or otherwise, to or during the petitioner's criminal trial.[21] At the same time, the record indicates that, following his December, 2015 arrest on domestic related charges, Samperi contacted Conway for advice on how to proceed and that he subsequently retained Conway as counsel in 2017, more than six months after the petitioner's criminal proceeding concluded. That evidence suggests that, although Conway had terminated his representation of Samperi in June, 2015, Samperi continued to operate as though he could consult with Conway on legal matters. Samperi nevertheless testified at the petitioner's habeas trial that Conway specifically informed him that Conway could not continue to represent him due to his representation of the petitioner.[22]

[21] In its memorandum of decision, the court found that, "[a]t the time of [the petitioner's] criminal trial, Conway continued to represent Samperi in what is best described as an 'on-and-off-and-on again' manner." That finding presumably is predicated on the court's erroneous finding that Conway appeared on behalf of Samperi at the January 13, 2016 proceeding in the weapons case. The court did not identify any other legal proceeding in which Conway represented Samperi prior to the conclusion of the petitioner's criminal trial and the record is devoid of evidence of such representation. See footnote 9 of this opinion.

[22] Samperi testified that Conway told him that, due to his representation of the petitioner, "he had to back out [of the weapons case and] he couldn't be my lawyer anymore." Samperi similarly testified, when asked about Silverstein's involvement in that case, that Conway had told him that his representation of the petitioner could give rise to a conflict of interest, so Conway "had to turn my case over to another attorney."

In articulating the foregoing factors in *State* v. *Davis*, supra, 344 Conn. 133–34, our Supreme Court emphasized that the relevant inquiry is dependent on a number of factors and is not limited to those quoted from *United States* v. *Infante*, supra, 404 F.3d 392. In our view, the character and extent of an attorney's representation of another client is a critical consideration in ascertaining whether a conflict of interest exists.

At the habeas trial, the petitioner presented no evidence regarding the substantive nature of Conway's representation of Samperi in the weapons case. Conway began representing Samperi in March, 2015, and was replaced by Silverstein in June, 2015. At the habeas trial, Conway testified that he only recalled appearing in court on behalf of Samperi once or twice prior to his replacement by Silverstein. Conway also acknowledged that some scheduled appearances during that time period may have been continued "without anybody showing up" to court. See, e.g., *Marshall* v. *Commissioner of Correction*, 184 Conn. App. 709, 717–19, 196 A.3d 388 (noting, in support of conclusion that no conflict of interest existed due to counsel's simultaneous representation of witness for brief period who later testified at petitioner's criminal trial, that counsel had represented that witness for only "approximately four months" and that there were not "a lot of things going on with the case while [counsel] represented [the witness] other than getting pretrials"), cert. denied, 330 Conn. 949, 197 A.3d 389 (2018).

The limited nature of Conway's representation of Samperi in the weapons case stands in stark contrast to *Perillo* v. *Johnson*, supra, 205 F.3d 775. In that case, Attorney Jim Skelton served as defense counsel to Linda Fletcher, who was charged along with Pamela Perillo and Mike Briddle with capital murder arising out of the same incident. Id., 782–83. After Fletcher's trial, she and Skelton "stayed in contact with each other by written

correspondence and with telephone calls. Skelton also developed a close relationship with Fletcher's mother. . . . [W]hen Fletcher planned to remarry, Skelton was asked to come to California and give the bride away. Skelton agreed, and traveled to California to spend several days participating in the wedding festivities with Fletcher's family." Id., 784. When Fletcher returned to Texas in 1981 to testify as a witness for the state in Briddle's criminal trial, "she stayed with Skelton for between seven and ten days in his one bedroom condominium." Id., 786.

When Skelton subsequently was appointed to represent Perillo in her criminal trial in November, 1983, he did not alert her to his prior representation of Fletcher. Id. In preparing for Perillo's trial, he met with Fletcher, allowed her to again stay in his condominium, and worked at length with her to ensure that her testimony was consistent with her prior testimony at Briddle's trial and to afford her "a preview of [his] cross-examination on Perillo's behalf." Id., 788–89. In concluding that an actual conflict existed with respect to Skelton's representation of Perillo and Fletcher, the court stated that "[w]here the prior representation involved a . . . substantial attorney-client relationship, a finding of actual conflict is more likely. . . . Where, however, defense counsel's involvement in the prior representation was either transient or insubstantial, we have been less inclined to find an actual conflict." (Citation omitted.) Id., 799.

Unlike in *Perillo*, the petitioner in the present case provided no evidence that Conway's simultaneous representation of Samperi and the petitioner in the early stages of both the petitioner's criminal action and the weapons case involving Samperi was anything other than transient and insubstantial. Considered in totality, the foregoing factors convince us that Conway's simultaneous representation of Samperi and the petitioner

for four months in 2015 did not create a conflict of interest with respect to Conway's representation of the petitioner at his criminal trial. The habeas court improperly concluded to the contrary.

B

Even if we were to conclude that a conflict of interest existed, the petitioner still could not prevail. On our thorough review of the record before us, we conclude that the petitioner failed to satisfy his burden of demonstrating that Conway was hampered by a conflict of interest that adversely affected his representation of the petitioner.

In *State* v. *Davis*, supra, 344 Conn. 122, our Supreme Court noted that "an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client . . . ." (Internal quotation marks omitted.) Id., 133. To establish that a conflict of interest adversely affected the representation of a client, the court explained, there must be evidence that the interests of counsel and the client diverge "with respect to any material factual or legal issue, or to a course of action, or that [counsel's] representation of the defendant was otherwise impaired as a result of [counsel's] loyalty to [another client]." Id., 134–35. That explication is consistent with the court's earlier pronouncement in *State* v. *Davis*, supra, 338 Conn. 458, that "[o]nce a [party] has established that there is an actual conflict, he must show that a lapse of representation . . . resulted from the conflict. . . . To prove a lapse of representation, [that party] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's

other loyalties or interests." (Internal quotation marks omitted.) Id., 478 n.13; see also *Diaz* v. *Commissioner of Correction*, supra, 344 Conn. 378 (same).

1

In its memorandum of decision, the court identified only one defense strategy or tactic that was available, but not pursued by Conway—his "failure to use Samperi's prior convictions and pending cases to attack his credibility." On appeal, the petitioner maintains that attacking Samperi's credibility was a plausible line of attack, which establishes the requisite adverse impact on Conway's representation.[23] We do not agree.

At the outset, we note that the court's conclusion that impeaching Samperi with his prior convictions was a plausible tactic ignores the undisputed fact, which both the state and Conway emphasized during jury selection and at trial, that the petitioner and several of the witnesses had significant criminal histories. As Conway reiterated during closing argument, both he and the prosecutor in voir dire sought assurances from the jurors that they would not allow a witness' criminal history to impact their ability to assess the credibility of witnesses.

In its memorandum of decision, the court found that "Conway did not attack Samperi's credibility because he assessed Samperi's testimony as helpful to the

[23] To the extent that the petitioner relies on *State* v. *Crocker*, 83 Conn. App. 615, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), and *State* v. *Taylor*, 177 Conn. App. 18, 171 A.3d 1061 (2017), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018), those cases are inapposite, as they involved pretrial disqualification regarding a defendant's sixth amendment right to counsel of choice. Unlike requests for postconviction relief, for which an actual conflict must be established; see, e.g., *State* v. *Davis*, supra, 344 Conn. 132; *Marshall* v. *Commissioner of Correction*, supra,184 Conn. App. 714–21 (2018); in cases involving pretrial disqualification, a party can prevail if they establish that "a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (Internal quotation marks omitted.) *State* v. *Crocker*, supra, 626.

defense and made . . . a tactical decision to not impeach [him]." The court nonetheless opined that "[w]hether or not Conway thought Samperi's testimony could or would be helpful to the defense is irrelevant to determining whether a conflict existed . . . ." We disagree. First, the court's statement is contrary to *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 591 n.20, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005), in which this court noted that, "[i]n determining whether counsel's performance was adversely affected by an actual conflict of interest, counsel's testimony regarding the reasons for his or her trial strategy is wholly proper evidence to be considered . . . by the court."[24]

At the habeas trial, Conway testified that "the basic facts" of the petitioner's criminal case "were that someone came to collect a debt owed" by the victim. In formulating a defense strategy, the petitioner gave Conway three different accounts of what transpired on October 19, 2014. The petitioner's third version—that Coutermash had offered to give the petitioner a ride in exchange for "a favor" of backing up Coutermash while collecting a debt from the victim, who was "a pretty big guy"—fit best with the evidence. That defense strategy placed Coutermash in the victim's residence with a knife, where he slashed the victim during an altercation prior to fleeing. Consistent therewith, Conway pursued a defense that centered around demonstrating that the petitioner lacked the intent to commit a robbery and, thus, could not be convicted of felony murder. Conway testified that, for this strategy to have any chance of success, he "had to get [Coutermash] placed [inside the victim's residence] somehow some way." Conway

[24] As the United States Supreme Court noted in *Sullivan*, "[a]n attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." (Internal quotation marks omitted.) *Cuyler* v. *Sullivan*, supra, 446 U.S. 347.

further testified that "the only person [he] really had to fulfill that role of, sort of, an independent witness was Samperi." For that reason, Conway "was thrilled when the state said they were going to call him as a witness." Moreover, in light of the defense strategy pursued at trial, Conway testified that he deliberately declined to question Samperi about his prior convictions or pending cases on cross-examination because Conway "wanted the jury to believe [Samperi's] testimony because he was saying things that were favorable to [the petitioner]." Conway believed that Samperi's testimony supported the defense theory that the crimes were "not something that [the petitioner] would have organized or had it in his mind or . . . taken the initiative on. [Samperi's testimony] was there to show that there had to be somebody else, [Coutermash] . . . that had to be the driving force behind whatever went down" at the victim's residence.

Second, "to amount to an unconstitutional lapse in representation, an alternative defense not undertaken must be 'plausible' and 'viable,' as well as in conflict with counsel's other interests." *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 589, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); see also *Winkler* v. *Keane*, 7 F.3d 304, 309 (2d Cir. 1993) ("[T]o prove adverse effect on the basis of what an attorney failed to do, [a party] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative." (Internal quotation marks omitted.)), cert. denied, 511 U.S. 1022, 114 S. Ct. 1407, 128 L. Ed. 2d 79 (1994); *United States* v. *Williams*, 902 F.3d 1328, 1332–33 (11th Cir. 2018) (same). A determination that an alternative strategy or tactic is viable, in turn, requires a showing that it would have meaningfully

assisted the client in some way. See, e.g., *Bigelow* v. *Commissioner of Correction*, 146 Conn. App. 737, 744 n.4, 80 A.3d 84 (2013) (alternative strategy of placing blame on petitioner's brother "was simply not a plausible, viable defense based on the facts of the case" (internal quotation marks omitted)).

In the present case, all of the evidence offered by the state at the petitioner's criminal trial, and the testimony of Vivian and Ashante in particular, pointed to only one perpetrator in the homicide that occurred at 397 Circular Avenue on October 19, 2014. The petitioner, by contrast, testified at trial that both he and Coutermash entered that residence because Coutermash needed to collect a debt, that a struggle subsequently ensued between himself and the victim, and that the gun in the petitioner's hand discharged during that struggle.[25] Samperi was the only witness who could substantiate the petitioner's account in any manner, which he did in his testimony at the petitioner's criminal trial.[26] In addition, Samperi's testimony, coupled with

[25] As this court recounted in the petitioner's direct appeal: "[T]he [petitioner] testified at trial and was the final witness called by the defense. . . . [He] testified that, on October 19, 2014, Coutermash told him that he needed to 'collect some money' from someone. . . . [The petitioner] claimed that when he and Coutermash arrived at 397 Circular Avenue, both of them entered the victim's apartment, and Coutermash demanded $400 from the victim. The [petitioner] testified that he entered the victim's apartment only after Coutermash and the victim began fighting and when things were 'getting out of control . . . .' Upon entering the apartment, the [petitioner] told the victim: '[L]isten, just give [Coutermash] his money—you know—let me get the hell out of here, just give him what you owe him, it's gone far enough, it's out of control, just give him his money, you know.' The [petitioner] further testified that, immediately after he told the victim to give Coutermash money, Coutermash fled the apartment. At that point, the [petitioner] claimed that the victim charged at him, the two began to struggle over the gun in his hand, and the gun 'went off' twice during the struggle." (Citation omitted.) *State* v. *Papantoniou*, supra, 185 Conn. App. 100–101.

[26] At the petitioner's criminal trial, Samperi testified that he spoke with Coutermash the day after the victim's murder and that Coutermash seemed nervous. Samperi testified that Coutermash told him that "he fucked up" and that "he screwed up bad." On cross-examination, Samperi also testified that "[Coutermash] told me that he went there to collect a debt, he had the fight with the guy."

Coutermash's desire to collect a debt from the victim, was the only evidence that cast doubt on the state's contention that the petitioner possessed the mental state necessary to commit the underlying felony, which in this case is burglary in the first degree, on which the felony murder charge is predicated.

We agree with the respondent that the only alternative tactic identified by the petitioner—impeaching Samperi's testimony—would have left the petitioner with no support for his version of events that placed Coutermash inside the victim's residence as an active participant seeking to collect a debt. Such impeachment is not a plausible alternative strategy because it in no way would have supported an alternative defense to the felony murder and burglary charges faced by the petitioner. See *Marshall* v. *Commissioner of Correction*, supra, 184 Conn. App. 719–21 (failure to impeach former client with pending charges insufficient to demonstrate conflict adversely affected performance). In this case, there was no divergence with respect to the interests of the petitioner and Conway regarding that course of action.[27] See *United States* v. *Williams*, 372 F.3d 96, 102 (2d Cir. 2004); *State* v. *Davis*, supra, 344 Conn. 134; *Mercer* v. *Commissioner of Correction*, 51 Conn. App. 638, 644, 724 A.2d 1130, cert. denied, 248 Conn. 907, 731 A.2d 309 (1999). We therefore conclude that Conway's failure to impeach Samperi did not adversely affect his representation of the petitioner. To the contrary, it demonstrates that Conway was acting in the petitioner's best interest with respect to the one

In addition, Samperi testified that, prior to the victim's murder, Coutermash and Marini had multiple conversations in his presence about robbing the victim. Samperi testified that the petitioner was not present for those conversations. Samperi also identified a knife found at the crime scene as one that looked like a knife he had given to Coutermash.

