KEVIN EPPS *v.* COMMISSIONER OF CORRECTION (SC 19773)

Palmer, McDonald, Robinson, D'Auria, Kahn and Vertefeuille, Js.

Argued November 8, 2017—officially released January 16, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to the Appellate Court, *Gruendel*, *Sheldon* and *Mullins*, *Js.*, which affirmed the habeas court's judgment, and the respondent, on the granting of certification, appealed to this court. *Appeal dismissed.*

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, *Leon F. Dalbec, Jr.*, former senior assistant state's attorney, and *Erika L. Brookman*, assistant state's attorney, for the appellant (respondent).

Adele V. Patterson, senior assistant public defender, for the appellee (petitioner).

Opinion

PER CURIAM. The petitioner, Kevin Epps, was convicted of assault in the first degree and kidnapping in the first degree in connection with an incident in which he had inflicted horrific injuries on his then fiancée while the two were in his parked van.[1] In two decisions issued after the petitioner's conviction was rendered final, this court respectively (1) overruled the long-standing interpretation of our kidnapping statutes under which the crime of kidnapping did not require

[1] See generally *State* v. *Epps*, 105 Conn. App. 84, 86–87, 89, 936 A.2d 701 (2007), cert. denied, 286 Conn. 903, 943 A.2d 1102 (2008).

that the restraint used be more than that which was incidental to and necessary for the commission of another crime against the victim, and (2) deemed that holding to apply retroactively to collateral attacks on final judgments.[2] The petitioner thereafter sought a new trial on the kidnapping charge in light of those holdings in an amended petition for a writ of habeas corpus.

The habeas court granted the petition. It concluded that the petitioner's claim challenging the kidnapping instruction at his criminal trial for the first time in the habeas proceeding was not subject to a defense of procedural default and that the omission of a limiting instruction on the element of restraint in the kidnapping charge (*Salamon* claim); see footnote 2 of this opinion; was not harmless beyond a reasonable doubt. On appeal, the Appellate Court determined that the petitioner's claim was subject to a procedural default defense, but that the petitioner had overcome that defense, in part by demonstrating that the instructional error was not harmless beyond a reasonable doubt given the conflicting testimony at the criminal trial regarding the petitioner's restraint of his fiancée. *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 737, 741–42, 104 A.3d 760 (2014). The respondent, the Commissioner of Correction, filed a petition for certification to appeal to this court, seeking to challenge the Appellate Court's interpretation and application of the procedural default defense.

While the respondent's petition was pending before this court, we issued our decision in *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016). In that case, we held that *Salamon* claims are not subject to procedural default and determined that habeas

[2] See *State* v. *Salamon*, 287 Conn. 509, 518, 542, 548, 949 A.2d 1092 (2008); *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 751, 12 A.3d 817 (2011).

relief was warranted because the omission of the *Salamon* limiting instruction was not harmless beyond a reasonable doubt. Id., 70–81. After reaching that conclusion, we observed, parenthetically, that this court had not had occasion to consider the position adopted by the United States Supreme Court in 1993, when that court retreated from 200 years of precedent assessing harm for constitutional error under the same standard in both direct appeals and collateral proceedings in favor of a stricter standard for relief in the latter. Id., 81–83; see *Brecht* v. *Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Shortly after we issued our decision, this court notified the parties to the present case that, in light of *Hinds*, the respondent had permission to file an amended petition for certification. Over the petitioner's objection, this court granted the respondent's amended petition, which raised the question "left unresolved" by *Hinds* regarding the proper measurement of harm in collateral proceedings like the present one and the question of whether, irrespective of which standard applied, harm had been established in the petitioner's criminal case.[3]

[3] Specifically, this court granted certification, limited to the following questions:

"1. Whether, in a question left unresolved by *Hinds* v. *Commissioner of Correction*, [supra, 321 Conn. 76–94], in a collateral proceeding, where the petitioner claims that the trial court erred by omitting an element of the criminal charge in its final instructions to the jury, is harm measured in accordance with *Brecht* v. *Abrahamson*, [supra, 507 U.S. 637], or is harm measured in accordance with *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)?

"2. If the *Brecht* standard for assessing harm is adopted by this court, did the evidence in this case establish that the absence of an instruction in accordance with *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), had no 'substantial and injurious effect or influence in determining the jury's verdict' finding the petitioner guilty of kidnapping?

"3. If the *Neder* standard for assessing harm is adopted by this court, did the Appellate Court err when it held that '[i]n the absence of a *Salamon* instruction, [it had] no reasonable assurance that the [petitioner's] kidnapping conviction was not based on restraint of the victim that was incidental to the assault of which the petitioner was convicted?' " *Epps* v. *Commissioner of Correction*, 323 Conn. 901, 150 A.3d 679 (2016).

After a careful review of the record, we have reconsidered our decision to permit the respondent to file the amended petition for certification and to grant that petition. The respondent had squarely argued to the habeas court that the petition should be assessed under the harmless beyond a reasonable doubt standard. The respondent never argued in the alternative that a higher standard of harmfulness should apply to collateral proceedings even if the petitioner's claim was not subject to procedural default, despite federal case law applying a higher standard since 1993. Accordingly, we conclude that this is not the proper case in which to fairly address this consequential issue and that certification was improvidently granted.[4]

The appeal is dismissed.

RUTH COHEN *v.* FRANKLIN COHEN
(SC 19640)

Rogers, C. J., and Palmer, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed from the trial court's decision to grant the plaintiff's motion to modify alimony on the ground that the defendant's income had substantially increased. The parties' separation agreement, which was incorporated into the dissolution judgment, provided that the defendant would pay the plaintiff alimony based on a certain percentage of

[4] Insofar as the respondent also asked this court to consider whether the petitioner was entitled to prevail under the less stringent *Neder* standard, the respondent has not effectively briefed that question by disregarding the requirements of that standard, under which a reviewing court must be satisfied "beyond a reasonable doubt that the omitted element *was uncontested* and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Emphasis added.) *Neder* v. *United States*, 527 U.S. 1, 17, 118 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); accord *State* v. *Thompson*, 305 Conn. 806, 815, 48 A.3d 640 (2012); *State* v. *Rodriguez–Roman*, 297 Conn. 66, 90, 3 A.3d 783 (2010); *State* v. *Flowers*, 278 Conn. 533, 544, 898 A.2d 789 (2006); *State* v. *Montgomery*, 254 Conn. 694, 738, 759 A.2d 995 (2000).

his income. Several years later, the defendant's income was significantly reduced, and the trial court granted his motion to modify alimony to a fixed weekly amount, finding that there had been a substantial change in circumstances since the time of the divorce. Subsequently, the plaintiff filed a motion to modify that prior modification order, claiming that the defendant's earnings at that time were substantially in excess of the earning capacity on which the prior modification order was based, and noting that the original alimony award was based on a percentage of the defendant's income. The defendant objected, claiming that the modification of alimony statute (§ 46b-86) required the trial court to compare the parties' current financial circumstances to their circumstances at the time of the last court order and, furthermore, that it was improper under *Dan* v. *Dan* (315 Conn. 1) to modify alimony solely on the basis of an increase in the supporting spouse's income. The trial court found that there had been a substantial change in circumstances because the income of both parties had substantially increased and granted the motion for modification, ordering the defendant to pay alimony based on a percentage of his income. The court reasoned that the modification was permitted under *Dan* because the alimony award based on the prior modification order was no longer sufficient to fulfill the underlying purpose of the original award, namely, to have the plaintiff share in the defendant's fluctuating income from employment. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly considered the parties' financial circumstances at the time of the divorce decree when it granted the plaintiff's motion to modify the prior modification order: the trial court did not improperly base its decision to modify alimony on a comparison between the parties' current financial circumstances and their circumstances at the time of the divorce decree, as that court's finding that the prior modification order was no longer sufficient to fulfill the underlying purpose of the original alimony award could only have been made on the basis of the change in the parties' financial circumstances since the date of that prior modification order, the most significant of which was the threefold increase in the defendant's income; furthermore, there was no merit to the defendant's claim that the trial court was barred from considering the purpose of the original alimony award in crafting an equitable modification because, although the trial court was not permitted the change the underlying purpose of the original alimony award by way of a modification, the underlying purpose of the original alimony award was properly considered once the court determined that the changed circumstances justifying the prior modification had ceased to exist.
2. The plaintiff's motion for modification was not legally insufficient on its face on the ground that it alleged only that the defendant's income had significantly increased without alleging that the prior modification order was insufficient to fulfill the underlying purpose of the original alimony award; the allegation that there had been a substantial change in circum-

stances because the defendant's income had substantially increased since the prior modification order was sufficient to justify reconsideration of that prior order, and the plaintiff was not required to enumerate in the motion itself the reasons why the substantial change in circumstances justified a modification or to cite the case law supporting the motion.

3. The trial court properly considered extrinsic evidence of the parties' intent when they entered into the separation agreement and properly took judicial notice of the plaintiff's previous financial affidavit in the court file to support its conclusion that the purpose of the original alimony award was to address the fluctuating nature of the defendant's income and to have the plaintiff share in that income: the trial court properly considered extrinsic evidence of the parties' intent, as the separation agreement did not indicate whether the purpose of the alimony award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or to provide her with the same standard of living she had enjoyed during the marriage; furthermore, it having been well established that a court has the power to take judicial notice of court files of other actions between the same parties and this court having determined that the trial court was authorized to consider the underlying purpose of the original alimony award, it was proper for the trial court to take judicial notice of items in the court file that shed light on that underlying purpose.

4. The defendant could not prevail on his claim that the trial court's modification order was impermissible in view of the court's finding that the underlying purpose of the original alimony award was to allow the plaintiff to share in the defendant's standard of living after the divorce because that purpose was not a legitimate purpose of the original award: although the defendant's claim that the trial court's modification order had an unlawful purpose effectively constituted a collateral attack on the original alimony award, inasmuch as the trial court was bound by the purpose of the original award in determining whether a modification was justified, this court addressed the defendant's claim because he could not prevail on it and in order to provide future litigants with guidance; furthermore, under this court's decision in *Dan*, it may be a legitimate purpose of an alimony award to allow the supported spouse to share the supporting spouse's standard of living after the divorce, and any modification of an alimony award should implement the original purpose of the award to the extent possible; moreover, the trial court was not required to presume, pursuant to this court's decision in *Dan*, that the exclusive purpose of the original alimony award was to allow the plaintiff to continue to enjoy the standard of living that she had enjoyed during the marriage, as the plaintiff, unlike the supported spouse in *Dan*, was merely attempting to reinstate the percentage provision of the original alimony award, thereby preserving its underlying purpose.

Argued October 17, 2017—officially released January 16, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Dennis Harrigan*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Shay, J.*, granted the defendant's motion for modification of alimony; subsequently, the court, *Colin, J.*, granted the plaintiff's motion for modification of alimony, from which the defendant appealed. *Affirmed.*

Samuel V. Schoonmaker IV, with whom, on the brief, were *Jonathan E. Von Kohorn* and *Wendy Dunne DiChristina*, for the appellant (defendant).