[27] In its memorandum of decision, the habeas court found that the petitioner "thought Samperi would be very helpful [as a witness at his criminal trial], especially providing an innocent explanation for the knife [recovered at the scene]." The court also noted Conway's testimony at the habeas trial that the petitioner "wanted [Samperi] to testify" at his criminal trial.

witness who could corroborate the petitioner's account of what transpired on October 19, 2014.[28]

[28] As Conway argued during closing argument, Samperi's testimony was "consistent with what [the petitioner] testified. [Samperi] testified that he talked to [Coutermash] within a day or so of what happened. Lifelong friends, confidants . . . . [Samperi] had gotten wind of what had gone down, confronts [Coutermash]—dude, what happened? I fucked up. I went to go collect—get some money and a fight broke out, I fucked up. Not we, I. Consistent with [the petitioner's] testimony. Four days later, after viewing the news and all the stories associated, knowing that he's a suspect, [Coutermash] attempts to control the narrative. Now he tells [Samperi] all right, this is what happened, in greater detail . . . but that's not as persuasive as if he had said it moments afterwards perhaps. [Coutermash] is no dummy. He knew based on the accounts in the paper and the fact that [the petitioner] had told him that he left his hat in there and the sweatshirt, something bad had happened, someone was going down for it, it wasn't going to be [Coutermash]; and he also knew the police would be talking to other people, he wanted to get his story out there so they would tell them the same story."

Furthermore, in arguing that the victim had let the petitioner and Coutermash into his residence, Conway emphasized that there was no evidence of forced entry, just banging on the door, based on the lack of damage to the entry way. Conway also highlighted evidence that the victim's wife testified to the fact that the victim had one hour earlier asked his wife for $400, from which he asked the jury to infer that the victim knew that someone would be coming by for $400. He then argued that there was no evidence that anyone owed the petitioner any money and that, "by all accounts, [the petitioner] was a sad sack. Doesn't have a car, walks everywhere, never explained by anybody, that $400, never said who the hell are you and why are you asking for $400. It's such a specific amount. . . . So, there was no unlawful entry if he was standing outside and [Coutermash] was invited in by [the victim]. That's not unlawful entry. Remained in the hallway until things got out of hand. They got out of hand because [Coutermash] made them get out of hand, hitting [the victim] in the head with the butt of the knife and slashing, and at that point, [Coutermash] freaked out and [the petitioner] says chill, chill, chill, stop. [The petitioner] didn't want to be a part of that; he just wanted to stop. He did say dude, just give him his $400 and get the hell out of here . . . . He wanted to get the hell out of there. [Coutermash] sees his opportunity, bolts out the door, [the petitioner] turns, gun in hand, [the victim] lunges, and the events proceed from there. [The petitioner] was trying to get out. He wanted to get out so bad, he's wiggling out of his sweatshirt. He couldn't, [the victim] wouldn't let him. He didn't want to remain there; he wanted to get the hell out of there.

"Intent to rob, that's . . . on the burglary, right? Enter or remain unlawfully . . . . That's the first part, and the second, with the intent to commit a crime therein. The crime alleged by the state was robbery. Again, I go back, the $400, and the testimony from [Samperi] about what [Coutermash] said and what [the petitioner] said. Ride with me, watch my back, I'm going to collect a debt. Give me my $400. An hour before, [the victim] had asked

The court also found that an actual conflict of interest adversely affected Conway's performance due to his failure to comply with certain Rules of Professional Conduct, which required Conway to notify the petitioner in writing of his prior representation of Samperi. We do not agree.

Although the Rules of Professional Conduct properly can inform a court's legal analysis, the rules themselves are not the law. As our Supreme Court has explained, "[a]ttorney conduct may breach ethical standards . . . without violating the sixth amendment right to counsel." *Diaz* v. *Commissioner of Correction*, supra, 344 Conn. 389–90. Significantly, our Supreme Court has clarified that, "although there undoubtedly is some overlap, the constitutional right to effective assistance of counsel, and the rules that govern attorney ethical conduct serve fundamentally different purposes." Id., 390. The fundamental purpose of the Rules of Professional Conduct is to guide an attorney's ethical conduct; by contrast, the fundamental purpose of the sixth amendment right to effective counsel is to ensure "a fair trial based on competent representation." (Internal

his wife for $400. Coincidence? You make the call. My $400. It's no different than if he had lent [a television] set to Larry, he went back and said give me my [television] back . . . . He's not trying to deprive another of their property forever. No intent to rob on the part of [the petitioner]. . . . Only one person had an intent in that incident, [Coutermash]. . . .

"[The petitioner] is the perfect scapegoat and he's not an angel . . . . I'm not asking you to feel sorry for him. [Coutermash] thought very little of him, [the petitioner] was a drunk at the time barely getting by, relying on others. His boss asked him to come in and watch my back and I'll pay you some of the money that we owe you—he hadn't been paid for the month of October. . . . Coutermash was the alpha dog here, [the petitioner] was the mutt, and . . . at the last minute, here, hold [the gun]. . . . [Coutermash] planned this, he dressed all in black, he brought the gun, he bought the gun, he was owed money, he drove, he made admissions to [Samperi], he covered his tracks by sanitizing things, he took a . . . deal that took 220 years off of the table by sitting in that chair right there and talking to you. . . ."

quotation marks omitted.) Id.; see also *Nix* v. *Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) ("breach of an ethical standard does not necessarily make out a denial of the [s]ixth [a]mendment guarantee of assistance of counsel").

In its memorandum of decision, the court began its analysis of the petitioner's sixth amendment conflict of interest claim by noting rules 1.7 and 1.9 of the Rules of Professional Conduct, as well as the commentary thereto.[29] The court then declared: "The present habeas

[29] Rule 1.7 of the Rules of Professional Conduct provides: "(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

"(1) the representation of one client will be directly adverse to another client; or

"(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

"(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

"(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

"(2) the representation is not prohibited by law;

"(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

"(4) each affected client gives informed consent, confirmed in writing."

Rule 1.9 of the Rules of Professional Conduct provides in relevant part: "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

"(c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

"(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

"(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

The commentary to rule 1.9 provides in relevant part: "The scope of a 'matter' for purposes of this [r]ule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific

corpus matter is a cautionary tale because it is a dispute caused by ambiguities created by Conway operating under an undisclosed actual or potential conflict of interest. Conway did not, in contravention of rule 1.7 [of the Rules of Professional Conduct], obtain written consent from [the petitioner]. The lack of full disclosure to [the petitioner], opposing counsel, and the court demonstrates that [the petitioner] was deprived of his right to a fair criminal trial because Conway operated under a conflict of interest."[30] In discussing Conway's failure to comply with those Rules of Professional Conduct, the court stated that "[t]he consent confirmed in writing is crucial." Throughout the remainder of its decision, the court repeatedly emphasized Conway's failure to disclose his representation of Samperi to the petitioner in writing.[31]

transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. . . .

"Matters are 'substantially related' for purposes of this [r]ule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rules of Professional Conduct 1.9, commentary.

[30] At the habeas trial, Conway testified that he informed the petitioner of his prior representation of Samperi and that the petitioner was "well aware of the fact that [he had] represented Samperi." In its memorandum of decision, the court noted that this testimony was contradicted by that of the petitioner. The court nevertheless did not resolve that critical factual discrepancy. Instead, it stated: "While it is unclear precisely what was said between Conway and [the petitioner] about Samperi, it is clear that Conway did not disclose his conflict in writing to [the petitioner] . . . ."

[31] For example, on page twenty-seven of its decision, the court stated that Conway "did not disclose his conflict in writing" and "obtain [the petitioner's] written consent to continue with Conway after such a disclosure." On page twenty-eight of its decision, the court stated that Conway's assessment of the helpfulness of Samperi's testimony at the petitioner's criminal trial "is irrelevant to determining whether a conflict existed and disclosing it to [the petitioner] in writing." On page twenty-nine of its decision, the court stated: "Conway's failure to disclose his conflict in writing foreclosed [the petitioner's] opportunity to proceed with a conflict that he had properly waived." On page thirty-two of its decision, the court stated: "Conway failed to properly disclose this conflict of interest to [the petitioner] in writing."

We are aware of no authority, from Connecticut or elsewhere, which holds that a petitioner in a habeas action may satisfy his burden under *Sullivan* of demonstrating that an actual conflict of interest adversely affected his counsel's representation by establishing a breach of the Rules of Professional Conduct generally, or the duty under rule 1.7 to disclose a potential conflict of interest to a client in writing specifically. In *Diaz* v. *Commissioner of Correction*, supra, 344 Conn. 365, our Supreme Court addressed that issue and stated: "[A] petitioner carries a higher burden in establishing a sixth amendment violation on the basis of an alleged conflict of interest than would be necessary to establish that an attorney ran afoul of the Rules of Professional Conduct. Specifically, in order to establish a violation of his constitutional right, the petitioner must establish that an actual conflict of interest adversely impacted the representation . . . and not merely that there was a significant risk of a material limitation [pursuant to rule 1.7 (a) (2)]." (Citation omitted.) Id., 389 n.11. *Diaz* thus instructs that whether an attorney complied with the Rules of Professional Conduct is not the relevant inquiry. Although a failure to comply with those rules is "unbecoming of an officer of the court"; id., 390; and cannot be condoned, the relevant inquiry for purposes of an ineffective assistance of counsel claim is whether the petitioner established that counsel "was burdened by an actual conflict of interest that adversely affected [his] performance." *State* v. *Davis*, supra, 344 Conn. 126.

In light of the foregoing, we conclude that proof that an attorney violated rule 1.7 of the Rules of Professional Conduct does not suffice to establish a violation of a client's sixth amendment right to effective assistance of counsel. To prevail on such a claim, a party "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, supra, 446 U.S. 348. That burden is satisfied by proof

that an actual conflict of interest existed; see *State* v. *Davis*, supra, 344 Conn. 133–34; and that "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, supra, 344 Conn. 378. The petitioner in the present case did not meet that burden. We therefore conclude that the habeas court improperly determined that the petitioner's sixth amendment right to effective assistance of counsel was violated.

The judgment is reversed with respect to counts one and two of the second amended petition alleging ineffective assistance of counsel and the case is remanded with direction to deny the petition for a writ of habeas corpus.

In this opinion the other judges concurred.

BRYAN SPIOTTI *v.* WENDY CLARKE ET AL.
(AC 47397)

BRYAN SPIOTTI *v.* ANDREW WIELBLAD
(AC 47399)

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

Syllabus

The plaintiff in each of two cases, a police officer, appealed from the trial court's judgments granting in part a motion to strike by the defendants in the first case and granting a motion to strike by the defendant in the second case. The plaintiff alleged in his operative complaints that B, a dancer employed at R Co., an adult entertainment establishment, was served intoxicating liquors while on the premises of R Co. despite the fact that she was already noticeably intoxicated and that B's intoxicated behavior caused personal injuries to the plaintiff, who had been called to R Co. due to B's disruptive behavior. The plaintiff claimed, inter alia, that the court improperly granted the motions to strike as to the counts alleging reckless service

of alcohol on the ground that he failed to plead the necessary elements of that cause of action. *Held*:

The trial court improperly granted the motion to strike in the first action as to the count of the operative complaint against the defendant V Co. alleging liability under the Dram Shop Act (§ 30-102) on the ground that the plaintiff failed to provide timely statutory notice to V Co., as, in light of Governor Ned Lamont's Executive Order No. 7G that temporarily suspended statutory deadlines related to service of process, the plaintiff provided timely notice to V Co.

The trial court improperly struck the reckless service of alcohol counts in both actions on the ground that the plaintiff failed to allege sufficient facts to support the claims against the defendants because the allegations in the operative complaints did not rise beyond ordinary negligence, as, taking as true the factual allegations in the operative complaints and construing them in the manner most favorable to sustaining their legal sufficiency, this court concluded that the alleged conscious and intentional disregard of the substantial risk of serving B alcohol while she was intoxicated in favor of increased profits demonstrated wanton and reckless conduct that, if proven, was legally sufficient to support a cause of action for reckless service of alcohol.

The trial court improperly determined that the reckless service of alcohol counts in both actions were barred by the firefighter's rule, which provides generally that a firefighter or police officer who enters private property in the exercise of his or her duties generally cannot bring a civil action against the property owner for injuries sustained as the result of a defect in the premises, as the reckless service of alcohol counts of the operative complaints did not allege any dangerous or defective conditions on the premises but, rather, alleged recklessness in serving B alcohol in pursuit of profits despite the fact that she already was intoxicated, and, accordingly, those counts did not sound in premises liability and were therefore not barred by the firefighter's rule.

The trial court properly struck the negligent security counts of the operative complaints in both actions, as such counts sounded in premises liability and, thus, were barred by the firefighter's rule.

The trial court improperly struck the negligent supervision claims against the defendants in both actions on the ground that such claims were premised on the service of alcohol to an intoxicated person and, as such, were barred by the Dram Shop Act, as the allegations in the negligent supervision counts of the operative complaints, when construed in the manner most favorable to sustaining their legal sufficiency, included allegations outside the scope of the Dram Shop Act and the counts therefore should not have been stricken.

The trial court improperly determined, in the alternative, that the allegations in the negligent supervision counts of the operative complaints in both

actions were inadequate to state such a cause of action, as, when the complaints were construed broadly, realistically, and in the manner most favorable to sustaining their legal sufficiency, considering the facts necessarily implied from the allegations, including the allegation that the defendants had a duty to monitor B and to remove her from R Co.'s premises for showing signs of aggressiveness, the allegations were sufficient to set forth a cause of action for negligent supervision.

Argued June 3—officially released October 14, 2025

Procedural History

Action, in each case, to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Pierson*, *J.*, granted the motion to intervene as a plaintiff in the first case filed by the town of Wolcott; thereafter, the court, *D'Andrea*, *J.*, granted in part the motion to strike filed by the defendants in the first case and granted the motion to strike filed by the defendant in the second case and rendered judgment thereon, from which the plaintiff in each case appealed to this court. *Reversed in part*; *further proceedings*.

Andrew S. Marcucci, with whom was *Robert C. Lubus*, for the appellant (plaintiff in each case).

Ron J. Houde, *Jr.*, for the appellees (named defendant et al. in Docket No. AC 47397 and defendant in Docket No. AC 47399).

Opinion

BISHOP, J. In these consolidated appeals, the plaintiff,[1] Bryan Spiotti, appeals from the judgments of the trial court granting, in part, the motions of the defendants[2] Wendy Clarke, doing business as Rockstar Cabaret; W Ventures, LLC (Ventures); and Andrew Wielblad

[1] The intervening plaintiff in the underlying action in Docket No. AC 47397, the town of Wolcott, did not participate in this appeal.

[2] The complaint also named M Properties, LLC, as a defendant in the underlying action in Docket No. AC 47397. In his appellate brief, the plaintiff states that he is no longer pursuing claims against M Properties, LLC, and he does not raise any claims on appeal as to M Properties, LLC. Accordingly,

to strike the operative complaints in the two underlying actions. On appeal, the plaintiff claims that the trial court improperly granted the motions to strike as to (1) the count against Ventures alleging liability under the Dram Shop Act, General Statutes § 30-102, due to the plaintiff's failure to provide timely statutory notice of that claim, (2) the reckless service of alcohol counts against the defendants (a) for the plaintiff's failure to plead the necessary elements of that cause of action and (b) because the firefighter's rule barred those counts, (3) the negligent security counts against the defendants on the grounds that they were barred by the firefighter's rule, and (4) the negligent supervision counts against the defendants on the grounds that (a) the Dram Shop Act barred those counts and (b) the allegations were insufficient to set forth a cause of action for negligent supervision. For the reasons that follow, we reverse the judgments of the trial court only with respect to the granting of the motions to strike as to the Dram Shop Act count against Ventures and as to both the reckless service of alcohol and the negligent supervision counts against the defendants. Accordingly, we reverse in part the judgments of the trial court.

These consolidated appeals arise from two underlying actions brought by the plaintiff with respect to an incident that was alleged to have occurred at an adult entertainment establishment in Wolcott known as the Rockstar Cabaret (Rockstar). In essence, the plaintiff alleged in his operative complaints that Raven Booker, a dancer employed at Rockstar, was served intoxicating liquors while on the premises of Rockstar despite the fact that she was already noticeably intoxicated and, in the early morning hours of March 6, 2020, Booker's intoxicated behavior caused personal injuries to the plaintiff, an officer of the Wolcott Police Department,

we refer in this opinion only to Clarke, doing business as Rockstar Cabaret; W Ventures, LLC; and Wielblad as the defendants.

who had been called to Rockstar due to Booker's disruptive behavior.

The plaintiff's operative complaint in Docket No. CV-21-6059371-S (2021 action), dated January 19, 2022, was brought against Clarke, doing business as Rockstar, and Ventures, the owner and backer of Rockstar.[3] The operative complaint sets forth the following four distinct causes of action: (1) count one against Clarke, doing business as Rockstar, and count five against Ventures are based on the Dram Shop Act; (2) count two against Clarke, doing business as Rockstar, and count six against Ventures allege reckless service of alcohol; (3) count three against Clarke, doing business as Rockstar, and count seven against Ventures assert claims based on negligent security; and (4) count four against Clarke, doing business as Rockstar, and count eight against Ventures allege negligent supervision.

On August 29, 2022, Clarke, doing business as Rockstar, and Ventures filed a motion to strike the counts of the complaint against them.[4] Specifically, they argued that (1) the Dram Shop Act counts were barred because the plaintiff failed to provide them with timely statutory notice of those claims; (2) the reckless service of alcohol counts were (a) legally insufficient because they did not allege recklessness but only mere negligence and (b) otherwise barred by the firefighter's rule; (3) the counts sounding in negligent security (a) were barred by the firefighter's rule and (b) failed sufficiently to plead a duty owed by the defendants; and (4) the counts alleging negligent supervision (a) were simply a reiteration of the allegations under the Dram Shop Act, which

[3] This complaint also set forth claims against M Properties, LLC, namely, a violation of the Dram Shop Act (count nine), reckless service of alcohol (count ten), negligent security (count eleven), and negligent supervision (count twelve). See footnote 2 of this opinion.

[4] M Properties, LLC, also participated in the motion to strike and the court granted that motion as to all counts against M Properties, LLC.

constitutes the exclusive remedy, and (b) were legally insufficient.

In Docket No. CV-22-6064603-S (2022 action), the plaintiff brought an amended complaint, dated December 7, 2022, against Wielblad, an owner of Rockstar, personally. That operative complaint alleged against Wielblad a claim based on the Dram Shop Act (count one); reckless service of alcohol (count two); negligent security (count three); and negligent supervision (count four). Wielblad filed a motion to strike the complaint against him in its entirety, raising arguments similar to those presented in the motion to strike in the 2021 action.

In the trial court, these two complaints and motions to strike followed parallel tracks but were not consolidated. On January 26, 2024, the court ruled on the motions to strike in the 2021 action and the 2022 action using similar reasoning. The court granted the motion to strike in the 2021 action as to eleven counts of the operative complaint, leaving only count one alleging Dram Shop Act liability against Clarke, doing business as Rockstar. In the 2022 action, the court granted the motion to strike as to all four counts of the operative complaint. These appeals followed.[5] The plaintiff filed

[5] On the date that these appeals originally were filed, the trial court had not yet rendered a judgment on the stricken counts, and, in the 2021 action, there remained a count outstanding against Clarke, doing business as Rockstar. The plaintiff filed a motion pursuant to Practice Book § 61-4 (b) in the 2021 action seeking permission to file an immediate appeal as to the order striking three of the counts of the complaint against Clarke, doing business as Rockstar. The trial court granted the plaintiff's § 61-4 motion on April 1, 2024. The plaintiff filed a further § 61-4 motion with this court. On April 29, 2024, this court granted the motion on the condition that judgment be rendered on the stricken counts of both underlying complaints on or before May 6, 2024, and both appeals be amended accordingly. See Practice Book §§ 10-44 and 61-9; *Breen* v. *Phelps*, 186 Conn. 86, 89, 439 A.2d 1066 (1982); *Pellecchia* v. *Connecticut Light & Power Co.*, 139 Conn. App. 88, 90, 54 A.3d 658 (2012), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013). The trial court rendered judgment on the stricken counts in both actions on May 3, 2024, and the plaintiff amended both appeals accordingly.

a motion to consolidate the two appeals, which this court granted.

Before addressing the plaintiff's claims, we set forth the following standard of review concerning a motion to strike. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [motion to strike] is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . *Thus*, [*i*]*f facts provable in the complaint would support a cause of action*, *the motion to strike must be denied.* . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Emphasis in original; internal quotation marks omitted.) *Kumah* v. *Brown*, 127 Conn. App. 254, 259, 14 A.3d 1012 (2011), aff'd, 307 Conn. 620, 58 A.3d 247 (2013).

I

The plaintiff first claims that the court improperly granted the motion to strike as to the count of the operative complaint in the 2021 action against Ventures alleging liability under the Dram Shop Act on the ground that he failed to provide timely statutory notice.[6] We agree.

[6] In ruling on the motions to strike, the court noted that, although the notice requirement under § 30-102 is properly addressed in a motion to dismiss, the plaintiff had agreed on the record that the court could resolve the issue in the context of the defendants' motion to strike.

The Dram Shop Act permits an action against any person who sells liquor to an intoxicated purchaser who, as a result of such intoxication, causes injuries to a third person, "provided the aggrieved person . . . shall give written notice to such seller of such person's . . . intention to bring an action under this section. Such notice shall be given . . . within one hundred twenty days of the occurrence of such injury to person or property . . . . Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured or whose property was damaged, and the time, date and place where the injury to person or property occurred." General Statutes § 30-102.

The 120 day notice requirement of the Dram Shop Act is a condition precedent to maintaining a cause of action alleging a violation of the Dram Shop Act; the failure to file timely notice pursuant to § 30-102 deprives the trial court of subject matter jurisdiction. See *Davenport* v. *Quinn*, 53 Conn. App. 282, 292–93, 730 A.2d 1184 (1999). Our review of the issue of whether the trial court properly determined that the plaintiff's statutory notice under § 30-102 was defective is plenary. See id., 286–87.

Attached to the original complaint in the 2021 action is a return of service, dated November 9, 2020, stating that service was made on Clarke and provided notice of an intent to bring an action pursuant to the Dram Shop Act. There is also a return of service in the file dated March 9, 2021, in which the state marshal indicates that service was made on, among others, Ventures. In determining whether notice was given within 120 days, we turn to Governor Ned Lamont's pandemic related Executive Orders concerning the tolling of statutory time limits. Governor Lamont's Executive Order

No. 7G, effective March 19, 2020, suspended the operability of statutory time limits and requirements regarding service of process until that suspension was lifted on March 1, 2021, by Governor Lamont's Executive Order No. 10A.[7]

The court determined that because the November 9, 2020 notice letter was addressed only to Clarke, whom the court determined had received timely notice, and because "§ 30-102 required that 'the aggrieved person or persons shall give written notice to such seller of such person's or persons' intention to bring an action under this section,' " then "[t]he plaintiff has not provided sufficient legal support for this court to conclude that giving notice to [Clarke], Permittee, personally, with her claimed mailing address at [Ventures in Wolcott], constitutes proper statutory notice to [Ventures] . . . ." The court concluded that Ventures did not receive timely statutory notice and struck that count of the operative complaint in the 2021 action.

Applying the timing of Executive Order No. 7G and its recission to the present case leads us to a different result than that reached by the trial court. The record reflects a return of service dated March 9, 2021, indicating that Ventures had been served with the complaint by

[7] Executive Order No. 7G provides in relevant part: "I hereby suspend, for the duration of this public health and civil preparedness emergency, unless earlier modified or terminated by me, all statutory . . . (2) time requirements, statutes of limitation or other limitations or deadlines relating to service of process, court proceedings or court filings . . . . Unless otherwise specified herein, this order shall take effect immediately and shall remain in effect for the duration of the public health and civil preparedness emergency, unless earlier modified by me." Executive Order No. 7G (March 19, 2020).

Executive Order No. 10A provides in relevant part: "[T]he provisions of Executive Order No. 7G, Section 2, dated March 19, 2020 . . . as they relate to the following, shall expire on March 1, 2021 . . . a. all statutory time requirements, statutes of limitation or other limitations or deadlines relating to service of process, court proceedings or court filings in civil matters . . . ." Executive Order No. 10A (March 1, 2021).

that date. The complaint contained all of the plaintiff's assertions against Ventures with the particularity required by the Dram Shop Act, and there is no claim on appeal that the substance of the notice was insufficient or that such notice could not be appended to a complaint.

The 120 day notice requirement of the Dram Shop Act was suspended as a result of Governor Lamont's Executive Order No. 7G, effective March 19, 2020, and that suspension subsequently was lifted on March 1, 2021, by Governor Lamont's Executive Order No. 10A. The injury was alleged to have occurred on March 6, 2020, thirteen days before the effective date of Executive Order No. 7G. Notice was given to Ventures on March 9, 2021, eight days after the suspension of the 120 day notice requirement had been lifted.[8] Accordingly, notice to Ventures was timely provided within 120 days pursuant to § 30-102 and, therefore, we conclude that the court improperly struck the Dram Shop Act count (count five of the operative complaint in the 2021 action) against Ventures.

II

The plaintiff next claims that the court improperly struck the reckless service of alcohol counts against the defendants in that it improperly determined that (1) the operative complaints failed to sufficiently plead the necessary elements of that cause of action and (2) the firefighter's rule applied so as to bar those claims. We agree with the plaintiff.

A

In ruling on the motions to strike, the court reasoned, similarly, but in two separate decisions, that the reckless service of alcohol counts of the operative complaints failed to allege sufficient facts to support the

[8] We note that none of the parties in this matter has argued that Executive Order No. 7G or its termination is inapplicable to the present case.

claims against the defendants in that the allegations in the operative complaints did not rise beyond ordinary negligence. Our analysis leads us to a different conclusion.

"The interpretation of pleadings is . . . a question of law for the court . . . [over which] [o]ur review . . . is plenary." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, 199 Conn. App. 252, 261, 235 A.3d 626 (2020). "In order to prove that a sale of intoxicating liquor was made in a wilful, wanton and reckless manner, the plaintiff must demonstrate that the defendants acted in a manner that tended to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Coble* v. *Maloney*, 34 Conn. App. 655, 661, 643 A.2d 277 (1994). The elements of reckless service of alcohol are: (1) intoxication, (2) that was readily apparent, and (3) that the defendant continued to serve alcoholic beverages despite obvious intoxication. See *Futterleib* v. *Mr. Happy's, Inc.*, 16 Conn. App. 497, 509–10, 548 A.2d 728 (1988).

"Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent." (Internal quotation marks omitted.) *Matthiessen* v. *Vanech*, 266 Conn. 822, 832, 836 A.2d 394 (2003). "The reason that intentional and reckless misconduct are treated the same is that the difference between the two in a conceptual sense is microscopic. Wanton misconduct is more than negligence, more than gross negligence. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the

consequences of action. Wilful misconduct is intentional misconduct, and wanton misconduct is reckless misconduct, which is the equivalent of wilful misconduct." (Internal quotation marks omitted.) *Futterleib* v. *Mr. Happy's, Inc.*, supra, 16 Conn. App. 509–10.

Contrary to the trial court's determination, we conclude that the allegations in the reckless service of alcohol counts, if proven, show a wanton disregard for safety. Specifically, in those counts the plaintiff alleged the following: "[I]t is common practice at Rockstar for exotic dancers to mingle with patrons at the bar and for the patrons to buy drinks for the dancers, as these personal interactions encourage the patrons to spend more money at the establishment in the form of private dances or lap dances and alcohol, which consequently accrues to the monetary benefit of both the dancers and the defendant[s] . . . [who] not only tolerated but openly encouraged this practice."[9] Additionally, the counts alleged that the defendants "therefore had an incentive to consciously disregard the risk of overserving [Booker] in the pursuit of profit, and they did in fact consciously disregard [that] risk on March 6, 2020." The plaintiff further alleged that the defendants, their agents, servants, and/or employees knew or should have known that "serving an intoxicated person on the premises constituted a substantial risk to the safety of its patrons and to the public" and that the wrongful conduct of the defendants, their agents, servants, and/or

[9] The reckless service of alcohol count against Wielblad further alleged that, prior to the date of the incident, Wielblad knew that Booker had been reprimanded by staff at Rockstar for bringing alcohol into the establishment when arriving for her shift and had previously been fired for such actions and that Wielblad rehired her due to a shortage of dancers and/or because she was a significant source of revenue for Wielblad and/or Rockstar. We note that we consider these allegations only as to Wielblad and that the reckless service counts against Ventures and Clarke doing business as Rockstar are sufficient despite not containing the additional allegations as made against Wielblad.

employees "indicates a conscious, wanton, wilful, and/or deliberate disregard of the rights and safety of [the plaintiff] and was reckless, exhibiting highly unreasonable conduct involving an extreme departure from ordinary care in a situation where a high degree of danger is, or should have been, apparent."