Thomas M. Cassone, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. The marriage of the plaintiff, Ruth Cohen, and the defendant, Franklin Cohen, was dissolved in 2002. At that time, the trial court, *Hon. Dennis Harrigan*, judge trial referee, incorporated their separation agreement, which contained a provision requiring the defendant to pay alimony to the plaintiff, into the divorce decree. In 2010, the defendant filed a motion to modify the alimony provision of the divorce decree on the ground that his income had declined significantly. The trial court, *Shay, J.*, granted that motion by way of a corrected memorandum of decision in 2012. In 2013, the plaintiff filed a motion to modify the 2012 modification order on the ground that the defendant's income had substantially increased. The trial court, *Colin, J.*, granted that motion. The defendant

then filed this appeal[1] claiming, among other things, that Judge Colin improperly (1) based his conclusion that there had been a significant change in the parties' financial circumstances warranting a modification of the 2012 modification order on a comparison of their current circumstances to their circumstances at the time of the divorce decree, instead of their circumstances at the time of the previous 2012 modification order, (2) considered the plaintiff's motion for modification when it was "legally insufficient" on its face, (3) considered certain evidence in support of his conclusion that the 2012 modification order should be modified, and (4) rendered an illegal "lifetime profit sharing order." We reject these claims and affirm the judgment of the trial court.

The record reveals the following procedural history and facts that were found by Judge Colin or are undisputed. The marriage of the parties was dissolved on January 4, 2002, after twenty-seven years of marriage. At the time of the dissolution judgment, the plaintiff was unemployed and had no income. The defendant was employed in the commercial mortgage business and had a net weekly income of $2961.98. The parties entered into a separation agreement, which the trial court, *Hon. Dennis Harrigan*, judge trial referee, approved and incorporated into the divorce decree. The separation agreement provided in relevant part that, "[c]ommencing January 1, 2002, the [defendant] shall pay during his lifetime to the [plaintiff], as alimony, 33 1/3 [percent] of the first $180,000 of the [defendant's] gross income from his employment and 33 1/3 [percent] of [one half] . . . of the income actually received from his limited partnership interest in [various entities] and 25 [percent] of the next $200,000 in earnings and 38

[1] The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[percent] of the next $370,000 in earnings . . . .'' The agreement further provided that ''[t]he [plaintiff] shall not be entitled to share in [the] earnings of the [defendant] in excess of $750,000 in any calendar year and in no event shall receive more than $250,000 as her share of commission payments in any calendar year.'' The alimony payments were to continue until the plaintiff's death, remarriage or cohabitation.

As the result of poor market conditions during the years 2008, 2009 and 2010, the defendant's income was significantly reduced. In 2010, he filed a motion to modify the alimony provision of the divorce decree by reducing the percentage of his income that he was required to pay the plaintiff. After an evidentiary hearing, the trial court, *Shay*, *J.*, found that there had been a substantial change in circumstances since the time of the divorce decree because the defendant's current net income had decreased to $1373.95 per week, and the plaintiff's net income had increased to $945.15 per week. Judge Shay granted the defendant's motion for modification and ordered that the defendant pay the plaintiff $250 per week until her death or remarriage.

In September, 2011, the plaintiff filed a motion to open and vacate that modification order on the basis of new evidence showing that the defendant's income was actually $8805.63 per week, not $1137.95 as Judge Shay had found. The plaintiff contended that, in light of the cyclical nature of the defendant's business, alimony expressed as a percentage of the defendant's income was more appropriate than a set dollar amount. The defendant agreed that an award based on a percentage of his income was appropriate. After an evidentiary hearing, Judge Shay issued a corrected memorandum of decision, finding that the plaintiff's current net income from employment was $392.09 per week and her investment income was $581 per week, for a total of $973.09 per week, and the defendant's current net income was

$1310.34 per week. Judge Shay further found, however, that the defendant's net income should be calculated on the basis of his income over a two year period and that, using that method, his earning capacity was $158,420 per year, or a net income of $2163 per week. On that basis, Judge Shay ordered the defendant to pay the plaintiff $2750 per month until her death or remarriage (2012 modification order).

In November, 2013, the plaintiff filed a motion to modify the 2012 modification order on the ground that the defendant's earnings in 2012 were more than $293,000, substantially in excess of his earning capacity of $158,420 as found by Judge Shay. In her motion, the plaintiff pointed out that the original alimony provision of the divorce decree had required the defendant to pay the plaintiff a percentage of his income. The defendant objected to the motion on the ground that it would be improper for the court to consider the divorce decree because, when considering a motion for modification of alimony orders pursuant to General Statutes § 46b-86, the trial court's "inquiry is necessarily confined to a comparison between the current conditions and the last court order." *Borkowski* v. *Borkowski*, 228 Conn. 729, 738, 638 A.2d 1060 (1994). The defendant further contended that a modification based solely on an increase in his income would be improper under this court's holding in *Dan* v. *Dan*, 315 Conn. 1, 14, 105 A.3d 118 (2014), that "an increase in the income of the supporting spouse, standing alone, is not a sufficient justification to modify an alimony award."

After an evidentiary hearing, the trial court, *Colin J.*, found that the plaintiff had a current net income from employment of $438.[2] In addition, she received $284 per week in social security benefits and $180 per month

[2] Hereinafter, all references to the trial court are to Judge Colin unless otherwise indicated.

from a pension, for a total weekly income of $763.54. The defendant had a current net weekly income of $6765. The trial court found that there had been a substantial change in circumstances in that "the incomes of both parties have substantially increased." The court then addressed the defendant's argument that, under *Dan* v. *Dan*, supra, 315 Conn. 14, an alimony modification cannot be based solely on an increase in the supporting spouse's income. The court concluded that *Dan* was distinguishable because (1) there had been no intervening modification of the original alimony award in *Dan*, (2) the supported spouse in *Dan* was seeking a modification that would have increased the amount that she was receiving to more than the amount of original alimony award, and (3) the intent of the original award in *Dan* was to allow the supported spouse to maintain the standard of living that she had enjoyed during the marriage, but, in the present case, the intent of the original award was to allow the plaintiff to share in the defendant's post-divorce earnings.

The court then noted that, under *Dan*, "[w]hen the initial award was not sufficient to fulfill the underlying purpose of the award . . . an increase in the supporting spouse's salary, in and of itself, may justify an increase in the award. For example, if the initial alimony award was not sufficient to maintain the standard of living that the supported spouse had enjoyed during the marriage because the award was based on a reduction in the supporting spouse's income due to unemployment or underemployment as a result of an economic downturn, and, after the divorce, the supporting spouse's income returns to its previous level, a modification might well be justified." *Dan* v. *Dan*, supra, 315 Conn. 15–16. After concluding that the 2012 modification order was "no longer sufficient to fulfill the underlying purpose of the original alimony award, namely, to have the plaintiff share in the defendant's fluctuating

income from employment," the trial court granted the plaintiff's motion for modification. The court ordered the defendant to pay the plaintiff "25 [percent] of the first $500,000 of the [his] gross income from employment. The defendant shall make minimum payments of $3333.33 per month on the first of each month, in advance. Then, if, as and when the defendant receives gross income from employment over $160,000 in any year, he shall pay to the [plaintiff] 25 [percent] of the gross income from employment within ten business days of the defendant's receipt of gross income from employment in excess of $160,000. The plaintiff shall not be entitled to share in the defendant's gross income from employment in excess of $500,000; as a result, the maximum amount of alimony that the plaintiff can receive under this order is $125,000 per year." The payments were to continue until the plaintiff's death or remarriage, and the order was retroactive to January 1, 2014.

On appeal, the defendant contends that the trial court improperly (1) based its conclusion that there had been a significant change in the parties' financial circumstances, warranting a modification of the 2012 modification order, on a comparison of their current circumstances to their circumstances at the time of the divorce decree, instead of their circumstances at the time of the previous 2012 modification order, (2) considered the plaintiff's motion for modification when it was "legally insufficient" on its face, (3) considered certain evidence in support of its conclusion that the 2012 modification order should be modified, and (4) rendered an illegal "lifetime profit sharing order." We reject all of these claims.

I

We first address the defendant's claim that the trial court improperly considered the parties' financial cir-

cumstances at the time of the divorce decree when it determined that (1) there was a substantial change in circumstances warranting consideration of the plaintiff's motion for modification, and (2) the 2012 modification order should be modified. We begin our analysis with a review of the legal principles governing the modification of alimony awards. "It is . . . well established that when a party, pursuant to § 46b-86, seeks a postjudgment modification of a dissolution decree . . . he or she must demonstrate that a substantial change in circumstances has arisen subsequent to the entry of the [decree]." *Borkowski* v. *Borkowski*, supra, 228 Conn. 736. "Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony . . . are relevant to the question of modification." (Internal quotation marks omitted.) Id., 737.

"The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties.

"Therefore, although the trial court may consider the same criteria used to determine the initial award without limitation . . . in doing so, its inquiry is necessarily confined to a comparison between the current conditions and the last court order. To permit the trial court to reconsider all evidence dating from before the original divorce proceedings, in determining the adjustment of alimony, would be, in effect, to undermine the policy behind the well established rule of limiting proof of the substantial change of circumstances to events occurring subsequent to the latest alimony order—the avoidance of relitigating matters already settled." (Cita-

tions omitted; footnote omitted; internal quotation marks omitted.) Id., 738.

In the present case, the defendant contends that the trial court ignored these principles when it concluded that there had been a substantial change in circumstances, which is "the threshold predicate for the trial court's ability to entertain [the plaintiff's] motion for modification [of alimony] . . . ." Id., 737. Specifically, the defendant points out that the court found that "the incomes of both parties have substantially increased." Because the plaintiff's income had, in fact, *decreased* from $973.09 per week at the time of the 2012 modification order to $763.54 per week in 2015, the defendant contends that the trial court could only have been comparing the plaintiff's current income to her income at the time of the divorce decree, which was zero. It follows, he further contends, that the trial court must also have been comparing the defendant's current income to his income at the time of the divorce decree when, under *Borkowski*, the court should have compared the financial circumstances of the parties at the time of the 2012 modification order to their current circumstances. See *Borkowski* v. *Borkowski*, supra, 738 (when determining whether there are substantially changed circumstances for purposes of establishing threshold predicate for consideration of motion for modification, trial court's "inquiry is necessarily confined to a comparison between the current conditions and the last court order").

We agree with the defendant that, when the trial court was considering whether there had been a substantial change in circumstances, it should have compared the parties' current financial circumstances in 2015 to their circumstances as found by Judge Shay in the 2012 modification order and not their circumstances at the time of the divorce decree. Although the trial court's memorandum of decision is not entirely clear on this point,

we also agree that it is reasonable to conclude that the trial court's statement that the plaintiff's income had substantially increased indicates that the court was comparing her current income to her income at the time of the divorce decree.[3] Even if we were to assume, however, that that was the case, we conclude that any error was harmless.

The trial court expressly stated that "the defendant's income has increased substantially and the [2012 modification order] is *no longer* sufficient to fulfill the underlying purpose of the original alimony award . . . ." (Emphasis added.) It is clear, therefore, that the court believed that the 2012 modification order *was* sufficient to fulfill the underlying purpose of the original alimony award, to the extent possible under the changed circumstances, at the time that it was rendered. If that was no longer the case, it could only have been because of the change in the parties' financial circumstances *since the date of the 2012 modification order*, the most significant of which was, by far, the increase in the defendant's income.[4] Accordingly, even if the trial court's threshold finding that there was a substantial change in circumstances was improperly based on a comparison of the parties' financial circumstances at the time of the divorce decree with their current circumstances, it is clear that the court would have reached the same conclusion if it had properly compared the parties' financial circumstances at the time of the 2012 modification order with their current circumstances.

[3] Indeed, in light of the fact that the trial court expressly noted that the plaintiff's net weekly income at the time of the 2012 modification order was $973, we find it improbable that the court mistakenly believed that the plaintiff's income had increased from the date of the 2012 modification order.

[4] As we have indicated, the trial court found that the defendant's weekly net income had increased from $2163 at the time of the 2012 modification order to $6765 in 2015 and that the plaintiff's net weekly income at the time of the 2012 modification order was $973 and was $763.54 in 2015.

With respect to the defendant's claim that the trial court improperly based its modification order on a comparison between the parties' financial circumstances at the time of the divorce decree and their current circumstances, we disagree. Judge Shay found in the 2012 modification order that there had been a substantial change in circumstances since the date of the divorce decree in part because "the [plaintiff] is now employed and has additional income from investments . . . ." Partly on the basis of this change in circumstances, Judge Shay reduced the alimony award from a percentage of the defendant's income, capped at $250,000, to a flat payment of $2750 per month. Thus, when Judge Colin stated in his 2015 decision that any alimony modification should reflect "the substantial change in the [plaintiff's] income," presumably since the date of the divorce decree, he was merely recognizing the continuing validity of Judge Shay's holding that the substantial increase in the plaintiff's income since the date of the divorce decree warranted a reduction in the original alimony award. It does not follow that Judge Colin's order modifying the 2012 modification order by increasing the alimony payment to a percentage of the defendant's income, with payments capped at $125,000, was based on a comparison of the defendant's income at the time of the divorce decree with his current income. Rather, as we have indicated, because Judge Colin believed that the 2012 modification order was sufficient when it was rendered to fulfill the purpose of the alimony award in the divorce decree, to the extent possible, his modification of the 2012 modification order could only have been based on changes in the parties' financial circumstances since the date of that order, the most significant of which was the threefold increase in the defendant's income.

Finally, to the extent that the defendant contends that, after Judge Shay issued the 2012 modification

order, the trial court was barred under *Borkowski* from considering the purpose of the original alimony provision in the divorce decree when it was crafting an equitable modification, we disagree.[5] The defendant effectively contends that, when Judge Shay issued the 2012 modification order, he intended to change the underlying purpose of the alimony award and that the new purpose should be controlling for purposes of all future motions for modification. There is an important distinction, however, between changing the purpose of an original alimony award when ruling on a motion for modification, which is generally prohibited, and finding that a modification of alimony is required because changed circumstances have made it impossible to fulfill the underlying purpose of the original award, which is a proper function of the court. See *Dan* v. *Dan*, supra, 315 Conn. 17 (court's ruling on motion for modification should not change underlying purpose of initial alimony award but may consider that underlying purpose); *Borkowski* v. *Borkowski*, supra, 228 Conn. 738 ("[t]he power of the trial court to modify the existing order does not . . . include the power to retry issues already decided"). Because the court is not permitted to change the underlying purpose of the original alimony award by way of modification, the purpose of a modification is controlling only as long as the circumstances requiring that modification continue to be present. Accordingly, if a trial court considering a subsequent motion for modification determines that the circumstances justifying a previous modification have ceased to exist, then the underlying purpose of the original alimony award still controls. We therefore conclude that the trial court properly considered the underlying purpose of the original alimony award upon determining that the

[5] We address the defendant's claim that the trial court in the present case improperly considered certain evidence to determine the purpose of the original alimony award in part III of this opinion.

changed circumstances justifying the 2012 modification order no longer existed.

II

We next address the defendant's claim that the plaintiff's motion for modification was "legally insufficient" on its face because it alleged only that the defendant's income had significantly increased and did not allege that the 2012 modification order was insufficient to fulfill the underlying purpose of the original alimony award or that there were other exceptional circumstances justifying a modification, as required by *Dan*. We disagree.

In support of this claim, the defendant points out that this court held in *Dan* that an increase in income, standing alone, does not justify a modification of an alimony award unless "the initial award was not sufficient to fulfill the underlying purpose of the award"; *Dan* v. *Dan*, supra, 315 Conn. 15–16; or if other exceptional circumstances exist. Id., 17. As we recognized in *Dan*, however, "it is well established that an increase in the income of the paying spouse, standing alone, is sufficient to *justify reconsideration* of a prior alimony order pursuant to § 46b-86 . . . ." (Citation omitted; emphasis in original.) Id., 9. In other words, a party seeking modification of an alimony award need only claim in the motion for modification that there has been a substantial change in circumstances to warrant reconsideration. We have never required a party seeking modification to cite in the motion for modification itself all of the reasons *why* the substantial change in circumstances justifies a modification or the case law supporting the motion. Accordingly, we conclude that the plaintiff's motion for modification, which alleged that there had been a substantial change in circumstances because the defendant's income had substantially

increased since the 2012 modification order, was not legally insufficient.

III

We next address the defendant's claim that, even if the plaintiff's motion for modification was legally sufficient, the trial court improperly considered certain evidence to support its conclusion that the purpose of the original alimony award was "to address the fluctuating nature of the defendant's income and to have the plaintiff share in that income [from employment] . . . ." Specifically, the defendant contends that (1) the trial court should not have considered extrinsic evidence of the parties' intent when they entered into the separation agreement without first finding that the agreement was ambiguous; see *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920, 929 (2015) ("[w]hen only one interpretation of a contract is possible, the court need not look outside the four corners of the contract" [internal quotation marks omitted]); and (2) the court improperly took judicial notice of the contents of the court file. See *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) ("[A]uthorities have drawn a distinction between 'legislative facts,' those which help determine the content of law and policy, and 'adjudicative facts,' facts concerning the parties and events of a particular case. The former may be judicially noticed without affording the parties an opportunity to be heard, but the latter, at least if central to the case, may not."). We disagree.

As we have indicated, this court held in *Dan* that the trial court should consider the purpose of the original alimony award when determining whether an increase in the supporting spouse's income, standing alone, justifies a modification. See *Dan* v. *Dan*, supra, 315 Conn. 11–15. In the present case, the original alimony award in the separation agreement unambiguously provided

that the defendant would pay the plaintiff a percentage of his income, up to a maximum of $250,000 annually. The agreement did not indicate, however, whether the purpose of the award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or, instead, to provide her with the same standard of living that she had enjoyed during the marriage. If the defendant's income prior to the divorce had been steady over a long period of time and the parties anticipated that he would have a similar income for the foreseeable future, it would be reasonable to conclude that the purpose of the original alimony award was simply to maintain the plaintiff's standard of living. On the other hand, if the defendant's income had fluctuated widely from year to year before the divorce, it would be reasonable to conclude that the purpose of the award was to allow the plaintiff to continue to share in the defendant's income after the divorce, in both bad times and good times. Because the separation agreement itself was silent on this point, we conclude that the trial court properly considered extrinsic evidence, including the defendant's testimony at the hearing on the plaintiff's motion for modification in 2015 that his income fluctuated widely from year to year on the basis of business conditions.

The defendant also claims that the trial court improperly took judicial notice of certain items in the court file, specifically, the plaintiff's 2002 financial affidavit. It is well established, however, that "[t]he trial court has the power to take judicial notice of court files of other actions between the same parties." *In re Mark C.*, 28 Conn. App. 247, 253, 610 A.2d 181, cert. denied, 223 Conn. 922, 614 A.2d 823 (1992). To the extent that the defendant contends that it was improper for the court to do so under the specific circumstances of this case because the court was barred from considering *any* evidence that predated the 2012 modification order,

we have already concluded that the trial court was authorized to consider the underlying purpose of the original alimony award. See part I of this opinion. Accordingly, we conclude that it was proper for the court to take judicial notice of items in the court file that shed light on that purpose.

IV

Finally, we address the defendant's claim that "[t]he trial court entered an impermissible lifetime profit sharing order based on its finding that the 'underlying purpose of the original alimony award [was] . . . to have the plaintiff share in [the defendant's] fluctuating income [from employment],' rather than to meet her needs." We disagree.

As a preliminary matter, we note that, inasmuch as the trial court was bound by the purpose of the original alimony award when determining whether a modification was justified; see *Dan* v. *Dan*, supra, 315 Conn. 15–16; the defendant's claim that the modification order had an unlawful purpose effectively constitutes a collateral attack on the original alimony award.[6] Collateral attacks on judgments are strongly disfavored. See, e.g., *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013). Nevertheless, because the defendant cannot prevail on this claim, and in order to provide future litigants with guidance on this issue, we address it. Cf. *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to prop-

[6] We have concluded in part I of this opinion that the trial court properly considered the purpose of the original alimony award when it modified the 2012 modification order.

erly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim").

This court concluded in *Dan* v. *Dan*, supra, 315 Conn. 11, that "[t]here is little, if any, legal or logical support . . . for the proposition that a legitimate purpose of alimony is to allow the supported spouse's standard of living to match the supporting spouse's standard of living *after* the divorce, when the supported spouse is no longer contributing to the supporting spouse's income earning efforts." (Emphasis in original.) Id., 11. The specific issue that was before this court in *Dan*, however, was whether an increase in the supporting spouse's income, standing alone, justifies increasing an alimony award *when the purpose of the alimony award was to allow the supported spouse to continue the standard of living that she enjoyed during the marriage.*[7] Id., 18–19. We did not intend to suggest in that case that parties are barred as a matter of law from voluntarily entering into a divorce agreement containing an alimony provision that is intended to allow the supported spouse to share, to any extent whatsoever, the supporting spouse's standard of living after the divorce. Indeed, there are circumstances under which both the supported spouse and the supporting spouse might reason-

[7] This court observed in *Dan* that, "[h]istorically, alimony was based [on] the continuing duty of a divorced husband to support an abandoned wife and should be sufficient to provide her with the kind of living [that] she might have enjoyed but for the breach of the marriage contract by the [husband]." (Internal quotation marks omitted.) *Dan* v. *Dan*, supra, 315 Conn. 10. The defendant in *Dan* contended that the purpose of the alimony award at issue in that case was to "ensure that [the plaintiff] receive[d] adequate support." (Internal quotation marks omitted.) The plaintiff did not dispute this claim, but claimed only that the original alimony award was no longer sufficient to meet her needs or to allow her to enjoy the standard of living that she enjoyed during the marriage. Id., 18. Thus, there was no claim or evidence that the underlying purpose of the original alimony award was to allow the plaintiff to share the defendant's standard of living after the divorce.

ably desire such an arrangement. For example, when, as in the present case, the level of the supporting spouse's income is highly sensitive to market conditions, the supporting spouse might reasonably agree to an arrangement that allows the supported spouse to share in the benefits of particularly good years in order to avoid being required to make a substantial flat payment in bad years. Such an arrangement would also avoid the need for frequent motions for modification based on the supporting spouse's fluctuating income. If the supporting spouse anticipates that there may be a significant increase in his average annual income after the divorce, he can protect himself by including an annual cap on alimony payments, as the defendant did in the present case.[8] Accordingly, we reject the defendant's claim that *Dan* held, as an inviolable rule of law, that it is not a legitimate purpose of alimony to allow the supported spouse to share the supporting spouse's standard of living after the divorce, even to a limited extent. Rather, the main teachings of *Dan* are that the *ordinary*, but not necessarily exclusive, purposes of alimony are either to allow the supported spouse to continue enjoying the standard of living that he or she enjoyed during the marriage or to allow the supported spouse to become self-sufficient; id., 10–11; and that any modification of an alimony award should implement the original purpose of the award to the extent possible.[9] See id., 15–16.