Taking as true the factual allegations in the operative complaints and construing them in the manner most favorable to sustaining legal sufficiency; see *Kumah* v. *Brown*, supra, 127 Conn. App. 259; we conclude that the alleged conscious and intentional disregard of the substantial risk of serving Booker alcohol while she was intoxicated in favor of increased profits demonstrates wanton and reckless conduct that, if proven, is legally sufficient to support a cause of action for reckless service of alcohol.

B

The plaintiff also argues that the court improperly determined that the reckless service of alcohol counts sound in premises liability and, therefore, are barred by the firefighter's rule. We agree.

As previously noted, "[t]he interpretation of pleadings is . . . a question of law for the court . . . [over which] [o]ur review . . . is plenary." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, supra, 199 Conn. App. 261.

"The common-law firefighter's rule provides, in general terms, that a firefighter or police officer who enters private property in the exercise of his duties occupies the status of a licensee and, therefore, is owed a duty of care by the property owner that is less than that owed to an ordinary invitee. . . . Thus, under the firefighter's rule, the landowner generally owes the firefighter or police officer injured on his property only the duty not to injure him wilfully or wantonly . . . ."

(Citation omitted; internal quotation marks omitted.) *Levandoski* v. *Cone*, 267 Conn. 651, 653–54, 841 A.2d 208 (2004). In other words, the firefighter's rule generally provides "that a firefighter or police officer who enters private property in the exercise of his or her duties generally cannot bring a civil action against the property owner for injuries sustained as the result of a defect in the premises." *Sepega* v. *DeLaura*, 326 Conn. 788, 789, 167 A.3d 916 (2017). "[T]he firefighter's rule does not extend beyond claims of premises liability." *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 860, 168 A.3d 479 (2017); see also *Sepega* v. *DeLaura*, supra, 789 (holding that firefighter's rule should not be extended beyond claims of premises liability); *Levandoski* v. *Cone*, supra, 661 (firefighter's rule is confined to claims of premises liability).

In *Sepega* v. *DeLaura*, supra, 326 Conn. 788, the plaintiff, a municipal police officer, brought suit against the defendant alleging injuries resulting from the defendant's negligence in creating conditions wherein the plaintiff was mandated to kick in the door to the defendant's home. Id., 790. Our Supreme Court concluded that because the claim sounded in ordinary negligence and not premises liability relating to dangerous or defective conditions on the premises, the trial court improperly granted the defendant's motion to strike on the basis that the claim was barred by the firefighter's rule. Id., 790–815. In so deciding, our Supreme Court held that "the firefighter's rule should not be extended beyond claims of premises liability . . . ." Id., 789.

In *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 846, a Connecticut state trooper brought an action against Milford Hospital, Inc., for injuries sustained while subduing an emotionally disturbed patient, alleging that the hospital was negligent in failing to supervise or restrain the patient properly; failing to provide for

adequate security in the area where foreseeably dangerous patients were held; allowing the patient, who was known to be dangerous, to go to the bathroom unrestrained and unaccompanied; and failing to train its staff properly. Id., 848. The trial court granted the defendant's motion to strike, determining that the complaint was barred by the firefighter's rule. Id., 849. Our Supreme Court reversed, reasoning that the plaintiff's complaint sounded in negligence and that, in light of *Sepega*, the firefighter's rule does not extend beyond claims of premises liability. Id., 859–60.

As in *Lund* and *Sepega*, the reckless service of alcohol counts of the operative complaints in the present case do not allege any dangerous or defective conditions on the premises. Rather, those counts alleged recklessness in serving Booker alcohol in pursuit of profits despite the fact that she already was intoxicated. Accordingly, those counts are not barred by the firefighter's rule because they do not sound in premises liability.

For the foregoing reasons, as detailed in part II A and B of this opinion, we conclude that the court improperly struck the reckless service of alcohol counts against the defendants.

III

The plaintiff next claims that the court improperly struck the negligent security counts of the operative complaints against the defendants on the ground that they were barred by the firefighter's rule.[10] We disagree.

The issue before us is whether the negligent security counts sound in premises liability and, thus, are barred

[10] The plaintiff also argues that the court improperly determined that he failed to allege facts establishing a duty, a breach of that duty, and proximate cause with respect to the negligent security counts of the operative complaints. Because the negligent security counts are barred by the firefighter's rule regardless of whether they were sufficiently pleaded, we need not address this additional argument.

by the firefighter's rule, or whether they sound in ordinary negligence and, therefore, are not barred by the firefighter's rule. See, e.g., *Sepega* v. *DeLaura*, supra, 326 Conn. 789 (holding that firefighter's rule does not extend beyond claims of premises liability).

As previously noted, because our review of this claim involves the interpretation of pleadings, a legal determination, our review is plenary. See *Carrico* v. *Mill Rock Leasing, LLC*, supra, 199 Conn. App. 261. "[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . .

"[T]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury . . . and [t]he existence of a duty of care is a prerequisite to a finding of negligence . . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . .

"With respect to the element of duty in a premises liability action, possession and control of the premises by the defendant is dispositive. Liability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property. . . . Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." (Citations omitted; internal quotation

marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, supra, 199 Conn. App. 261–63.

In counts three and seven of the operative complaint in the 2021 action, alleging negligent security against Clarke, doing business as Rockstar, and Ventures, and in count three of the operative complaint in the 2022 action, alleging negligent security against Wielblad, the plaintiff alleges that the defendants, their agents, servants, and/or employees had a duty to provide adequate security on the Rockstar premises and that the injuries sustained by the plaintiff were the result of negligent security in that: there was not enough security staff and/or bouncers appropriate for the venue, taking into account all of the circumstances there and then existing; the defendants failed to hire security staff and/or bouncers with professional security experience and training to regulate behavior on the premises that would otherwise prompt a police response; and the defendants failed to provide adequate training to the security staff and/or bouncers to regulate behavior on the premises that would otherwise prompt a police response.

In the case at hand, however, our analysis does not turn on whether the defendants owed a duty of care to the plaintiff but, instead, turns on whether these particular counts are based on a claim of premises liability. On the basis of our review of the operative complaint, we conclude that this claim falls squarely within the category of a premises liability claim.

The Supreme Court's decision in *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 869 A.2d 179 (2005), aids our analysis of whether the claims in the present case are based on the theory of premises liability. In *Monk*, a nightclub patron was attacked by her husband's former girlfriend in a parking lot owned or managed by the defendants. Id., 110. In reversing the judgment of this court, our Supreme Court considered

"whether the Appellate Court improperly affirmed the decision of the trial court granting the defendants' motion for summary judgment on the ground that it is inconsistent with public policy to impose on parking lot owners and managers a duty of care to business invitees who are attacked intentionally on the premises by assailants with whom the invitees are acquainted." Id.

By describing the plaintiff patron's status with respect to the premises as a business invitee, our Supreme Court framed the issue regarding the lack of adequate security in terms of premises liability. "In the case of a negligence action grounded upon a theory of premises liability, the nature of the duty owed to a plaintiff depends upon the plaintiff's status on the premises at the time of the alleged injury. . . . A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe. . . . In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover. . . . Such a duty of care to an invitee, however, only attaches if the defendant exercised possession and control over the area at the time and place the injury occurred." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Millette* v. *Connecticut Post Ltd. Partnership*, 143 Conn. App. 62, 69–70, 70 A.3d 126 (2013).

In the present case, the gravamen of the plaintiff's negligent security counts against the defendants is the failure of those in possession and control of Rockstar (Clarke, Ventures, and Wielblad), through their agents, servants, and/or employees, to maintain the premises in such a manner as to keep it reasonably safe. See *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 49, 58 A.3d 293 (2013) ("[a]s the plaintiff's allegations stem from an injury caused by a dangerous condition

on the premises, liability is dependent on possession and control of the dangerous premises").

Similar to the claim of a lack of security in the parking lot in *Monk*, the allegations in the negligent security counts in the present case stem from an alleged dangerous condition on the premises, specifically, that of inadequate security. These allegations, therefore, are related to the defendants' alleged possession and control of Rockstar because, without such possession and control, the defendants owed no duty to the plaintiff. Accordingly, we determine that the negligent security counts sound in premises liability and, therefore, are barred by the firefighter's rule. Thus, we conclude that the court properly granted the motions to strike as to the negligent security counts of the operative complaints against the defendants.[11]

[11] The plaintiff also argues that a public function exception to the firefighter's rule applies. The plaintiff cites no case law nor are we aware of any applying a public function exception to the firefighter's rule. Rather, in support of his argument, the plaintiff cites to *Morin* v. *Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 612 A.2d 1197 (1992). In that case, a police officer, who was injured when he tripped on a defective stair after responding to a fire at the defendant condominium, brought an action for negligence in the maintenance of the stairway. Id., 325. The jury returned a verdict for the plaintiff, but the trial court granted the defendant's motion to set aside the verdict and the plaintiff appealed. Id., 326. In affirming the judgment of this court, our Supreme Court held that there was insufficient evidence as a matter of law to support the conclusion that the defendant had constructive notice of the plaintiff's presence at the time and place of the incident. Id., 325.

The plaintiff in *Morin* argued that "even if he failed to establish constructive notice by showing a predictable pattern of prior usage, constructive notice should be assumed because, according to § 345 (2) of the Restatement (Second) of Torts, there is an exception to the general rule that licensees are not afforded the implied representation of safety given to invitees when, as here, the premises were open to the public. The exception provides that '[t]he liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held *open to the public*, is the same as the liability to an invitee.' . . . 2 Restatement (Second), Torts [§ 345 (2), pp. 226–27 (1965)]." (Emphasis in original.) *Morin* v. *Bell Court Condominium Assn., Inc.*, supra, 223 Conn. 334. After noting a paucity of case law, our Supreme Court rejected the plaintiff's argument that he should

IV

The plaintiff last claims that the court improperly struck the negligent supervision claims against the defendants on the ground that (a) those claims were premised on the service of alcohol to an intoxicated person and, as such, were barred by the Dram Shop Act and (b) the allegations, nonetheless, were insufficient to set forth a cause of action for negligent supervision. We agree with the plaintiff.

The operative complaints allege that the plaintiff's injuries were the result of the negligent supervision of

be considered an implied invitee because he was injured in an area open to the public because "[t]he fact that common areas of a condominium complex are open to the various condominium owners does not establish that they are, as a matter of law, open to the public. In situations in which the premises have been considered open to the public, there is generally some sort of public function or traditional business purpose being served. Public or business functions are conspicuously absent in a private residence such as a condominium building." (Footnotes omitted.) Id., 334–35.

Significantly, *Morin* contains no mention of the firefighter's rule. At the time of the trial court's 1990 decision in *Morin*, the firefighter's rule had not yet been extended by our Supreme Court in *Furstein* v. *Hill*, 218 Conn. 610, 590 A.2d 939 (1991), to police officers. "In *Furstein* v. *Hill*, supra, [610, our Supreme Court] considered whether to extend the firefighter's rule to a police officer. . . . [In *Furstein*, our Supreme Court] read [*Roberts* v. *Rosenblatt*, 146 Conn. 110, 148 A.2d 142 (1959)] as adopt[ing] the principle expressed in the Restatement (Second) of Torts, § 345 (1), that the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee. 2 Restatement (Second), Torts [§ 345 (1), pp. 226–27 (1965)]. *Furstein* v. *Hill*, supra, 615. We concluded that the rule applies to police officers as well as firefighters." (Citation omitted; internal quotation marks omitted.) *Levandoski* v. *Cone*, supra, 267 Conn. 659.

The firefighter's rule is not without distinction between public and private property. "The common-law firefighter's rule provides, in general terms, that a firefighter or police officer who enters private property in the exercise of his duties occupies the status of a licensee and, therefore, is owed a duty of care by the property owner that is less than that owed to an ordinary invitee." Id., 653–54. The operative complaints in the present case alleged that Rockstar was owned by Clarke, Ventures, and Wielblad. Despite the plaintiff's argument that Rockstar was open to the public, there is no dispute that Rockstar was privately owned.

the defendants' employees by their agents, servants, and/or employees, in the following ways: (1) inadequate supervision of security staff and/or bouncers thereby causing the altercation to spiral out of control and prompt a police response; (2) failure to properly train their agents, servants, and/or employees to properly monitor individuals showing signs of intoxication and/or aggressiveness; (3) failure to adopt adequate policies and/or procedures for monitoring individuals showing signs of intoxication and/or aggressiveness; (4) failure to properly train their agents, servants, and/or employees to remove individuals showing signs of intoxication and/or aggressiveness from the premises; (5) failure to adopt adequate policies and/or procedures for removing individuals showing signs of intoxication and/or aggressiveness from the premises; (6) failure to properly supervise the premises; (7) failure to properly and adequately staff the premises; and (8) failure to provide adequate security on the premises.

A

The trial court determined that the negligent supervision counts against the defendants were "clearly and specifically related to the service of alcohol, which falls exclusively under the scope of the Dram Shop Act." Our analysis leads us to a different conclusion.