The defendant points out, however, that this court in *Dan* presumed that the alimony award in that case, which was based on a voluntary agreement between

[8] As we have indicated, the trial court also included a cap on alimony payments in the modification order that is the subject of this appeal, a cap that was one half of the amount provided for in the original alimony award.

[9] We emphasize, however, that we continue to believe that the trial courts should not, in the absence of good reasons, depart from the general rule that the purpose of alimony is to allow the supported spouse to continue to enjoy the standard of living that existed during the marriage.

the parties and included a percentage of any bonus income that the defendant received, as well as a flat payment of $15,000 per month; see *Dan* v. *Dan*, supra, 315 Conn. 4; was intended to allow the plaintiff to maintain the standard of living that she enjoyed during the marriage, not to allow her to share the defendant's standard of living after the divorce. See id., 18 ("it is reasonable to conclude, in the absence of any suggestion to the contrary, that the purpose of the original alimony award, which was based on the stipulation of the parties . . . was to allow the plaintiff to maintain the standard of living that she enjoyed during the marriage"). Because the award in the present case was also based on a percentage of his income, the defendant contends, the trial court in the present case should have made the same presumption.

As we have explained, however, the plaintiff in *Dan* made no claim that the purpose of the alimony award was to allow her to share the defendant's standard of living after the divorce, but claimed only that she was no longer able to enjoy the standard of living that she had enjoyed during the marriage. See footnote 7 of this opinion. Moreover, the plaintiff in *Dan* was not attempting to reinstate the provision of the original alimony award that required the defendant to pay her a percentage of his bonus income, which was the provision that allowed the plaintiff's income to track the defendant's income after the divorce, at least to some extent. See id., 4–5. Rather, she was attempting to *increase* the defendant's flat alimony payment on the ground that his base salary had increased from $696,000 at the time of the divorce to more than $3.24 million at the time of the motion for modification. Id., 5–6. Thus, in the absence of any other change in circumstances, the modification requested by the plaintiff in *Dan* could only have increased her standard of living to a level higher than that contemplated by the original alimony

award. In contrast, the plaintiff in the present case was merely attempting to reinstate the percentage provision of the original award, thereby preserving its underlying purpose. Accordingly, we conclude the trial court was not required under *Dan* to presume in the present case that the exclusive purpose of the original alimony award was to allow the plaintiff to continue to enjoy the standard of living that that she enjoyed during the marriage.

The judgment is affirmed.

In this opinion the other justices concurred.

IN RE EGYPT E. ET AL.*
(SC 19913)
(SC 19914)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson and Espinosa, Js.**

Syllabus

The respondent parents, M and N, appealed from the judgments of the trial court terminating their parental rights with respect to their two minor children, E and A, on the statutory (§ 17a-112 [j] [3] [C]) ground that their acts of parental commission or omission had denied the children the care, guidance or control necessary for their physical, educational, moral or emotional well-being. M and N brought A to the hospital for a shoulder injury, and it was determined that A had multiple bruises and bone fractures that were consistent with child abuse. The petitioner, the Commissioner of Children and Families, removed the children from the family home, and they have since remained in foster care with a nonrelative. M and N initially gave inadequate and inconsistent explanations for A's injuries, but M later admitted to the police that he had engaged in certain conduct that was consistent with A's injuries. M eventually pleaded guilty under the *Alford* doctrine to certain criminal

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** The listing of justices reflects their seniority status on this court as of the date of oral argument.

charges on the basis of that conduct, but both M and N refused to acknowledge that M was responsible for A's injuries. Although N divorced M in an effort to have the children returned to her, she made daily telephone calls to him while he was incarcerated, in which she professed her love for him, and provided misleading statements, during a court-ordered evaluation, regarding her feelings toward M. In terminating the parental rights of M and N as to both children, the trial court found that the criteria of § 17a-112 (j) (3) (C) had been proven. M and N appealed to this court, which reversed the judgments of the trial court and remanded the cases for a new trial because the record did not clearly indicate that M and N had received proper notice of the finding that reunification efforts were not necessary. On remand, the trial court granted the petitioner's motion to file amended termination petitions alleging, inter alia, that the court previously had approved a permanency plan of termination and adoption. The trial court found that M and N had failed to acknowledge or admit the cause of A's injuries until the conclusion of the second trial on the termination petitions, and, consequently, they had made no plan to keep E safe. In light of these omissions, the trial court concluded that M and N were unable to provide E with the care, guidance, or control necessary for her well-being. M and N appealed, claiming that the trial court improperly terminated their parental rights as to E pursuant to § 17a-112 (j) (3) (C) because there was no evidence that acts of parental commission or omission had caused E to suffer any type of harm prior to her removal from the family home and, therefore, that the termination of their parental rights improperly was based on a finding of predictive harm. *Held* that the trial court properly found that the criteria of § 17a-112 (j) (3) (C) had been proven as to E on the basis of the postremoval acts of parental omission by M and N: although the plain and unambiguous language of § 17a-112 (j) (3) (C) contemplates the termination of parental rights for harmful acts of parental commission or omission that already have occurred, the filing of the amended petition to terminate the parental rights of M and N established a new adjudicatory date under the relevant rule of practice (§ 35a-7 [a]), and, therefore, the trial court properly considered the harmful acts of parental omission that occurred after the removal of E from the home of M and N, which included their persistent failure to acknowledge the cause of A's injuries and failure to take the therapeutic steps that would prevent a similar tragedy from occurring in the future; furthermore, the omissions of M and N clearly fell within the purview of § 17a-112 (j) (3) (C), as that statute encompasses a broad range of parental behaviors, including those that constitute a failure to protect a child by acknowledging the existence of a dangerous situation, and the evidence was sufficient to establish that the omissions of M and N were harmful to E, who, although physically uninjured, suffered the emotional and psychological trauma attendant to her removal from her biological parents' home, followed by years of foster placement during

which she lacked the care, guidance or control of her biological parents and the stability and permanence necessary for a young child's healthy development; moreover, M and N could not prevail on their claim that expert testimony from two psychologists regarding the negative effects that children suffer when deprived of care and guidance from their biological parents was insufficient to establish that E had been psychologically harmed, as expert testimony in termination proceedings is accorded great weight, and M and N provided no reason for this court to conclude that E was not susceptible to this type of trauma in light of other evidence in the record that E specifically was harmed by the extended period of separation from M and N.

(*One justice dissenting*)

Argued September 20, 2017—officially released January 10, 2018***

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Frazzini, J.*, granted the petitioner's motion to consolidate the petitions; thereafter, the cases were transferred to the Child Protection Session at Middletown and tried to the court, *C. Taylor, J.*; judgments terminating the respondents' parental rights, from which the respondent parents separately appealed to this court, which reversed the judgments of the trial court and remanded the cases for a new trial; subsequently, the cases were tried to the court, *Hon. Barbara M. Quinn*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgments terminating the respondents' parental rights, from which the respondent parents separately appealed. *Affirmed.*

Stein M. Helmrich, for the appellant (respondent mother).

Dana M. Hrelic, with whom were *Brendon P. Levesque* and, on the brief, *Scott T. Garosshen*, for the appellant (respondent father).

*** January 10, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Michael Besso, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ROGERS, C. J. This case chiefly concerns the scope of the ground for termination of parental rights contemplated by General Statutes § 17a-112 (j) (3) (C), regarding acts of parental commission or omission that deny a child the care necessary for the child's physical or emotional well-being.[1] The respondent parents, Morsy E. and Natasha E., appeal[2] from the judgments of the trial court terminating their parental rights as to their two daughters, Egypt E. and Mariam E., after finding that ground proven by clear and convincing evidence. The respondents claim that the court improperly terminated their parental rights as to Egypt because that child, unlike her sister, did not suffer any harm prior to her removal from the respondents' home, which they

[1] General Statutes § 17a-112 (j) (3) (C) provides that a trial court may terminate parental rights if "the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ." To terminate parental rights, the court also must find that reasonable efforts have been made to reunify a parent and child, unless the parent is unable or unwilling to benefit from those efforts or the court finds that such efforts are unnecessary; General Statutes § 17a-112 (j) (1); and that termination of parental rights is in the best interest of the child. General Statutes § 17a-112 (j) (2).

Since the filing of the termination of parental rights petitions in the present cases, § 17a-112 was the subject of certain amendments that have no bearing on the merits of this appeal. E.g., Public Acts 2016, No. 16-105, §§ 1 and 2. For purposes of clarity, we refer to the current revision of the statute.