We begin with a brief discussion of the history of the Dram Shop Act and its relationship to a common-law negligence claim set on the same factual allegations. In *Quinnett* v. *Newman*, 213 Conn. 343, 568 A.2d 786 (1990), overruled by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), our Supreme Court explained the history of a common-law claim for negligence in the selling of alcohol to intoxicated adults and the Dram Shop Act as follows: "At common law there is no cause of action based upon negligence in selling alcohol to adults who are known to be intoxicated. While such

acts may constitute the breach of a duty owed to others, the cause of action in a variety of factual settings has uniformly failed for the reason that the subsequent injury has been held to have been proximately caused by the intervening act of the immoderate consumer whose voluntary and imprudent consumption of the beverage brings about intoxication and the subsequent injury. . . . In Connecticut, as far back as 1872, it came to be felt that the . . . common-law rule [limiting the liability of purveyors of alcohol] was to some extent overly harsh and should be modified by statute. . . . The 1872 act gave a cause of action against a seller who sold intoxicating liquor to a person who thereby became intoxicated for any damage or injury to any other person, or to the property of another done by the intoxicated person in consequence of his intoxication. Thus, this act, in situations where it was applicable, displaced the common-law rule that the proximate cause of intoxication was not the furnishing of the liquor but its consumption. . . . The modern version of this so-called civil damage or dram shop act is . . . § 30-102. Despite numerous amendments throughout its one hundred twenty-nine year history, the act's applicability remains essentially unchanged." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Quinnett* v. *Newman*, supra, 345–47. In *Quinnett*, our Supreme Court held that "we are here confronted with a tavern seller-adult patron situation, the precise factual circumstance contemplated by § 30-102. This being the case, we defer to the legislative policy as it is articulated by § 30-102 and leave the plaintiff to the remedy set forth therein." Id., 347–48.

In *Craig* v. *Driscoll*, supra, 262 Conn. 312, our Supreme Court overruled *Quinnett*, holding that the Dram Shop Act "does not occupy the field so as to preclude a common-law action in negligence against a purveyor of alcoholic beverages for service of alcoholic

liquor to an adult patron who, as a result of his intoxication, injures another." Id., 330. Shortly after the decision in *Craig*, "the legislature effectively overruled [the] holding in that case by expressly abrogating the common-law negligence action that this court had recognized. See Public Acts 2003, No. 03-91." *O'Dell* v. *Kozee*, 307 Conn. 231, 265, 53 A.3d 178 (2012). Number 03-91 of the 2003 Public Acts added the following language to the Dram Shop Act: "Such injured person shall have no cause of action against such seller for negligence in the sale of alcoholic liquor to a person twenty-one years of age or older." As a result, the plain language of the Dram Shop Act eliminates the common-law negligence causes of action allowed for by *Craig* and constitutes the exclusive remedy "[i]f any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another . . . ." General Statutes § 30-102.

The question before us is whether the Dram Shop Act bars the plaintiff's negligent supervision claims. "Under Connecticut law, an employer may be held liable for the negligent supervision of employees. See *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 500, 537 A.2d 527 (1988) (recognizing independent claim of direct negligence against employer who failed to exercise reasonable care in supervising employee); *Roberts* v. *Circuit-Wise, Inc.*, 142 F. Sup[p]. 2d 211, 214 (D. Conn. 2001) (in negligent supervision action, 'plaintiff must plead and prove that she suffered an injury due to the defendant's failure to supervise an employee whom the defendant had [a] duty to supervise'); see also *Shore* v. *Stonington*, 187 Conn. 147, 155, 444 A.2d 1379 (1982) (liability in 'any situation where a third party is injured by an employer's own negligence in failing to select an employee fit or competent to perform the services of

employment')." *Seguro* v. *Cummiskey*, 82 Conn. App. 186, 191, 844 A.2d 224 (2004).

In the present case, the negligent supervision counts of the operative complaints largely restate the allegations in the Dram Shop Act counts as to the service of alcohol to an intoxicated person. They also contain, however, when construed in the manner most favorable to sustaining their legal sufficiency; see, e.g., *Kumah* v. *Brown*, supra, 127 Conn. App. 259; allegations outside the scope of the Dram Shop Act. The negligent supervision counts are not premised on simple negligence. Rather, they assert distinct claims against the defendants for a failure to supervise. Specifically, the Dram Shop Act allows the seller of alcohol to be held liable for injuries caused to a third person by a purchaser of alcohol as a consequence of such intoxication but provides that the injured person "shall have no cause of action against such seller for negligence in the sale of alcoholic liquor to a person twenty-one years of age or older." General Statutes § 30-102. By contrast, a claim sounding in negligent supervision pertains to an employer's failure to exercise reasonable care in supervising employees. *See Seguro* v. *Cummiskey*, supra, 82 Conn. App. 191–92. The negligent supervision counts in the present case alleged, in part, that the defendant employers failed to adequately supervise security staff and bouncers in such a way that they would know to remove from the premises an employee who was becoming aggressive. This relates to an employer's response to a situation apart from any service or ingesting of alcohol by a disruptive employee. Accordingly, we conclude that because the plaintiff pleaded negligent supervision outside the scope of the Dram Shop Act, the related counts should not have been stricken.

B

Finally, as to the negligent supervision counts, the plaintiff argues that the court improperly determined

that the allegations in the operative complaints were inadequate to state such a cause of action. We agree.

The trial court determined, in the alternative, that the negligent supervision counts against the defendants failed to allege the necessary elements of that cause of action. The court considered this an additional reason to strike the negligent supervision counts of the operative complaints.

Our review of this claim involves the interpretation of pleadings, a legal determination, over which our review is plenary. See *Carrico* v. *Mill Rock Leasing, LLC*, supra, 199 Conn. App. 261. "[A]n employer may be held liable for the negligent supervision of employees. . . . [I]n [a] negligent supervision action, [a] plaintiff must plead and prove that [he] suffered an injury due to the defendant's failure to supervise an employee whom the defendant had [a] duty to supervise . . . . Negligence occurs where one under a duty to exercise a certain degree of care to avoid injury to others fails to do so. . . . The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Citations omitted; internal quotation marks omitted.) *Seguro* v. *Cummiskey*, supra, 82 Conn. App. 191–92.

The operative complaints allege that Booker was an employee of Rockstar; that the defendants, their agents, servants and/or employees had a duty to provide adequate supervision of individuals on the Rockstar premises; and that the plaintiff's injuries were the result of the defendant's negligent supervision in failing, among other things, to monitor Booker and remove her from the premises for showing signs of aggressiveness. Accordingly, the complaint alleges a duty to monitor its employees and a breach of that duty that caused

actual injury.[12] When we construe the complaints broadly, realistically, and in the manner most favorable to sustaining their legal sufficiency, considering the facts necessarily implied from the allegations; see *Kumah* v. *Brown*, supra, 127 Conn. App. 259; we conclude that the allegations are sufficient to set forth a cause of action for negligent supervision.

For the foregoing reasons, as detailed in part IV A and B of this opinion, we conclude that the trial court improperly struck the negligent supervision counts of the operative complaints.

The judgments are reversed only as to counts two, four, five, six, and eight of the operative complaint in Docket No. CV-21-6059371-S and as to counts two and four of the operative complaint in Docket No. CV-22-6064603-S; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

RICHARD FINKELSTEIN *v.* 45 LAKE DRIVE, LLC
(AC 47992)

Elgo, Moll and DiPentima, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant on his complaint alleging, inter alia, a prescriptive easement over the defendant's property pursuant to statute (§ 47-37). The plaintiff claimed, inter alia, that the court improperly determined that his use of the defendant's property was not open and visible and continuous and uninterrupted for fifteen years. *Held*:

[12] We note that there was no argument asserted in the motions to strike and no argument on appeal regarding the legal existence of a duty of employers to monitor their employees for aggressiveness. "In ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion." *Meredith* v. *Police Commission*, 182 Conn. 138, 140, 438 A.2d 27 (1980).

The trial court's finding that the plaintiff's use of the defendant's property was not open and visible was not clearly erroneous, as the plaintiff presented no evidence that he maintained the area where he crossed the defendant's property and he left no physical conditions to put the prior owner or the defendant on notice of his use, and the prior owner of the defendant's property had no knowledge of the plaintiff's use of the alleged easement until the plaintiff informed him of the use upon the sale of the property to the defendant.

The trial court's finding that the plaintiff's use of the defendant's property was not continuous and uninterrupted for fifteen years was not clearly erroneous, as the court discredited the plaintiff's testimony that he biannually crossed the defendant's property to reach the rear of his property for yardwork, and there was ample support in the record for the court's finding that the plaintiff used the defendant's property only sporadically and intermittently.

The trial court properly determined that the plaintiff failed to establish the boundaries of the alleged prescriptive easement with reasonable certainty, as the plaintiff presented only his own testimony and several exhibits, which the court found to be inadequate.

Argued September 4—officially released October 14, 2025

Procedural History

Action for, inter alia, a prescriptive easement, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Hon. Edward S. Domnarski*, judge trial referee, granted the plaintiff's motion to file an amended substitute complaint; thereafter, the case was tried to the court, *Swienton, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

James Colin Mulholland, for the appellant (plaintiff).

Craig C. Fishbein, for the appellee (defendant).

Opinion

MOLL, J. The plaintiff, Richard Finkelstein, appeals from the judgment of the trial court, rendered following a bench trial, in favor of the defendant, 45 Lake Drive, LLC, on count one of the plaintiff's amended substitute complaint alleging a prescriptive easement over the

defendant's property. On appeal, the plaintiff claims that the court improperly determined that (1) his use of the defendant's property was not (a) open and visible and (b) continuous and uninterrupted for fifteen years, and (2) he failed to establish the bounds of the alleged prescriptive easement with reasonable certainty.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Since November, 1998, the plaintiff has owned the property located at 43 Lake Drive in East Hampton. The plaintiff's property contains a small cottage. The cottage was occupied by a tenant when the plaintiff purchased the property; however, the tenant subsequently moved out in December, 1998, and the plaintiff took control of the house and started renovations in January, 1999. In September, 2021, the defendant limited liability company purchased, and is the record owner of, the property located at 45 Lake Drive in East Hampton, which borders the plaintiff's property.

There is a separation of approximately five feet between the southerly line of the defendant's property and the northern corner of the plaintiff's home. As there is limited space on the sides of the plaintiff's cottage, the plaintiff cannot access the rear of his property using a vehicle over his property only. There formerly was a

[1] The plaintiff further claims that the court improperly determined that his use of the defendant's property was not done under a claim of right. Because we conclude that the court properly determined that the plaintiff failed to establish that the other statutory elements of a prescriptive easement claim were satisfied, we need not address the claim of right issue. See *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 540, 285 A.3d 1128 (2022) ("[t]he well established statutory elements necessary to establish an easement by prescription [pursuant to General Statutes § 47-37] are that the use is (1) open and visible, (2) continuous and uninterrupted for fifteen years, and (3) engaged in under a claim of right" (internal quotation marks omitted)).

split rail fence separating the parties' properties, but it was destroyed in some sections, which left enough room for the plaintiff to cross the defendant's property and thereby enter the rear of his own property. The plaintiff built a stockade fence in 2016, which ran along the common border of 43 and 45 Lake Drive, but there remained an open area for the plaintiff to cross the defendant's property and access the rear of his property. Blocking the open area was a net fence that the plaintiff removed at his convenience to cross the defendant's property and enter into the back of his own property.

The plaintiff claimed that, from 1999 until 2022, he crossed the defendant's property over the common border of the parties' properties various times whenever he wished to drive his truck into his backyard or to facilitate access to the back of his property to contractors who used equipment or vehicles. James St. John, who owned 45 Lake Drive from July, 2012, until the defendant's purchase in September, 2021, had not been made aware of the plaintiff's use of the common border until August, 2021, during the final walkthrough for the sale to the defendant. Before the closing, on August 19, 2021, the plaintiff informed the defendant that he possessed a prescriptive easement that enabled him to pass through 45 Lake Drive and into the back of his property. Despite negotiations between the defendant's attorney and St. John's attorney, the warranty deed to 45 Lake Drive did not contain any language granting or referring to an easement related to the plaintiff's use of such property.

After purchasing 45 Lake Drive, the defendant performed extensive renovations to the dwelling located on the property, as well as to the property itself. In 2022, the defendant erected a fence that made it impossible for the plaintiff to continue crossing its property to access the rear of his property.

On January 31, 2022, the plaintiff commenced this action. The plaintiff's three count amended substitute complaint, which the trial court, *Hon. Edward S. Domnarski*, judge trial referee, granted the plaintiff permission to file on September 6, 2022, alleged the following claims against the defendant: (1) a prescriptive or adverse easement (count one);[2] (2) an implied easement (count two);[3] and (3) malicious erection of structures (count three).[4] In support of his prescriptive easement claim, which is the subject of this appeal, the plaintiff alleged that his use of the defendant's property was open, visible, continuous, uninterrupted for the fifteen year statutory period, and made under a claim of right. On October 20, 2022, the defendant filed an answer leaving the plaintiff to his proof as to his material allegations.[5]

The case was tried to the court, *Swienton*, *J.*, on March 5, 2024. The court heard testimony from the plaintiff, among other witnesses, and admitted several exhibits in full into the record. On July 31, 2024, the court issued its memorandum of decision rendering judgment in favor of the defendant on the plaintiff's prescriptive easement claim. The court determined in relevant part that the plaintiff failed to establish, by a preponderance of the evidence, (1) that his use of the defendant's property was open and visible, (2) that his use of the defendant's property was continuous and uninterrupted for fifteen years, and (3) the bounds of

[2] The plaintiff cited the quiet title statute, General Statutes § 47-31, in asserting his easement claims.

[3] Prior to trial, the plaintiff withdrew his implied easement claim.

[4] The court, *Swienton*, *J.*, rendered judgment in the defendant's favor on the plaintiff's malicious erection of structures claim. The plaintiff does not challenge on appeal that portion of the court's judgment.

[5] The defendant also asserted several special defenses. On March 2, 2023, the plaintiff filed a motion to strike all of the defendant's special defenses, which the court granted on May 16, 2023.

the alleged prescriptive easement with reasonable certainty. This appeal followed. Additional facts will be set forth as necessary.

Before addressing the plaintiff's claims, we set forth the applicable standard of review. "Whether a right of way by prescription has been acquired presents primarily a question of fact for the trier after the nature and character of the use and the surrounding circumstances have been considered. . . . When the factual basis of a trial court's decision [regarding the existence of a prescriptive easement] is challenged, our function is to determine whether, in light of the pleadings and evidence in the whole record, these findings of fact are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, 294 Conn. 418, 426–27, 984 A.2d 734 (2009). "The burden is on the party claiming a prescriptive easement to prove all of the elements by a preponderance of the evidence. . . . Whether the requirements for such a right have been met in a particular case presents a question of fact for the trier of facts. . . . In such cases, the trier's determination of fact will be disturbed only in the clearest of circumstances, where its conclusion could not reasonably be reached." (Citation omitted; internal quotation marks omitted.) *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 125, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006).

I

The plaintiff first claims that the trial court erred in concluding that he did not establish that his use of the

defendant's property was (1) open and visible and (2) continuous and uninterrupted for fifteen years. We disagree.

General Statutes § 47-37 provides: "No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years." "The well established statutory elements necessary to establish an easement by prescription are that the use is (1) open and visible, (2) continuous and uninterrupted for fifteen years, and (3) engaged in under a claim of right." (Internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 540, 285 A.3d 1128 (2022). "It is axiomatic that, in determining whether a prescriptive easement has vested, the nature of the easement will dictate the type of evidence that is required to prove it. Cf. *Missionary Society of the Diocese of Connecticut* v. *Coutu*, 134 Conn. 576, 584, 59 A.2d 732 (1948) ('[t]he circumstances of this class of cases are so varied, and it is so important that every circumstance should be taken into consideration, that we doubt the propriety of laying down universal and absolute rules of law as to the effect in evidence of particular facts' . . .)." *Slack* v. *Greene*, supra, 294 Conn. 429. Therefore, whether a plaintiff has satisfied the elements of § 47-37 is a case-by-case, fact-based inquiry.

In addressing the plaintiff's contentions that his use of the defendant's property was open and visible, and continuous and uninterrupted for fifteen years, the court found that the defendant's property was used to access the rear of the plaintiff's property when the plaintiff had (1) a shed delivered in 1999, (2) tree work done in 2008 and 2018, (3) a soil delivery in an unspecified year, (4) a propane tank delivery in an unspecified year, and (5) a wooden stockade fence installed in 2016.

Additionally, the court stated that "[t]he plaintiff submitted several photographs into evidence. One photo[graph] showed his truck parked in the rear of his lot . . . . Another showed a bucket truck for tree work in the rear of his lot. . . . Both would have required crossing 45 Lake Drive to access the rear of his lot. Other photographs showed a mound of soil in the backyard, a new propane tank, and flats of stones in the rear of the lot which the plaintiff testified necessitated trucks crossing 45 Lake Drive. However, other than his testimony, no further evidence was submitted to substantiate his claims."

The court further stated that the plaintiff "[testified] that he cleared the rear of his property twice a year, spring and fall. The court does not find this credible. There was no evidence to corroborate this claim other than one photo[graph] of his truck in the rear of his property. . . . [P]hotographs of the rear of his property [admitted into evidence] indicate little to no upkeep, weeds, and overgrowth. These are seasonal properties, and there is no evidence to support or suggest that the plaintiff was open and visible in his usage of the defendant's property." (Citation omitted.)

On the basis of the evidence before it, the court determined that the plaintiff failed to demonstrate that his use of the defendant's property "was open and visible, and continuous and uninterrupted for fifteen years. No evidence was presented that the plaintiff ever maintained the area he claims to have the right to use. There were no physical conditions sufficiently open and visible to put the owners of 45 Lake Drive on notice that there was a use that may be adverse to their rights. . . . Due to the seasonal nature of the properties, as well as the sporadic and intermittent use of the defendant's property, the court cannot find that the plaintiff's use of the defendant's property was open, visible, continuous and [un]interrupted. The plaintiff—when it

suited him—on no regular schedule drove his truck to the back of his property across the defendant's property." (Citation omitted.) The court further stated: "It simply cannot be the case that an owner of a property can cross the property of another for no other reason than his own convenience, and then claim a prescriptive easement. True, it is far easier [for the plaintiff] to drive his truck into [his] backyard to remove debris, or to install a propane tank, or to erect a fence. However, he still can walk into [his] backyard to perform these tasks."[6]

A

The plaintiff asserts that the court improperly concluded that he failed to demonstrate that his use of the defendant's property was open and visible. The plaintiff principally argues that he used the defendant's property during the daytime, often during the week, and not in secret. He further asserts that the court erred in its reasoning that his use was not open and visible, as he claims that no case law requires physical manifestations of such use on the easement area for this element to be satisfied. The defendant responds that the court's finding that the plaintiff's use was not open and visible was not clearly erroneous. We agree with the defendant.

"The purpose of the open and visible use requirement is to give the owner of the servient land, in a claim for a prescriptive easement, knowledge and full opportunity to assert his own rights. . . . To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. Open generally means

[6] The plaintiff argues that whether his use of the defendant's property was convenient or that he could access the back of his property on foot is not relevant to a prescriptive easement analysis. We conclude that these observations by the court are, at most, dicta and are not determinative regarding whether the plaintiff is entitled to the grant of a prescriptive easement.

that the use is not made in secret or stealthily. It may also mean that it is visible or apparent. . . . An openly visible and apparent use satisfies the requirement even if the neighbors have no actual knowledge of it. A use that is not open but is so widely known in the community that the owner should be aware of it also satisfies the requirement. . . . Concealed . . . usage cannot serve as the basis [for] a prescriptive claim because it does not put the landowner on notice." (Internal quotation marks omitted.) *Viering* v. *Groton Long Point Assn., Inc.*, 223 Conn. App. 849, 874, 311 A.3d 215, cert. denied, 349 Conn. 901, 312 A.3d 586 (2024).

"This court previously has held . . . that a party's maintenance of a disputed area, including planting and maintaining vegetation, may demonstrate an open and visible use of that area. See, e.g., *Padula* v. *Arborio*, [219 Conn. App. 432, 460, 296 A.3d 276] (plaintiffs removed soil and grass, installed sprinkler system, laid down new sod, dug out old tree and planted new trees, and replaced fence, among other things, in disputed area) [cert. denied, 348 Conn. 903, 301 A.3d 528 (2023)]; *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 811, 54 A.3d 232 (2012) (party made permanent improvements on land, including cleaning area of underbrush, cutting some trees down, planting lawn, trees, and garden, and installing fence in disputed area); *Eberhart* v. *Meadow Haven, Inc.*, 111 Conn. App. 636, 642, 960 A.2d 1083 (2008) (plaintiffs planted and maintained hedges and trees and maintained lawn, among other things, in disputed area); *Schlichting* v. *Cotter*, 109 Conn. App. 361, 367–69, 952 A.2d 73 (plaintiff pruned and removed trees, planted and maintained plants, removed poison ivy from trees and removed sumac from foliage, raked leaves, mowed, fertilized and maintained lawn, and planted, cultivated and maintained garden, among other things, in disputed

area), cert. denied, 289 Conn. 944, 959 A.2d 1009 (2008)." Id., 875–76.

An instructive example of the type of potentially adverse use that is not open and visible can be found in *Mierzejewski* v. *Brownell*, 102 Conn. App. 413, 423–24, 925 A.2d 1126, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007). In that case, the plaintiff argued that he had acquired disputed land by way of prescriptive easement due to the installation of a septic system underneath part of the defendant's land. Id., 416–17. The trial court found that there were no physical conditions present to show that the septic tank was underground in the disputed territory. Id., 423–24. Further, because the land around the septic tank "was sloping and uneven, the [trial] court found that the mound created by the septic tank appeared to be an unimproved portion of the parcel. Additionally, the [trial] court found that trees and other vegetation had grown on the septic mound, adding to its unimproved nature. The [trial] court further found that the elevated area lacked any pump, manhole cover, standpipe or other evidence that would indicate the presence of a septic tank beneath it." Id., 424. This court therefore held that these physical indicia demonstrated that the trial court's finding that the septic tank was not open and visible was not clearly erroneous. Id., 424–25.

On the basis of the foregoing, we leave undisturbed the court's finding that the plaintiff's use of the defendant's property was not open and visible. The court found that (1) the plaintiff presented no evidence that he maintained the area where he crossed the defendant's property to reach the rear of his property and (2) the plaintiff left no physical conditions to put St. John or the defendant on notice of his use.[7] Although our case

[7] The court also appears to suggest that the seasonal nature of a property may factor into an *open and visible* determination, stating that "[t]hese are seasonal properties, and there is no evidence to support or suggest that the plaintiff was open and visible in his usage of the defendant's property." Our Supreme Court has opined, however, that seasonal use is relevant to whether

law does not explicitly require these specific findings for the open and visible element to be met, these findings made together support the court's determination that the plaintiff's use was not open and visible. See *Viering* v. *Groton Long Point Assn., Inc.*, supra, 223 Conn. App. 875–76; *Mierzejewski* v. *Brownell*, supra, 102 Conn. App. 424–25.

Additionally, the fact that St. John, the prior owner of 45 Lake Drive, had no knowledge of the plaintiff's use of the alleged easement for nine years until the plaintiff informed him of such use upon the sale to the defendant also supports the court's determination that it was not open and visible. Although actual knowledge of possibly adverse use is not a requirement to satisfy this element; see *Slack* v. *Greene*, supra, 294 Conn. 427; the lack thereof in the present case supports the finding that the plaintiff put neither St. John nor the defendant on notice.

In sum, we conclude that the court's finding that the plaintiff's use of the defendant's property was not open and visible, such that it would put a reasonably diligent owner on notice of such use, was not clearly erroneous.

B

The plaintiff also claims that the court erred in concluding that he did not establish that his use of the defendant's property was continuous and uninterrupted for fifteen years. The plaintiff principally argues that the court incorrectly discredited his testimony that, from 1999 to 2020, he drove through the common border

the use of an alleged prescriptive easement was *continuous and uninterrupted*. See *Roche* v. *Fairfield*, 186 Conn. 490, 501 n.11, 442 A.2d 911 (1982) (holding that continuous and uninterrupted element was met where adverse use was merely seasonal). Insofar as the court imported the seasonal nature of the properties in examining the open and visible element, we do not deem that reliance to undermine its determination that the plaintiff failed to satisfy this element.

of the parties' properties twice per year in the spring and fall to clean up his backyard. Further, the plaintiff argues that the evidence submitted demonstrates that his use of the defendant's property was continuous and uninterrupted.[8] The defendant responds that the court's finding that the plaintiff's use was not continuous and uninterrupted because he only used the defendant's property sporadically is not clearly erroneous. We agree with the defendant.

First, with respect to the plaintiff's assertion that the court improperly discredited his testimony concerning his alleged annual spring and fall cleanups of his backyard, we note that "[i]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022). Thus, "[w]e will not disturb the court's credibility determinations on appeal."[9] *M. C.* v. *A. W.*, 226 Conn. App. 444, 452, 319 A.3d 183 (2024).

[8] The plaintiff contends that such evidence includes "testimony and other evidence demonstrating that the usual purposes underlying the plaintiff's use of [45 Lake Drive] for ingress and egress to the rear of his lot was for maintenance, storage (e.g., a rolling dock that was moved back and forth from the backyard to the lake) and upkeep, involving either general landscaping work (tree removal, yard clearing, the delivery of various materials, and the like), or needed or desired work on his cottage (roofing repair/replacement, furnace replacement, propane tanks deliveries and replacement, and the like), all such uses were maintained continuously from 1999 to when the defendant blocked the way in 2022 as noted."

[9] The plaintiff maintains that, in discrediting his testimony regarding the annual spring and fall cleanups, the court determined that there was a dearth of evidence corroborating his testimony when, according to the plaintiff, there was ample corroborating evidence. In its decision, however, the court expressly recognized that, other than in rare circumstances, witness testimony does not require corroboration, but that "[t]he absence of corroboration, of course, may affect the trier's decision as to the sufficiency of the evidence and the burden of proof . . . ." *Slack* v. *Greene*, supra, 294 Conn. 430. Thus, we do not construe the court's credibility determination to have depended on the lack of evidence corroborating the plaintiff's testimony.

Turning next to the plaintiff's contention that the record supported a finding that his use of the defendant's property was continuous and uninterrupted for fifteen years, we begin by recognizing that the use of a servient estate need not be constant in order to satisfy the "continuous and uninterrupted" element for a prescriptive easement claim. In *Frech* v. *Piontkowski*, 296 Conn. 43, 57, 994 A.2d 84 (2010), the servient estate owner defendants argued "that because the use of the reservoir was not constant, it was not continuous. The defendants point to testimony that the [plaintiffs] did not use their boat every year, and, in years that the boat was used, took the boat out about two or three times per month. Boating, however, was only one of several recreational uses that the plaintiffs made of the reservoir. They also swam, fished, skated and went ice fishing. The frequency of the boat use, therefore, is only one measure of the frequency of the use that the plaintiffs made of the reservoir. Moreover, we never have imposed a requirement that use must be constant in order to satisfy the requirement that use be continuous. See *Roche* v. *Fairfield*, 186 Conn. 490, 501 n.11, 442 A.2d 911 (1982) (recognizing that seasonal use is sufficient to satisfy continuity requirement)." Our Supreme Court further reasoned "that [i]t is axiomatic that, in determining whether a prescriptive easement has vested, the nature of the easement will dictate the type of evidence that is required to prove it. *Slack* v. *Greene*, supra, 294 Conn. 429. The plaintiffs claimed, and the trial court found that they had proven, that they

The plaintiff also contends that, in discrediting his testimony as to the annual spring and fall cleanups, the court relied on the photographs in evidence that, as the court found, "indicate[d] little to no upkeep, weeds, and overgrowth" in the rear of the plaintiff's property. The plaintiff challenges the court's purported reliance on these photographs on several bases. In short, we disagree with the plaintiff's interpretation of the court's decision as having hinged its credibility determination on the photographs in question, and, therefore, we need not address the plaintiff's arguments in this regard.

had acquired a prescriptive easement for recreational purposes. To require proof of daily or constant use for a recreational easement ignores the type of easement at issue. The evidence was sufficient to support the trial court's determination that the use was continuous." (Internal quotation marks omitted.) *Frech* v. *Piontkowski*, supra, 57. Therefore, constant use of an alleged prescriptive easement is not required to meet the "continuous and uninterrupted" element; like the "open and visible" element, this determination depends on the nature of the use of the servient estate.

In *Slack* v. *Greene*, supra, 294 Conn. 418, our Supreme Court analyzed whether the plaintiff's use of the alleged prescriptive easement was continuous with respect to the nature and frequency of such use. As the court explained: "[W]e disagree that the plaintiff's testimony was inadequate to support the trial court's finding that her use of the right-of-way was open and continuous during the prescriptive period because that testimony was not sufficiently specific with respect to [the] nature and frequency of her use. . . . [T]he plaintiff claimed a right to travel over a paved right-of-way located at the end of her driveway that leads to the nearest public road. In light of the nature of the right-of-way and its location in relation to the plaintiff's home, her testimony concerning the regular and uninterrupted nature of her use of the right-of-way from the time that she moved into her home until shortly before the commencement of this action—testimony that the trial court found to be highly credible—was sufficient to satisfy her burden of demonstrating that she used the right-of-way in an open and continuous manner during the prescriptive period." (Citation omitted; internal quotation marks omitted.) Id., 429–30.