[2] The respondents appealed from the judgments of the trial court to the Appellate Court. Thereafter, we granted the respondents' motions, pursuant to Practice Book § 65-2, to transfer the appeals to this court.

contend was a necessary predicate for termination of their parental rights pursuant to § 17a-112 (j) (3) (C). The respondents claim, therefore, that the termination of their parental rights improperly was based on a finding of predictive harm, a type of harm not contemplated by § 17a-112 (j) (3) (C). We agree with the respondents that a termination of parental rights pursuant to § 17a-112 (j) (3) (C) may not be based upon predictive harm. Under the unusual procedural circumstances underlying this appeal, however, we conclude that the court properly found that § 17a-112 (j) (3) (C) was proven on the basis that Egypt had been harmed by the respondents' postremoval acts of parental commission or omission. Specifically, because the petitions to terminate the respondents' parental rights were amended, and, therefore, the adjudicatory date was extended to encompass events subsequent to the filing of the original petitions, the court properly considered the conduct following the removal of the children, which had an actual, harmful effect on the well-being of Egypt. Accordingly, we affirm the judgments of the trial court.[3]

We begin by emphasizing that these cases are before this court for the second time on appeal following a retrial on the termination petitions. On June 1, 2015, the trial court, *C. Taylor*, *J.*, terminated the respondents' parental rights as to Egypt and Mariam after finding, inter alia, that the petitioner, the Commissioner of Children and Families, had proven by clear and convincing

[3] The respondents also claim that, because the termination of their parental rights as to Egypt was improper, the judgment terminating their parental rights as to Mariam should be reversed. In light of our conclusion that the trial court properly terminated the respondents' parental rights as to Egypt, we need not consider this claim. Furthermore, Natasha's claim that there was insufficient evidence that reasonable efforts were made to reunify her with both children and that she was unable to benefit from those efforts is moot because she failed to challenge the trial court's approval of the permanency plan of termination and adoption. See footnote 14 of this opinion.

evidence that the respondents' acts of parental commission or omission had denied each child the care, guidance or control necessary for her physical, educational, moral or emotional well-being. *In re Egypt E.*, Superior Court, judicial district of New Britain, Juvenile Matters, Child Protection Session at Middletown, Docket Nos. H14-CP-13010981A, H14-CP-13010982A, 2015 WL 4005340, *16–17 (June 1, 2015). The respondents appealed, challenging the court's findings that reasonable efforts at reunification had been made and that they had been unable or unwilling to benefit from those efforts. See *In re Egypt E.*, 322 Conn. 231, 241–42, 140 A.3d 210 (2016). This court reversed the judgments, reasoning that, although the trial court's additional, unchallenged finding that reunification efforts were not necessary normally would have rendered the matter moot, the trial court record did not indicate clearly that the respondents had received proper notice of that finding, thereby giving them the opportunity to challenge it on appeal. Id., 243–44. We therefore remanded the case for a new trial on the termination petitions to be held no later than the fall of 2016. Id., 244.

On August 5, 2016, the petitioner moved to amend the termination petitions, seeking to add a new ground for termination, namely, the respondents' failure to rehabilitate; see General Statutes § 17a-112 (j) (3) (B); to supplement her allegations as to reasonable efforts to reunify the respondents and the children, and to add an allegation that, on June 1, 2015, the trial court had approved a permanency plan of termination and adoption, rather than reunification, pursuant to General Statutes (Supp. 2014) § 46b-129 (k).[4] On September 13, 2016,

[4] Pursuant to General Statutes § 17a-111b (a) (2), "[t]he Commissioner of Children and Families shall make reasonable efforts to reunify a parent with a child unless the court . . . has approved a permanency plan other than reunification pursuant to subsection (k) of section 46b-129."

Pursuant to General Statutes § 17a-112 (j) (1), before a trial court may grant a petition for termination of parental rights, it must make a finding that reasonable efforts have been made to reunify the parent and the child,

the trial court denied the motion to amend insofar as it sought to add the ground of failure to rehabilitate, but granted it as to the other amendments sought by the petitioner. Accordingly, September 13, 2016, the date of the last amendment, became the adjudicatory date for the petitions.[5] See Practice Book § 35a-7 (a) (in adjudicatory phase of proceedings on petition for termination of parental rights, trial court is limited to considering evidence of events preceding latest amendment of petition); see also *In re Romance M.*, 229 Conn. 345, 358–59, 641 A.2d 378 (1994); *In re Mariah S.*, 61 Conn. App. 248, 254 n.4, 763 A.2d 71 (2000), cert. denied, 255 Conn. 934, 767 A.2d 104 (2001).

A second trial on the termination petitions was held before a new trial court, *Hon. Barbara M. Quinn*, judge trial referee, in October and November of 2016. At the conclusion of that trial, the court again terminated the respondents' parental rights on the basis of their acts of parental commission or omission. This appeal followed.

The following facts, which were found by the trial court, and procedural history are relevant to the appeal. Egypt and Mariam were born in 2012 and 2013, respectively, to Morsy and Natasha. On September 1, 2013, Morsy and Natasha brought Mariam, then about seven weeks old, to the Connecticut Children's Medical Center (hospital) on the advice of their pediatrician. That morning, according to the couple, they had noticed that

"unless the court finds in [the termination] proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required . . . ."

[5] At the beginning of the new trial, counsel for the petitioner sought confirmation of the adjudicatory date for the petitions, observing that, pursuant to the rules of practice, it would be September 13, 2016. When the trial court asked if any other party would like to be heard on that matter, Morsy's counsel and counsel for the children explicitly agreed, while Natasha's counsel did not object.

the infant's right shoulder was inflamed and made a " 'crunching sound' " when manipulated. Upon examination by a physician's assistant, various testing and the taking of X-rays, it was determined that Mariam had multiple bone fractures, including a "displaced fracture" of the right clavicle, two fractures of the left tibia and fractures of the left shoulder blade, left femur and right tibia. Mariam also had several bruises on various parts of her body which, according to the physician's assistant, are suspicious for child abuse when present on a child who is not independently mobile. Mariam was tested for osteogenesis imperfecta, a series of genetic bone diseases. The testing ruled out those diseases.[6]

Mariam had been in the exclusive care of Morsy and Natasha during the period in which medical professionals deemed the injuries to have occurred. Hospital staff notified the Department of Children and Families (department) and the police department in the town where the family resided about the child's injuries, and representatives of each entity arrived and questioned Morsy and Natasha. Egypt was examined for fractures or other injuries at that time, but none were found.

On that same day, the petitioner placed a ninety-six hour hold on both children and removed them from the respondents' custody. On September 5, 2013, the petitioner filed petitions alleging neglect and motions for orders for temporary custody, which subsequently were granted. The children have remained in foster care with a nonrelative since that time. The petitioner filed

[6] Thereafter, Natasha sought a second opinion on whether Mariam suffered from a bone disease. Tests were again performed the following month and produced the same results. A report memorializing the results of the testing was in evidence, and it indicates that the normal test results were discussed with Natasha. The parties further stipulated that the doctor who had performed these tests testified at the first trial on the termination petitions and that both respondents were present and had heard her testimony.

petitions to terminate the respondents' parental rights as to both children, alleging § 17a-112 (j) (3) (C) as a ground for termination, on October 4, 2013.

At the hospital, and in the days following the discovery of Mariam's injuries, Morsy and Natasha gave inadequate and shifting explanations for those injuries. They first said they knew of nothing that could have caused the injuries, then they suggested that they could have been caused by Egypt, who was then thirteen months old, when she bounced Mariam too vigorously in her "bouncy seat." Subsequently, they offered that something may have happened when the children were in the care of Natasha's father and stepmother for a brief period of time ten days earlier. Neither explanation was consistent with the nature and timing of the injuries.

During questioning by the police on September 2, 3 and 5, 2013, Morsy initially stated that he had dropped Mariam onto the floor in the family's condominium. Thereafter, he explained that he had dropped her twice while he was on the stairs. Finally, as recounted in a police report, Morsy said that, during the middle of the evening before the family had arrived at the hospital, Mariam had been crying and "he picked her up under her arms. He said [that] she was facing him, and he had his fingers on her back with his thumbs anterior to her shoulders. At this time, he stated [that] he may have grabbed her too hard, and described her as crying before and after this event. In addition, Morsy . . . reported [that] he placed [Mariam] hard into a bouncy chair onto the floor . . . and indicated [that] he could not recall when this exactly happened. Lastly, Morsy . . . described and demonstrated [that] while he was changing [Mariam's] diaper, he grabbed both [of] her legs, with his thumbs on the anterior distal thighs just above the knees [and] his fingers wrapped around her posterior lower legs, and straightened her legs by pressing down with his thumbs. He said he could not recall

when this specifically happened, but admitted he may have done this with more force than he was demonstrating during the interview." This explanation, unlike the others, was consistent with Mariam's injuries. Morsy was arrested on October 18, 2013, charged with various offenses, and ultimately pleaded guilty pursuant to the *Alford* doctrine to two counts of reckless endagement in the second degree.[7] Subsequent to admitting his culpability to the police, however, Morsy recommenced denying any knowledge of how Mariam's injuries had occurred. Natasha, for her part, also refused to acknowledge Morsy's responsibility for the injuries despite his admissions and criminal conviction.

At the time of the children's removal, Morsy and Natasha were given specific steps to aid them in reunifying with their children. The specific steps directed Natasha, inter alia, to take part in parenting and individual counseling toward the goal of her being able to protect her children. As to Morsy, the specific steps directed him to take part in parenting and individual counseling toward the goals of controlling his anger, recognizing how that anger impacts his ability to care for his children and learning how to protect the children and keep them safe. The respondents chose therapists and participated in the recommended counseling, but, nevertheless, each one continued to deny that Morsy had caused Mariam's injuries.

[7] Morsy initially was charged was assault in the first degree in violation of General Statutes § 53a-59, reckless endangerment in the first degree in violation of General Statutes § 53a-63 and risk of injury to a child in violation of General Statutes § 53-21. On August 27, 2015, he pleaded guilty pursuant to the *Alford* doctrine; see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (allowing defendant to enter guilty plea without admitting guilt based on acknowledgement that state has strong evidence to support conviction); to two counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64 and two counts of interfering with an officer in violation of General Statutes § 53a-167a. He was later sentenced, with a maximum release date of June 4, 2018.

In regard to Natasha, the trial court described her progress toward the therapeutic goals as "negligible." Specifically, she "clung to all other possible explanations for [the injuries], including medical explanations, stating that unless she saw someone injuring her child, she could not know what happened. She expended considerable emotional effort to protect her own feelings for Morsy at the expense of the safety of her children." Although Natasha knew that she had not caused the injuries herself, and that Morsy was the only other adult in the couple's condominium when the injuries had occurred, her stated position, according to her counselor, was that she " 'wasn't going to accuse anybody because she didn't see anybody do it and that was pretty much her stance [for] the entire time' the counselor worked with her." Natasha took a similar position during a court-ordered psychological evaluation. At the time of the first trial, despite having heard all of the evidence, she refused to believe that Morsy played any role in causing the injuries.

Natasha divorced Morsy in June, 2014, in an effort to have her children returned to her. Nevertheless, the court found, "she had made absolutely no progress toward complying with the specific step of learning how to keep her children safe. She repeatedly, throughout the time of Morsy's incarceration, made daily telephone calls to him and professed her love for him."[8] During her court-ordered psychological evaluation, she misled the evaluator about her feelings toward Morsy and her intention to separate from him. According to the court, Natasha "pa[id] lip service to the concept of keeping her children safe," but she "has never accepted

[8] In evidence were telephone logs and computer disks memorializing more than 700 telephone conversations between Morsy and Natasha during his period of incarceration, which, at the time of trial, he was yet to complete. During those telephone conversations, the two professed their love for each other and their desire to reunite the family upon his release from prison.

the need to truly separate herself from Morsy to be able to protect [them] from future harm."

Morsy similarly participated in various types of counseling, both prior to and during his incarceration. During that counseling, however, he was unable to acknowledge his role in Mariam's injuries. He was not willing to admit responsibility for the injuries during the first termination trial, at his criminal sentencing or at a subsequent parole hearing.