In the present case, the court found that "the facts in this case do not support a finding that the [plaintiff's] usage was . . . continuous and uninterrupted," as the

plaintiff's use of the defendant's property was "sporadic and intermittent . . . ." In *Slack*, the trial court credited the plaintiff's testimony regarding her regular, uninterrupted use of the servient estate, which thereby satisfied her burden of proof with respect to the "continuous" element. *Slack* v. *Greene*, supra, 294 Conn. 429–30. Conversely, the court in the present case discredited the plaintiff's testimony that he biannually crossed the defendant's property to reach the rear of his property for yardwork, which, in this case, was vital testimony in order for the plaintiff to prove this element. Moreover, although constant use of a servient estate is not required for the "continuous and uninterrupted" element to be met, such use must be more than sporadic for the plaintiff to satisfy his burden in this regard. Here, there is ample support in the record for the court's finding that the plaintiff's used the defendant's property only sporadically and intermittently.

In sum, because the plaintiff failed to present sufficient evidence to meet his burden of proving that his use of the defendant's property was continuous and uninterrupted for fifteen years, we conclude that the court's finding in this regard was not clearly erroneous.

II

Finally, the plaintiff contends that the trial court erred in concluding that he did not establish the bounds of the alleged prescriptive easement with reasonable certainty. He argues that he submitted a plethora of credible evidence proving the "actual route" taken by him through the defendant's property.[10] We reject this claim.

[10] The plaintiff points to the following evidence to support his contention that the court incorrectly found that he failed to establish an "actual route" through the defendant's property: (1) the plaintiff's testimony regarding where he would use the alleged easement; (2) a satellite photograph of the parties' properties; (3) a photograph depicting the area where the plaintiff allegedly crossed over into his property; (4) a sketch made by the plaintiff of the route that he would take to enter the alleged easement; (5) testimony that "his route was consistently in the same location" even though his access would vary depending on the direction from which he was entering; (6) a

"The prescriptive right extends only to the portion of the servient estate actually used . . . and is circumscribed by the manner of its use. . . . A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Citations omitted.) *Kaiko* v. *Dolinger*, 184 Conn. 509, 510–11, 440 A.2d 198 (1981). "This requirement is not satisfied when the use is 'indiscriminate over [an] entire area.' " *St. Germain* v. *Hurd*, 128 Conn. App. 497, 502, 17 A.3d 516 (2011). "There have been cases in which this court has affirmed the grant of a prescriptive easement that did not contain the specific terms of the easement, but in those cases, the scope of the easement was nonetheless defined by the common and ordinary use proven at trial. See, e.g., *Kelley* v. *Tomas*, [66 Conn. App. 146, 160, 167 n.4, 783 A.2d 1226 (2001)] (court's description of easement by prescription as general route across property used by defendants for more than twenty years without incident upheld although parties did not introduce evidence such as its metes and bounds); *Simonds* v. *Shaw*, [44 Conn. App. 683, 691, 691 A.2d 1102 (1997)] (court need not define scope of easement because it was already defined by boundaries of roadway)." *St. Germain* v. *Hurd*, supra, 502–503.

In addressing the issue of whether the plaintiff had established the bounds of the alleged prescriptive easement with reasonable certainty, the court found that "[t]here was no specifically designated area of where the trucks or machinery crossed over from 45 Lake Drive to the rear of the plaintiff's property. No evidence was submitted showing evidence of the route or of the ground where the trucks may have driven over, such as ruts or trampled grass, [other] than a drawing by the

photograph of the plaintiff's truck in his backyard; (7) a photograph of the fence blocking the route taken by the plaintiff to reach the rear of his property; and (8) a video of the plaintiff driving his vehicle through the defendant's property to reach his backyard.

plaintiff." See footnote 10 of this opinion. The court proceeded to determine that "[t]he evidence presented was insufficient for the court to determine, with reasonable certainty, what area is being claimed as a prescriptive easement. Would the width of the trucks, vehicles or machinery dictate the width of the easement? Did a vehicle come closer to the plaintiff's property so as to use the bare minimum of the defendant's property? If it was a large machine of some kind, would it have to make a wider swing into the property necessitating a wider easement? Even the video the plaintiff submitted [see footnote 10 of this opinion] shows him driving up the driveway of the defendant's property before turning into the rear of the plaintiff's lot—unlike the drawing [that] he submitted. The court has no evidence as to the actual route."

In *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, 138 Conn. App. 289, 300–301, 50 A.3d 968 (2012), this court affirmed the trial court's finding that the plaintiff in that case met its burden of proof that it established the bounds of the prescriptive easement over the defendant's property with reasonable certainty. The plaintiff had presented an abundance of testimony regarding the boundaries of the easement. Id., 301. This court concluded that, because the plaintiff sufficiently presented evidence that supported an inference that tractor trailer trucks used the prescriptive easement continuously, the plaintiff successfully met its burden of proving the boundaries of the easement with reasonable certainty. Id.

In the present case, the court determined that the plaintiff failed to meet his burden of proving the bounds of the alleged easement to a degree of reasonable certainty. Unlike in *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, supra, 138 Conn. App. 300–301, where the plaintiff had multiple witnesses corroborate the proposed prescriptive easement route, the plaintiff in this

case presented only his own testimony on the matter and several exhibits, which the court, as the trier of fact, found to be inadequate. See *Delena* v. *Grachitorena*, supra, 216 Conn. App. 231 ("[i]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)). Nothing in the record suggests that the court's finding in this regard is clearly erroneous. At most, the plaintiff proved that his use was nothing more than " 'indiscriminate over [an] entire area' " of the defendant's property. *St. Germain* v. *Hurd*, supra, 128 Conn. App. 502. We therefore conclude that the court did not err in determining that the plaintiff failed to establish the boundaries of the alleged prescriptive easement with reasonable certainty.

In sum, we conclude that the court properly determined that the plaintiff was not entitled to the grant of a prescriptive easement over the defendant's property pursuant to § 47-37.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* NORMAN HAUGHEY (AC 47637)

Alvord, Elgo and Keller, Js.

Syllabus

The defendant, who previously had been convicted of the crimes of murder, felony murder and capital felony, appealed from the trial court's dismissal of his motion for sentence modification. The defendant claimed that the court erred in determining that his sentence of life imprisonment without the possibility of release was a mandatory minimum sentence that the court was precluded from modifying pursuant to statute (§ 53a-39 (d)). *Held*:

The trial court correctly determined that § 53a-39 (d) precluded the modification of the defendant's sentence, as a definite sentence of life imprisonment without the possibility of release required to be imposed pursuant to the capital felony statute (§ 53a-35a (1) (A)) operated as a mandatory minimum sentence, despite the absence of the phrases "mandatory minimum" or "may not be suspended or reduced," and § 53a-39 (a) did not offer any express terms or criteria that would have allowed the court to modify that sentence.

The trial court improperly dismissed the defendant's motion for sentence modification on the ground that it lacked subject matter jurisdiction, as the limitation set forth in § 53a-39 (d) operated to limit the court's authority to modify the defendant's sentence but did not affect the court's subject matter jurisdiction, and, accordingly, the court should have denied the motion.

Argued September 3—officially released October 14, 2025

Procedural History

Substitute information charging the defendant with two counts each of the crimes of murder and felony murder, and with one count of the crime of capital felony, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Thompson*, *J.*; verdict and judgment of guilty; thereafter, the court, *P. Brown*, *J.*, dismissed the defendant's motion for sentence modification, and the defendant appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed*.

Michael W. Brown, assigned counsel, for the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, was *John P. Doyle, Jr.*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Norman Haughey, appeals from the judgment of the trial court dismissing his motion for modification of his sentence pursuant to General Statutes § 53a-39 (a). On appeal, the defendant claims that the court erred in its determination that his definite sentence of life imprisonment without the

possibility of release imposed a mandatory minimum sentence that was precluded from modification under § 53a-39 (d). Although we agree with the trial court that § 53a-39 (d) precludes modification of the defendant's sentence, we conclude that the trial court improperly determined that it lacked jurisdiction. Therefore, the form of the judgment is improper, as the court should have denied, rather than dismissed, the motion. Accordingly, we reverse the judgment dismissing the defendant's motion for modification of his sentence and remand the case with direction to deny the motion.

The following facts underlying the defendant's conviction, as set forth by this court in his direct appeal, are relevant to our resolution of this appeal. "Sometime in the late evening of December 1, 2003, the defendant visited the home of the victims, Donna Sosa and Mary Tomasi, located on Albert Street in Hamden. The defendant was personally familiar with the victims, as his grandmother, with whom he occasionally shared a residence, lived on Green Hill Road, which abutted the victims' property. Intent on acquiring money to support his crack cocaine addiction, the defendant gained access to the victims' home and shortly thereafter attacked Sosa in the kitchen, stabbing her repeatedly in the face, neck and right shoulder. The defendant then proceeded upstairs armed with a ten pound dumbbell retrieved from the living room floor, where he found Tomasi sleeping in her bedroom. After striking Tomasi in the face with the dumbbell, fracturing her skull, the defendant searched through her purse, stealing cash and several blank checks, which he later forged in an attempt to acquire additional funds. Sosa and Tomasi died from these attacks.

"The defendant subsequently was arrested and charged with two counts of murder in violation of [General Statutes] § 53a-54a (a), two counts of felony murder (burglary) in violation of [General Statutes] § 53a-54c

and one count of capital felony in violation of [General Statutes (Rev. to 2003)] § 53a-54b (7).[1] A jury trial followed and the defendant was convicted on all counts. At sentencing, the court merged the conviction of the murder and felony murder charges with the capital felony conviction, imposing a term of life imprisonment without the possibility of release." (Footnote added.) *State* v. *Haughey*, 124 Conn. App. 58, 60–61, 3 A.3d 980, cert. denied, 299 Conn. 912, 10 A.3d 529 (2010).

On December 26, 2023, the defendant filed a motion for modification of his sentence, asking the court to modify his sentence of life imprisonment without the possibility of release. The court, *P. Brown, J.*, held a hearing on the motion on March 15, 2024. Before presenting his argument on the merits of the motion, defense counsel raised a threshold issue of whether the defendant's sentence is eligible for modification. As to this issue, counsel argued that the phrases "mandatory minimum" and "sentences that may not be suspended or reduced" are "terms of art" and that, because the statutes under which the defendant was convicted and sentenced do not specifically contain that language, § 53a-39 (d) does not render the defendant's sentence ineligible for modification.

On April 3, 2024, the court issued a memorandum of decision in which it stated that, although "the defendant is correct that [General Statutes] § 53a-35a (1) (A) does not expressly provide that the sentence imposed is a 'mandatory minimum' or 'may not be suspended or

[1] All references in this opinion to § 53a-54b are to the 2003 revision of the statute. "Section 53a-54b was amended by No. 12-5, § 1, of the 2012 Public Acts to substitute 'murder with special circumstances' for 'capital felony.' " *State* v. *McCleese*, 333 Conn. 378, 425 n.25, 215 A.3d 1154 (2019). We refer to the crime proscribed by § 53a-54b as "capital felony" because that was the language used in the statute until its amendment in 2012 and that is the nomenclature employed by the parties and the trial court in this case.

reduced,' the defendant cites no case holding that these phrases must be used by the legislature in order to impose a mandatory minimum sentence." The court determined that the defendant's sentence of life imprisonment without the possibility of release constitutes a mandatory minimum sentence and, thus, § 53a-39 (d) precludes modification. Therefore, the court concluded that it lacked jurisdiction over the motion and dismissed it. This appeal followed.

The defendant's claim on appeal requires our interpretation of § 53a-39 (d). "The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, presents a question of law over which our review is plenary. . . . In construing [§ 53a-39 (d)], our 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Webber*, 225 Conn. App. 16, 29–30, 315 A.3d 320, cert. denied, 349 Conn. 915, 315 A.3d 301 (2024).

In accordance with § 1-2z, we begin our analysis with the text of the relevant statutes. Section 53a-39 (a) provides: "Except as provided in subsection (b) of this section, at any time during an executed period of incarceration, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence,

order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced." Subsection (d) of the statute limits its applicability by providing that "[t]he provisions of this section shall not apply to any portion of a sentence imposed that is a mandatory minimum sentence for an offense which may not be suspended or reduced by the court." General Statutes § 53a-39 (d).

Also relevant to our analysis are the statutes under which the defendant was convicted and sentenced. The defendant was convicted of capital felony under § 53a-54b, which, at the time of the offense, provided in relevant part: "A person is guilty of a capital felony who is convicted of any of the following . . . (7) murder of two or more persons at the same time or in the course of a single transaction . . . ." General Statutes (Rev. to 2003) § 53a-54b (7). Accordingly, he was sentenced under the capital felony statute—§ 53a-35a—which provides in relevant part that, "[f]or any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court as follows: (1) (A) For a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a . . . ."

On appeal, the defendant claims that § 53a-39 (d) does not apply to his sentence because the text of the sentencing statute, § 53a-35a (1) (A), specifically, "life imprisonment without the possibility of release," does not expressly include the phrase "mandatory minimum" or "may not be suspended or reduced." (Emphasis omitted.) The state counters that "[t]he pertinent statutes

plainly and unambiguously establish that, for a capital felony conviction, a sentence of life imprisonment without the possibility of release is a mandatory, nonsuspendable sentence for purposes of [§] 53a-39 (d).'"[2] We agree with the state.

The defendant contends that "[t]he terms used to signify mandatory minimum sentences are *mandatory minimum* and *may not be suspended or reduced*" and that, "[a]bsent this specific terminology in any part of a statute setting forth a crime or category of offense, § 53a-39 (d) does not preclude modification." (Emphasis in original.) We note, however, that § 53a-35a provides in relevant part that "the sentence of imprisonment shall be a definite sentence" of "a term of life imprisonment without the possibility of release . . . ." This language already requires a court to impose a sentence of no less than life imprisonment without the possibility of release and, thus, operates as a mandatory minimum sentence. To require that "mandatory minimum" or "may not be suspended or reduced" be included in the text to reflect a mandatory minimum sentence would be requiring superfluous language in a statute. See, e.g., *State* v. *Webber*, supra, 225 Conn. App. 31 ("statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" (internal quotation marks omitted)).

This interpretation finds support in the decisions of our appellate courts that have recognized that sentences imposed under statutes devoid of the specific terminology cited by the defendant still constitute a mandatory minimum. See, e.g., *State* v. *Lopez*, 197 Conn. 337,

[2] The state also argues that, because the sentence is a mandatory minimum and, thus, cannot be modified, the trial court lacks jurisdiction over the motion. Alternatively, however, the state argues that, if the court improperly determined that it lacked jurisdiction, "it only erred in the form of its judgment, and it should have denied, rather than dismissed, the [motion]." We agree with the state's alternative argument.

354–55 and n.10, 497 A.2d 390 (1985) (where sentencing statute for murder provided for "a term [of incarceration] not less than twenty-five years nor more than life," court found that, under "§ 53a-35a, murder is defined as a class A felony requiring a mandatory minimum sentence of twenty-five years [of] imprisonment" (internal quotation marks omitted)). This refutes the defendant's claim that a statute must contain the term "mandatory minimum" to be considered a mandatory minimum sentence.

Although prior decisions do not specifically address § 53a-35a (1) (A), the statute under which the defendant was sentenced, our courts' interpretation of § 53a-35a (1) (B), murder with special circumstances, presents a comparable example. See, e.g., *State* v. *Silva*, 339 Conn. 598, 601, 262 A.3d 113 (2021) (identifying sentence of life imprisonment without possibility of release provided by § 53a-35a (1) (B) as mandatory sentence). The phrase "mandatory sentence," like that identified in *State* v. *Silva*, supra, 601, operates as a mandatory minimum, as it prohibits the imposition of anything other than what the statute prescribes, including a lesser sentence. Section 53a-35a (1) (B) derives from the same subsection of the same statute and includes the same sentencing term—"life imprisonment without the possibility of release"—as § 53a-35a (1) (A). We are guided by our Supreme Court's recognition that § 53a-35a (1) (B) imposes a mandatory sentence in concluding that § 53a-35a (1) (A) imposes a mandatory sentence that constitutes a mandatory minimum as described in § 53a-39 (d).

The defendant, however, seeks to distinguish his sentence, which he refers to as an "authorized sentence," from a "mandatory minimum" sentence to argue that § 53a-39 allows courts "to impose a sentence other than an 'authorized sentence' as long as it does so within the other specifications of the sentence modification

statute." The defendant notes that "the legislature always maintains the power to make a life [sentence] without the possibility of release something less than a natural life sentence, and that is what the legislature has done with . . . § 53a-39." In support of his argument, the defendant relies on General Statutes § 54-125a (g), which provides in part that a person convicted of one or more crimes committed while under the age of twenty-one who received a definite sentence of more than fifty years may become eligible for parole after serving thirty years. Although the defendant concedes that this statute does not apply to him, he maintains that, by implication, a definite sentence of life imprisonment without the possibility of release may be modified under exceptions and that § 53a-39 (a) offers such an exception.

Under our state's law, "[t]he judiciary may impose a specific sentence, but the legislature has the power to define crimes, prescribe punishments for crimes, [and] impose mandatory minimum terms of imprisonment for certain crimes . . . ." *State* v. *McCleese*, 333 Conn. 378, 416, 215 A.3d 1154 (2019); see also *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ("the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and impose punishment within the limits and according to the methods therein provided"). "A trial court's power to impose a particular sentence is defined by statute, and the constitution does not require that the judiciary be given discretion in sentencing." *State* v. *Lopez*, supra, 197 Conn. 353. Section 53a-35a (1) (A) requires the court to impose a definite sentence of life imprisonment without the possibility of release. The trial court does not have the authority to modify this sentence in the absence of an exception provided by the legislature.

Unlike § 54a-125a (g), which expressly defines the exception to a definite sentence by stating eligibility criteria and the extent to which a sentence may be reduced, § 53a-39 (a) does not offer any express terms or criteria that would allow a court to modify a definite sentence of life imprisonment without the possibility of release. Moreover, subsection (d) of § 53a-39 explicitly restricts the court from modifying mandatory minimum sentences. If the legislature intended to create an exception for a sentence associated with the most serious crimes, while also precluding modification of all other mandatory minimums, it would have done so explicitly. See, e.g., *State* v. *Barnes*, 227 Conn. App. 760, 766, 323 A.3d 1166 ("[i]t is the duty of the court to interpret statutes as they are written . . . and not by construction read into statutes provisions which are not clearly stated" (internal quotation marks omitted)), cert. denied, 350 Conn. 922, 325 A.3d 1093 (2024). For all of these reasons, we conclude that the trial court correctly determined that § 53a-39 (d) precludes modification of the defendant's sentence.

We disagree, however, with the court's determination that it lacked subject matter jurisdiction and conclude that it improperly dismissed, when it should have denied, the defendant's motion for sentence modification. "Our Supreme Court has recognized the distinction between a trial court's jurisdiction and its authority to act under a particular statute. 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. . . . Although related, the court's authority to act pursuant

to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) Id., 769.

"Our courts consistently have held that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . [But] the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . After this occurs, the trial court has jurisdiction to modify or vacate the criminal judgment if the legislature or the state constitution grants continuing jurisdiction." (Citation omitted; internal quotation marks omitted.) *State* v. *Ward*, 341 Conn. 142, 149, 266 A.3d 807 (2021). "[T]he legislature has granted criminal courts continuing statutory authority to make changes to a duly imposed sentence in two ways. First, the legislature has authorized the courts to conduct sentence review pursuant to General Statutes § 51-196. Second, a criminal defendant may seek sentence modification of or discharge from his sentence pursuant to § 53a-39." (Internal quotation marks omitted.) *State* v. *Barnes*, supra, 227 Conn. App. 770.

As this court held in *Barnes*, "[t]hrough the enactment of § 53a-39, the legislature has determined that a court has competence to entertain sentence modifications and, thus, has conferred upon the court jurisdiction to modify a sentence." Id. Therefore, the statutory limitation set forth in § 53a-39 (d) that "[t]he provisions of this section shall not apply to any portion of a sentence imposed that is a mandatory minimum sentence for an offense which may not be suspended or reduced by the court" limits the court's authority and not its

subject matter jurisdiction. See *State* v. *Barnes*, supra, 227 Conn. App. 770 (where defendant had been released on special parole, court had subject matter jurisdiction over motion to modify sentence but lacked authority to afford defendant relief). In the present case, because the defendant is serving a mandatory minimum sentence, which the court does not have the authority to modify as provided by § 53a-39 (d), the court should have denied the motion, not dismissed it.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to render judgment denying the defendant's motion for sentence modification.

DANIEL SHEAR *v.* YUPAPORN SHEAR
(AC 47263)

Alvord, Elgo and Keller, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed from the trial court's judgment granting the defendant's motion for modification of custody and awarding the parties' joint legal custody of their minor child and the defendant primary physical custody of the child. The plaintiff challenged, inter alia, the propriety of the court's custody order. *Held*:

This court dismissed the appeal as moot, as there was no practical relief this court could afford the plaintiff because, during the pendency of the appeal, the challenged custody order had been superseded by a subsequent court order addressing the custody of the parties' child.

Argued September 3—officially released October 14, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Carbonneau*, *J.*, rendered judgment dissolving the marriage and granting

certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Nastri*, *J.*, granted the defendant's motion for modification of custody, denied the plaintiff's motion to vacate and issued certain orders, and the plaintiff appealed to this court; subsequently, the court denied the plaintiff's motion for reconsideration, and the plaintiff filed an amended appeal. *Appeal dismissed.*

Daniel Shear, self-represented, the appellant (plaintiff).

Yupaporn Noipeng, self-represented, the appellee (defendant).

Opinion

PER CURIAM. In this postjudgment dissolution matter, the self-represented plaintiff, Daniel Shear, appeals from the judgment of the trial court resolving several motions filed by the plaintiff and the self-represented defendant, Yupaporn Shear.[1] The plaintiff sets forth a myriad of claims in support of his efforts to reverse the judgment of the court as to custody of the parties' minor child. We dismiss the plaintiff's appeal.[2]

The following facts and procedural history are relevant to our resolution of this appeal. The parties' marriage was dissolved in 2012, and the court, *Carbonneau*, *J.*, incorporated the terms of the parties' written separation agreement into the judgment. That agreement provided that the parties would have joint custody of their

[1] The trial court noted that the defendant is now known as Yupaporn Noipeng.

[2] Because we dismiss the appeal as moot, we need not discuss at length the other impediments to review of the plaintiff's twelve issues identified preliminarily in his appellate briefing. We briefly note, however, that the bulk of the plaintiff's claims are inadequately briefed and unpreserved. Additionally, the plaintiff provided this court with only partial transcripts, which would have rendered the record inadequate to review many of the plaintiff's claims. See Practice Book § 61-10 (it is responsibility of appellant to provide adequate record for review).

child, with her primary residence with the defendant. Following the dissolution of their marriage, the parties engaged in extensive litigation. The parenting plan, however, remained in place until August, 2022, with the exception of an agreement, approved in May, 2015, that the defendant would have final decision-making authority as to the child's medical and dental issues and extracurricular activities. On August 16, 2022, following a hearing on the plaintiff's application for an emergency ex parte order of custody, which alleged that the plaintiff had not had physical contact or telephone calls with the child in more than eight months, the court issued an order awarding the plaintiff sole legal and physical custody of the child. On January 27, 2023, the parties agreed to a parenting time schedule pursuant to which the defendant would have unsupervised parenting time with the child of short duration, gradually increasing to unsupervised parenting time every other weekend (January, 2023 agreement). On February 10, 2023, the defendant filed a motion for modification, seeking joint custody and primary physical custody of the child. On February 14, 2023, the defendant filed an amended motion to vacate and stay the August 16, 2022 order awarding the plaintiff sole legal and physical custody of the child. On March 24, 2023, the plaintiff filed a motion to vacate the January, 2023 agreement, alleging that he would not have entered into it had he known that the defendant would continue to pursue her motion to vacate the order providing him sole custody.

The court, *Nastri*, *J.*, held a hearing over the course of five dates. In its January, 2024 memorandum of decision, the court described the proceedings as follows: "Both parties testified. In addition, the court heard testimony from Keona Leary, the minor child's former therapist at the Klingberg Family Centers; Lindsey Miller, a therapy supervisor at the Klingberg Family Centers;

Sossi Derrien, the minor child's former, occasional caregiver; Kathleen McDaniel, [the defendant's] friend; and [the guardian ad litem, Attorney Robert] McLaughlin." (Footnotes omitted.) The court made findings with respect to each of the parties and the child, concluded that it was in the child's best interest to reside primarily with the defendant, and, among other orders, awarded the parties joint custody of the child and set forth a parenting time schedule. This appeal followed. The plaintiff filed a motion for reconsideration, which was denied. The plaintiff thereafter amended his appeal.

We conclude that the plaintiff's appeal challenging the court's January, 2024 custody order is moot. "Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . 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.) *Christensen* v. *Christensen*, 232 Conn. App. 299, 302–303, 335 A.3d 89 (2025).

In the present case, following the filing of this appeal, in April, 2024, the plaintiff filed a motion for modification of custody. In May, 2024, the plaintiff filed an application for an emergency ex parte order of custody, which was denied. After a hearing, on June 4, 2024, the court, *Alfano*, *J.*, denied the plaintiff's motion for modification, finding that "there has been no material change in circumstances since the court issued its orders on January 3, 2024. Moreover, based upon the

testimony of the parties and the guardian ad litem, the court cannot find that it is in the best interest of the child to modify the court's current orders."

The court's June, 2024 order addresses custody of the parties' child, the same issue that was decided by the court, *Nastri*, *J.*, in its January, 2024 memorandum of decision. Consequently, the January, 2024 custody order has been superseded. Thus, we conclude that there is no practical relief that this court can afford the plaintiff with respect to his numerous challenges to the court's January, 2024 custody order, and this appeal is moot.[3] See, e.g., *J. Y.* v. *M. R.*, 215 Conn. App. 648, 662,

[3] In this appeal, the plaintiff also raises a claim with respect to three motions for contempt that he filed. The plaintiff's January, 2022 motion alleged, inter alia, that the defendant had picked the child up from school on a date that the plaintiff was to have parenting time in January, 2022. The plaintiff's February, 2022 motion alleged seventy instances in which the defendant allegedly had violated court orders between 2019 and February, 2022, primarily involving claims of missed visitation and good night phone calls. The third motion was filed during the final day of the hearing, December 15, 2023, and alleged that the defendant did not comply with court-ordered visitation on fifty-nine dates in 2022.

The plaintiff contends in this appeal that the court improperly failed to address his three motions for contempt in its January, 2024 memorandum of decision and directs this court's attention to a brief remark made by the trial court that it would "rule on the contempts." However, it is clear upon a careful review of the court file that the three motions for contempt were historical, in that all allegations of contempt predate the court's August, 2022 order, in which the plaintiff obtained relief in the form of the court's awarding him sole legal and physical custody of the child. Thus, we are not convinced that the trial court acted improperly in not adjudicating the alleged violations of orders with respect to visitation and good night phone calls, which alleged violations that occurred prior to the court's awarding the plaintiff sole custody of the child in August, 2022, and the parties' subsequent January, 2023 agreement.

Moreover, we note that the plaintiff's primary contention with respect to the motions for contempt is that the motions should have been adjudicated before the court issued its January, 2024 custody order because otherwise it "violates the standard of taking into account each party's willingness to follow the court's orders when deciding custody." To the extent that the plaintiff's argument ultimately seeks to attack the court's January, 2024 custody order, that argument is moot for the reasons expressed in this opinion. See *Christensen* v. *Christensen*, supra, 232 Conn. App. 303–304.

283 A.3d 520 (2022) (challenge to interim custody and visitation orders was moot in light of subsequent orders in which court "reiterat[ed]" orders or left them "largely unchanged," and proper recourse was to challenge later orders (internal quotation marks omitted)); *Santos* v. *Morrissey*, 127 Conn. App. 602, 605, 14 A.3d 1064 (2011) (appeal challenging earlier ruling on custody was moot in light of subsequent order addressing same issues).

The appeal is dismissed.