On October 14, 2016, the department, in support of the amended termination petitions, alleged the following facts as establishing, in relation to Egypt, the respondents' acts of commission or omission pursuant to § 17a-112 (j) (3) (C): that Mariam had suffered multiple fractures and bruising throughout her body, which were diagnostic for nonaccidental inflicted injuries, while in the exclusive care of the respondents; that the respondents, to date, had not adequately explained and/or acknowledged responsibility for inflicting the injuries or for failing to protect Mariam; that the respondents were unwilling to separate from each other; that Natasha could not provide the care, or a plan of care, to ensure Egypt's safety and well-being; that Morsy admittedly lacked the necessary parenting skills to provide Egypt with safe discipline and structure, or to safely provide for Egypt's emotional needs; that Egypt required continual care by a competent adult who could safely provide structure, discipline and boundaries while also providing a nurturing, trusting and stable environment, and who is capable of placing Egypt's safety above his or her own needs; and that, as a result of the respondents' actions, it has been necessary to remove Egypt from an unsafe, disrupted home environment.

A six day trial was held on the petitions in October and November, 2016. The court heard the following

testimony: the physician's assistant, who first saw Mariam for her injuries on September 1, 2013, described those injuries, the respondents' lack of an adequate explanation for them and the results of the further testing that was ordered; a medical doctor qualified as an expert in child abuse pediatrics, who had consulted with the medical team that had treated Mariam, stated that the infant's fractures were diagnostic for inflicted injuries not caused by normal handling, described the types of blows, bending or forceful manipulation that could have produced the fractures and opined that the injuries were inflicted within the twenty-four hour period preceding the family's arrival at the hospital; two department social workers, who were assigned to the case, described the decisions to invoke a ninety-six hour hold, then to seek temporary custody of the children and eventually to pursue termination of parental rights, given the respondents' incomplete and inconsistent explanations for Mariam's injuries and their failure truly to acknowledge any responsibility for them; two police officers, who had investigated Mariam's injuries and questioned Morsy and Natasha, described Morsy's shifting stories and ultimate admissions, Natasha's lack of an explanation for the injuries and her unusual demeanor and loyalty to her husband; and Natasha's therapist, who confirmed that Natasha, although previously claiming to have separated from Morsy, had rekindled her relationship with him and had never truly acknowledged that Morsy was responsible for Mariam's injuries.

The trial court also heard testimony from two psychologists, Barbara Berkowitz, Ph.D., a clinical psychologist who had performed the court-ordered psychological evaluation of Natasha,[9] and David Mantell, Ph.D,

[9] Berkowitz also evaluated the children and their maternal grandmother, with whom Natasha resided at the time, but did not evaluate Morsy. Morsy, for unexplained reasons, had refused to participate in the evaluation sessions.

a forensic psychologist, who testified as an expert witness for the petitioner. When asked to opine on whether reunification of the children with the respondents was appropriate in light of the respondents' failure to acknowledge the cause of Mariam's injuries, which had occurred while she was in their exclusive care, and Natasha's continuing commitment to Morsy, Berkowitz testified that "if [Morsy] is continuing to maintain his innocence despite his conviction and incarceration . . . and [if] there is no explanation about the injuries, it would be, not just imprudent, but unconscionable to reunify the children . . . [with] the two people that are the [only] two possible perpetrators." Berkowitz added that, without acknowledging and admitting the cause of the injuries, treatment of someone like Natasha would be difficult in that "the treating professional has both hands tied behind his or her back . . . ." As to the situation when the partner of an abuser is in denial about what occurred, Berkowitz noted that it is "not a good situation [and is] not safe for the children."

Berkowitz proceeded to agree that keeping children away from their biological parents could have adverse effects, and that, all else being equal, the first choice is always to keep families together. When the children's safety is a concern, however, the need to ensure it, unfortunately, can make removal, and the resulting harm, necessary. "[T]here's always consequences," she opined, "but [you] have to look at what's overall in the best interests of the children." When children are not raised by their biological parents, Berkowitz explained, "there are always clinical issues," such as separation and loss issues, self-esteem issues and relationship issues, but "[t]o return a child to an unchanged situation . . . is to return a child to a situation where the same kinds of awful things might happen again."

Mantell agreed with Berkowitz that acknowledging the cause of the injuries inflicted upon a child was a

necessary starting point for any effective treatment that would prevent that harm from reoccurring. According to Mantell, generalized acknowledgments of possible involvement were insufficient for purposes of developing an abuse specific treatment plan. Mantell testified further that, to keep children safe and to prevent reoccurrence of injuries, preventive and defensive actions are necessary, and understanding how the abuse occurred is a necessary predicate to such actions.

Mantell, like Berkowitz, testified that a child's biological home generally is assumed to be the preferred child rearing location.[10] Accordingly, he opined, a child's removal from that home entails harm to his or her well-being. Specifically, a child who is removed at birth is deprived of the opportunity to experience the special conditions that exist with his or her biological parents, and a child who is removed after birth will experience a trauma, causing a psychological wound, when the bonds that child has formed with the parents are broken. Mantell agreed that, when a child's biological home is unsafe, there is a need to balance the harms of removal against ensuring the child's basic safety and that if, over time, the reasons for removal are not addressed and corrected, continuing removal is justified. He confirmed, however, that in "many" cases in which children suffer inflicted injuries in their biological homes, they ultimately are returned to the caretakers who inflicted the injuries.

[10] Mantell explained his reasoning: "The assumptions are that there's a biological kinship that will promote mutual identification between the adult and the child, that with that biological identification comes as accompaniments emotional [and] psychological identifications that provide a child with a sense of identity and security, that children under those circumstances, it is assumed, are more likely to be valued, nurtured, protected and [will] develop more normally." In Mantell's view, a child who remains in his or her biological home is "likely to have a better life than [one] who grow[s] up in other circumstances."

Morsy and Natasha testified in opposition to the petitions. They each discussed a car accident that Morsy had experienced a week before Mariam was injured, in which he had suffered a concussion and after which he was prescribed pain medications. Morsy admitted that his initial explanations for Mariam's injuries were untrue and that he previously had difficulties believing that he caused the injuries, but testified that, now that he had heard all of the trial evidence, he believed that he was responsible. When shown a copy of the police report memorializing his statement that, on the night before the family arrived at the hospital, he had held Mariam forcefully by the areas of her body that were injured, he recalled grabbing her as described but could not remember applying force or causing the injuries. Morsy attributed his current realization that he had caused the injuries to hearing the testimony of the pediatrician who had consulted with Mariam's medical team and that of Mantell, which "really opened [his] eyes."

Natasha testified that, although for the prior three years she had been unsure about what had happened to Mariam, she now acknowledged that Morsy had inflicted the child's injuries. She too attributed her realization to having heard the testimony of the consulting pediatrician, although she acknowledged that previously she had seen that pediatrician's 2013 report and, further, that the potential medical causes for the injuries had been excluded much earlier. See footnote 6 of this opinion. Natasha agreed with the petitioner's counsel that the "worst thing" for her two daughters has been being separated from her, and that, due to the separation, the girls have been deprived of her parental guidance and have suffered harm to their emotional well-being.

In a memorandum of decision dated January 6, 2017, the trial court rendered judgments terminating the respondents' parental rights as to both Egypt and

Mariam. The court extensively discussed Natasha's inability, throughout the history of the case, to accept Morsy's role in Mariam's injuries, noting that, even at the conclusion of the retrial when she testified, her "confused beliefs were still palpably evident in her conduct and demeanor . . . ." The court described that Morsy "reluctantly" admitted responsibility for the injuries on the last day of the retrial and that this admission was unacceptably general and still evinced an unwillingness to face the details of what had occurred. Additionally, the court observed, neither of the respondents, at present, seemed to comprehend why removing Egypt from the home was necessary to protect her, instead "cling[ing] to the fact that Egypt was uninjured as a way to protect themselves from the awareness of the truth of Mariam's significant injuries and their failure to provide safety for both children."

The trial court found that Natasha had taken no action to inform herself about Mariam's injuries, that she could not confront the truth and that she had made "absolutely no progress" toward the goal of learning how to keep her children safe. It found further that Natasha's failure to acknowledge what had occurred meant that she could not be safely reunited with her children. The court found that Morsy similarly could not comply with the specific steps that he had been given. As the court explained, "[b]oth parents in their own individual ways demonstrate a remarkable capacity for self-deception. Even as each admitted [that] he or she now was ready to acknowledge Morsy as the source of the injuries to Mariam, each stated that awareness in very similar detached words. Such observable . . . lack of candor keeps them, the court concludes, from putting the needs of their children first, admitting their faults and thereby permitting the possibility of careful reunification with their children.

"This is the fatal flaw that has prevented reunification throughout these lengthy proceedings. It is at the heart of [the respondents'] inability and unwillingness to benefit from the services offered to them. It means that their children, even now, could not reasonably and safely be returned to them."

Thereafter, the trial court found, by clear and convincing evidence, that the department had made reasonable efforts to reunify both respondents with their children through counseling, visitation, education and other services, but also that the respondents were unable or unwilling to benefit from those efforts. The court further noted the earlier June 1, 2015 finding that reunification efforts were not required, and that that finding had remained unchallenged. Regarding the statutory ground for the termination of the respondents' parental rights as to Egypt, the court found, by clear and convincing evidence, that § 17a-112 (j) (3) (C) had been proven, in particular, through the respondents' omissions. Specifically, both parents, because of their denials and failures to acknowledge or admit the cause of the injuries to Mariam, had made no progress toward developing a plan to keep Egypt safe. In light of their omissions, according to the court, neither parent was able to provide Egypt "the care, guidance or control necessary for [her] physical, educational, moral or emotional well-being" as contemplated by § 17a-112 (j) (3) (C).[11] (Internal quotation marks omitted.) Finally, the court made the findings mandated by § 17a-112 (k) and found further that termination of the respondents'

[11] As to Mariam, the court found § 17a-112 (j) (3) (C) satisfied in that there was clear and convincing evidence that she had suffered nonaccidental, serious physical injuries while in the care of the respondents, which were not explained or acknowledged by them until the last day of trial, and that the respondents had failed to show that Mariam could be returned safely to their care. Neither of the respondents has challenged these findings on appeal.

parental rights was in the best interests of both children. This appeal followed.

The respondents claim that the trial court improperly terminated their parental rights, as to Egypt, pursuant to § 17a-112 (j) (3) (C) because there was no evidence that acts of parental commission or omission caused Egypt to suffer any type of harm prior to the department removing her from the respondents' home. Specifically, they claim, the statute's language is retrospective and contemplates harm that already has occurred to the child that is the subject of the petition, and not merely to that child's sibling, a situation that is addressed by a different statutory ground for termination not alleged in the amended petition.[12] The respondents contend that there was no indication that their home was anything other than a loving, caring and stable environment prior to Mariam being injured and both children then being removed. Accordingly, they claim, the trial court's conclusion that § 17a-112 (j) (3) (C) was satisfied, as to Egypt, improperly was predicated on a finding of prospective, predictive harm to that child. We are not persuaded. Rather, under the unusual procedural circumstances of this case, we conclude that the court properly found § 17a-112 (j) (3) (C) proven as to Egypt on the basis of the respondents' postremoval acts of parental omission, specifically, their failures to acknowledge and address the cause of Mariam's injuries, which thereby required Egypt to suffer the trauma attendant to prolonged separation from her biological

[12] See General Statutes § 17a-112 (j) (3) (F) (permitting termination of parental rights when parent deliberately has killed, or caused serious bodily injury to, another child of the parent). Although the petitioner alleged this ground for the termination of Morsy's parental rights as to Egypt in the first trial, the trial court found it unproven. See *In re Egypt E.*, supra, 2015 WL 4005340, *17–18. Thereafter, in the retrial, the petitioner withdrew the allegations as to § 17a-112 (j) (3) (F) and proceeded on § 17a-112 (j) (3) (C) alone.

parents' home[13] and deprived her of the care, guidance or control of her biological parents, as well as stability and permanency, for an extended three year period. Although those harmful acts of parental omission postdated the removal of Egypt from the respondents' household, they nevertheless predated the adjudicatory date established by the amended termination petition. Accordingly, the court properly considered them and concluded that they fell within the purview of § 17a-112 (j) (3) (C).[14]

We begin with the applicable standard of review and general governing principles. Although the trial court's

[13] On appeal, the respondents have not challenged the finding of neglect as to Egypt, which resulted in the department being granted custody of the child for the duration of these proceedings. Accordingly, we need not determine whether the initial separation of Egypt from the respondents beyond the preliminary ninety-six hour hold period was proper. We emphasize, however, that the *initial* removal of Egypt from the respondents' home does not form the basis of our conclusion that the respondents' acts of omission harmed Egypt's physical or emotional well-being.

[14] Natasha claims additionally that the trial court improperly terminated her parental rights, as to both children, because there was insufficient evidence that reasonable efforts were made to reunify her with the children and that she was unable or unwilling to benefit from those efforts. See General Statutes § 17a-112 (j) (1). This claim necessarily fails because, as the amended petitions and the court's memorandum of decision make clear, a permanency plan of termination and adoption, rather than reunification, previously had been approved by the court, thereby making reasonable efforts to reunify unnecessary. See footnote 4 of this opinion; see also General Statutes § 17a-111b (a) (2). Because the finding that reasonable efforts were unnecessary remains unchallenged, any claim that such efforts were insufficient or that Natasha could not benefit from those efforts is moot. See *In re Egypt E.*, supra, 322 Conn. 243; see also *In re Jorden R.*, 293 Conn. 539, 557, 979 A.2d 469 (2009).

Both respondents further argue that, in the event this court reverses the judgment of termination of parental rights as to Egypt on the basis of the claims made herein, we also should reverse the judgment as to Mariam and remand the case for a redetermination of whether termination of their parental rights remains in Mariam's best interests. In the respondents' view, such relief is warranted because of the strong sibling bond between the two children, which the trial court recognized. Because, as we explain herein, we disagree that the trial court improperly terminated the respondents' parental rights as to Egypt, we need not consider their claim that a

subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. Id., 587. On review, we must determine "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) Id., 588. To the extent we are required to construe the terms of § 17a-112 (j) (3) (C) or its applicability to the facts of this case, however, our review is plenary. *In re Elvin G.*, 310 Conn. 485, 499, 78 A.3d 797 (2013).

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Citation omitted; internal quotation marks omitted.) Id., 500. Subdivision (3) of § 17a-112 (j) "carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the

reversal of the judgment as to her also should require a reversal of the judgment as to Mariam.

termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 500–501.

The present case concerns § 17a-112 (j) (3) (C), which provides that a ground for termination of parental rights is established when a trial court finds, by clear and convincing evidence, that "the child [at issue] has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ."

To begin, we agree with the respondents that the focus of the statute clearly is retrospective, contemplating termination of rights for harmful acts of parental commission or omission that already have occurred.[15] This is apparent from the plain and unambiguous language of the provision, which requires the petitioner to show that, as a result of the parental acts of commission or omission, the "care, guidance or control" necessary for the child's well-being "*has been denied*." (Emphasis added.) General Statutes § 17a-112 (j) (3) (c); see also *In re Kelly S.*, 29 Conn. App. 600, 614, 616 A.2d 1161 (1992) (General Statutes [Rev. to 1991] § 45a-

[15] In fact, the petitioner does not contest that the statute requires actual, rather than speculative or predictive harm, but argues that actual harm to Egypt was proven. As explained hereinafter, we agree with the petitioner.

717 [f] [2], pertaining to termination proceeding before Probate Court when "the child has been denied" care necessary for emotional well-being, does not apply in cases of speculative harm). This is consistent, for the most part, with the other statutory grounds for removal. Specifically, unlike our statutes governing the temporary removal of a child from a parent's custody, which allow for such removal upon a showing that there is a *risk* of harm; see General Statutes § 17a-101g (e); General Statutes § 46b-129 (b); the statute governing termination of parental rights, a most drastic and permanent remedy, generally requires a showing, by clear and convincing evidence, that some type of physical or psychological harm to the child already has occurred.[16] See General Statutes § 17a-112 (j) (3) (A) through (G).

Aside from its retrospective focus, the language of § 17a-112 (j) (3) (C) and the decisions interpreting it make clear that the types of parental behaviors and resultant harms that the statute is intended to reach are many and varied. By virtue of the language, "act or acts of parental commission or omission," both positively harmful actions of a parent and a parent's more passive failures to take action to prevent harm from occurring are encompassed by § 17a-112 (j) (3) (C). The contemplated harmful acts include, but explicitly are not limited to, "sexual molestation or exploitation, severe physical abuse or a pattern of abuse," and the resultant harm to a child's well-being may be "physical, educational, moral or emotional . . . ." General Stat-

[16] We agree with the respondents that there is no evidence that, in October, 2013, when the petitioner initially sought to terminate their parental rights, Egypt, as opposed to Mariam, had suffered any harm to her physical, educational, moral or emotional well-being as a result of the respondents' acts of parental commission or omission. Had we reviewed this claim in the appeal from the first termination trial, therefore, in which the operative petitions, and hence the adjudicatory dates, were contemporaneous with the removal of the children, the result, as to Egypt, likely would not have been affirmed.

utes § 17a-112 (j) (3) (C). In sum, § 17a-112 (j) (3) (C) clearly was drafted in a manner such as would give it a broad and flexible range.

The Appellate Court decisions[17] applying § 17a-112 (j) (3) (C), or the correspondent statute for proceedings in the Probate Court, and concluding that an act of parental commission or omission had been proven demonstrate the statute's wide applicability. Recognized acts of parental commission or omission under the statute[18] have included physically assaulting a child, resulting in severe injury; *In re Clark K.*, 70 Conn. App. 665, 676, 799 A.2d 1099, cert. denied, 261 Conn. 925, 806 A.2d 1059 (2002); *In re Cheyenne A.*, 59 Conn. App. 151, 159, 756 A.2d 303, cert. denied, 254 Conn. 940, 761 A.2d 759 (2000); sexually abusing a child; *In re Carissa K.*, 55 Conn. App. 768, 781, 783, 740 A.2d 896 (1999); attempting to suffocate a child, although the child, fortunately, was not severely injured; *In re Quidanny L.*, 159 Conn. App. 363, 365–66, 369, 122 A.3d 1281, cert. denied, 319 Conn. 906, 122 A.3d 639 (2015); exposing a child to a parent's erratic, violent and mentally ill behaviors; *In re Nicolina T.*, 9 Conn. App. 598, 602–603, 607, 520 A.2d 639, cert. denied, 203 Conn. 804, 525 A.2d 519 (1987); threatening and yelling obscenities at a child; *In re Christine F.*, 6 Conn. App. 360, 362, 505 A.2d 734, cert. denied, 199 Conn. 808, 809, 508 A.2d 769,

[17] This court has not had much occasion to interpret § 17a-112 (j) (3) (C) or the corresponding Probate Court statutes. In one case, we held, as a matter statutory construction, that the legislature did not intend for the statute to apply to parental acts of commission or omission predating a child's birth. See *In re Valerie D.*, 223 Conn. 492, 512–13, 613 A.2d 748 (1992). In another, we held that a parent's life-threatening attacks on her children, caused by a psychotic episode, provided overwhelming evidence of acts of parental commission or omission adversely affecting the children's physical, emotional and psychological well-being. See *In re Theresa S.*, 196 Conn. 18, 26–27, 491 A.2d 355 (1985).

[18] We note that, although some of the listed behaviors, standing alone, satisfied § 17a-112 (j) (3) (C), most were considered to do so in combination with other parental acts or omissions.

770 (1986); severely neglecting a child's developmental and nutritional needs; *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 185–86, 193, 485 A.2d 1362 (1985); physically and emotionally abusing siblings or killing the child's other parent; *In re Sean H.*, 24 Conn. App. 135, 145, 586 A.2d 1171, cert. denied, 218 Conn. 904, 588 A.2d 1078 (1991); abusing a sibling in a child's presence or earshot and ordering the child to participate in such abuse; *In re Payton V.*, 158 Conn. App. 154, 162, 118 A.3d 166, cert. denied, 317 Conn. 924, 118 A.3d 549 (2015); *In re Nelmarie O.*, 97 Conn. App. 624, 629, 905 A.2d 706 (2006); refusing to believe a child's reports of sexual abuse and blaming the child for her foster care placement; *In re Lauren R.*, 49 Conn. App. 763, 772–73, 715 A.2d 822 (1998); and engaging in repeated criminal behavior resulting in prolonged incarceration, with little effort to engage in visitation with a child. *In re Brian T.*, 134 Conn. App. 1, 18, 38 A.3d 114 (2012). Pertinently, the statute frequently has been applied to parents who have failed to protect their children from abuse inflicted by third parties and failed to acknowledge that such abuse has occurred. See *In re Jorden R.*, 107 Conn. App. 12, 19, 944 A.2d 402 (2008), rev'd in part and vacated in part on other grounds, 293 Conn. 539, 979 A.2d 469 (2009); *In re Sheena I.*, 63 Conn. App. 713, 723, 778 A.2d 997 (2001); *In re Antonio M.*, 56 Conn. App. 534, 542–43, 744 A.2d 915 (2000); *In re Tabitha T.*, 51 Conn. App. 595, 603, 722 A.2d 1232 (1999); *In re Anna B.*, 50 Conn. App. 298, 307, 717 A.2d 289 (1998); *In re Lauren R.*, supra, 772–73; *In re Felicia D.*, 35 Conn. App. 490, 502, 646 A.2d 862, cert. denied, 231 Conn. 931, 649 A.2d 253 (1994); *In re Mark C.*, 28 Conn. App. 247, 254–55, 610 A.2d 181, cert. denied, 223 Conn. 922, 614 A.2d 823 (1992); *In re Christine F.*, supra, 362. In all of the foregoing cases, the children at issue suffered physical, emotional and/or psychological harm as a result of their parents' various acts of commission or omission.

In light of the foregoing, we conclude that the respondents' omissions in this case, namely, their continuing failures, over the course of three years, truly to acknowledge the cause of Mariam's injuries and to take the therapeutic steps that would prevent a similar tragedy from occurring in the future, clearly fell within the purview of § 17a-112 (j) (3) (C).[19] As we explained, the statute encompasses a broad range of parental behaviors, particularly, those that constitute a failure to protect a child by, among other things, acknowledging the existence of a dangerous situation. Moreover, contrary to the respondents' assertions, there was sufficient evidence presented to establish that these omissions were harmful to Egypt who, although physically uninjured, nevertheless suffered the emotional and psychological trauma attendant to a sudden removal from her biological parents' home, followed by years of foster placement during which she lacked the care, guidance or control of her biological parents and the stability and permanence necessary for a young child's healthy development.[20] Accordingly, we will not disturb the trial

[19] As to the respondents' claim that such acts properly are characterized as a failure to rehabilitate; see General Statutes § 17a-112 (j) (3) (B); we do not disagree but observe, nevertheless, that our jurisprudence is replete with cases in which particular parental behaviors have been held to satisfy more than one statutory ground for termination. See, e.g., *In re Kezia M.*, 33 Conn. App. 12, 16, 632 A.2d 1122, cert. denied, 228 Conn. 915, 636 A.2d 847 (1993).

[20] We note in this regard that the harm caused to Egypt, upon which we rely to find that § 17a-112 (j) (3) (C) was satisfied, is not merely that caused by her removal from the home, as such would render this statutory ground for termination proven in most any child protection case. Rather, it is the harm caused by the respondents' continuing, longstanding refusal to acknowledge any responsibility for the circumstances necessitating that removal and their prolonged failure to make any progress toward remedying those circumstances.

As earlier noted, Mantell testified that in "many" cases in which children suffer inflicted injuries in their biological homes they ultimately are returned to the caretakers who inflicted the injuries. A department social worker testified similarly, but additionally provided that in those situations there is acknowledgement and remedying of the situation that led to the assault. Cf. *In re Anna B.*, supra, 50 Conn. App. 301–302 (department declined to

court's conclusion that the statutory ground for termination had been proven. [21]

The respondents argue that the testimony of Berkowitz and Mantell, who spoke of the negative effects that children suffer when they are deprived of the care and guidance of their biological parents, was insufficient to establish that Egypt had been psychologically harmed during the three years she was not in their custody. According to the respondents, the two experts spoke only in generalities and not in regard to Egypt specifically. We disagree because, "in [a] termination proceeding, [p]sychological testimony from professionals is rightly accorded great weight"; (internal quotation marks omitted) *In re Elijah C.*, 326 Conn. 480, 501, 165

return children who were sexually assaulted to their home, although it had been wiling to consider such return, because mother failed to remove perpetrator as requested). In short, the prolonged separation of Egypt from the respondents was not inevitable, but, rather, was a result of the respondents' continuing omissions as described herein.

[21] The court's memorandum of decision, in finding § 17a-112 (j) (3) (C) proven, does not contain explicit findings as to the harm suffered by Egypt as a result of the respondents' acts of parental omission, but, rather, consistent with the statutory language, is more focused on those acts of omission themselves. Earlier in the proceedings, at the conclusion of the petitioner's case, the respondents had filed a joint motion for a directed judgment, requesting that the court dismiss the petition for the termination of their parental rights as to Egypt. They contended that a termination of rights premised on § 17a-112 (j) (3) (C) required, as a matter of law, that some type of harm already had befallen the child who was the subject of the petition and, here, there was no evidence that Egypt had suffered any such harm. In opposing the motion, the petitioner argued that moral or emotional harm could suffice and cited, inter alia, the testimony of Berkowitz and Mantell.

On November 7, 2016, the trial court, ruling from the bench, summarily denied the respondents' motion, "find[ing] that there [was] adequate evidence in the record . . . to find that the [petitioner] has made out a prima facie case for . . . [the] claims." The respondents did not request further clarification of the ruling, nor did they seek an articulation. Accordingly, we have reviewed the entire record to determine whether the ruling had a proper evidentiary basis. Notably, the evidence that we discuss herein was not contested by the respondents, and it was, to some degree, supplied by Natasha herself.

A.3d 1149 (2017); see also *In re Shane M.*, supra, 318 Conn. 590 (same); and the respondents have provided no reason for us to conclude that Egypt would be exempt from experiencing the traumas that, as the psychological experts explained, generally befall children in Egypt's circumstances. Again, Berkowitz testified that "[t]here's *always* consequences" when children are removed from their parents' custody, and "there are *always* clinical issues" when children are not raised by their biological parents. (Emphasis added.) Mantell explained that removing a child from her biological home entails harm to her well-being, and that, when a child who is old enough to have bonded with her parents, as Egypt was, is then removed from her home, the resultant trauma will cause a psychological wound.

Additionally, the record in this case does include evidence that Egypt, in particular, was harmed by the extended period of separation during which she was deprived of her biological parents' care, guidance or control. Specifically, Natasha responded affirmatively that the "worst thing" for her daughters was to be separated from her, and she agreed that, due to that separation, they had been deprived of her parental guidance and suffered harm to their emotional well-being.[22] Moreover, information in the reports memorializing Berkowitz' psychological evaluations of Natasha, the children and the children's maternal grandmother is indicative of Egypt's emotional suffering. Those reports were part

[22] We acknowledge that Natasha provided this testimony to establish that it was not in her daughters' best interests for her parental rights to be terminated. The testimony is also evidence, however, that Natasha was aware that separation was detrimental to her daughters. Nonetheless, she persisted in a course of conduct that prevented reunification by refusing to engage meaningfully in steps to create a safe home environment to which the children could return. Specifically, she failed to acknowledge the role that Morsy played in Mariam's injuries and her own responsibility for ensuring a safe environment for children.

of the evidence before the trial court.[23] In light of the foregoing, we reject the respondents' contention that there was insufficient evidence of harm to Egypt's well-being.

As a final matter, the respondents contend that the trial court, relying on Mariam's serious physical injuries, improperly placed on them the burden of showing that their parental rights, as to Egypt, should not be terminated. Section 17a-112 (j) (3) (C) provides, in its termi-

[23] Natasha and the maternal grandmother saw the children during visitation sessions and spoke to Berkowitz about their impressions. As to the maternal grandmother, Berkowitz' report indicates that she was "worried that Egypt was emotionally suffering by being away from her parents." The grandmother informed Berkowitz that Egypt "was particularly close to her father, [who at the time of the evaluation] she no longer sees at all," that Egypt frequently asked for her father during visitation sessions, and that Egypt was " 'losing her spark' due to the separation from her parents."

Natasha, for her part, expressed to Berkowitz her belief that reunification was in her children's best psychological interests because " 'they love me. I'm their mommy; no one in the world will take care of them as well as I do, or love them as much.' " She stated that her strongest concern, at the time, was the mental well-being of the children. Although Natasha believed that the children, physically, were alright, she "believed she could see 'trauma emotionally with Egypt. She asks for her father at every visit. She is very attached to him.' " Natasha also opined that Egypt was unhappy and needed an outlet, such as art therapy, to express herself.

In reporting on an interaction session between the children and Natasha that she had observed, Berkowitz indicated that Egypt seemed more distressed than Mariam and noted parenthetically that "Egypt was used to being raised by her mother, and is developmentally old enough to experience more distress from the separation." Berkowitz noted further that Egypt was asking for her father, whom she called " 'Baba,' " during the interaction session, "seeming to reflect the close father-daughter bond [that Natasha and her mother] had reported."

Egypt's total separation from her father was due, at some point, to Morsy's incarceration, but ultimately it was his failure to take responsibility for causing Mariam's injuries that limited the efficacy of the services available to him while incarcerated, influenced the denial of his parole, and thereby prevented reunification with Egypt. See *In re Katia M.*, 124 Conn. App. 650, 666, 670, 6 A.3d 86, cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010) (although incarceration alone may not form basis for termination of parental rights and it limits services that department can provide incarcerated parent, it does not excuse parent's failure to use resources offered).

nal clause, that serious physical injury to a child shall constitute "prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights," effectively rendering additional proof of such parental acts or omissions unnecessary. The Appellate Court has described this statutory language as "shift[ing] the burden from the petitioner to the [respondent] to show why a child with clear evidence of physical injury that is unexplained should not be permanently removed from [the respondent's] care." *In re Sean H.*, supra, 24 Conn. App. 144. The trial court here quoted the Appellate Court in the portion of its opinion finding that § 17a-112 (j) (3) (C) was proven as to Mariam, who clearly had suffered serious physical injuries. Thereafter, in the separate section of its opinion analyzing whether § 17a-112 (j) (3) (C) had been proven as to Egypt, who suffered no such injuries, the court briefly referred again to a burden shift.

After examining the broader context of the trial court's reference, we disagree with the respondents that the court considered Mariam's physical injuries to constitute prima facie evidence of the respondents' acts of parental commission or omission as to Egypt. Moreover, we conclude that the court held the petitioner to the requisite standard of proof. Specifically, in the immediately preceding paragraphs of the opinion, the court first quoted § 17a-112 (j) (3) (C), but placed emphasis on portions of the statute other than its terminal clause. It then discussed the respondents' behaviors solely in the period of time subsequent to Mariam's injuries and concluded that it was "their failure to act, their omissions, which for each of them establishes *by clear and convincing evidence* this specific ground for termination of parental rights. [Particularly] [i]n Natasha's case, it is her failure to come to terms with what has happened to her youngest daughter and her former husband's culpability [for] those injuries. For Morsy, it

is his failure to even now admit fully what he did." (Emphasis added.) Because the court's decision, considered as a whole, discloses no improper allocation of the burden of proof or reliance on Mariam's injuries to find that § 17a-112 (j) (3) (C) was proven as to Egypt, we conclude that there is no merit to the respondents' claim.

The judgments are affirmed.

In this opinion PALMER, EVELEIGH, ROBINSON and ESPINOSA, Js., concurred.

McDONALD, J., dissenting. The majority concludes that the trial court properly found that the petitioner, the Commissioner of Children and Families, had proven by clear and convincing evidence that Egypt E. had been denied, by reason of the acts of parental commission or omission by the respondents, Morsy E. and Natasha E., the care, guidance, or control necessary for her well-being, as required by General Statutes § 17a-112 (j) (3) (C), on the basis of the respondents' conduct after Egypt was removed from their custody by the Department of Children and Families. Specifically, the majority cites the respondents' failure "to acknowledge and address the cause of [their minor child] Mariam's injuries, which thereby required Egypt to suffer the trauma attendant to prolonged separation from her biological parents' home and deprived her of the care, guidance or control of her biological parents, as well as stability and permanency, for an extended three year period." (Footnote omitted.) Although I have no doubt that the petitioner properly could have relied on the evidence cited by the majority in support of a statutory ground for termination of the respondents' parental rights, that ground is not § 17a-112 (j) (3) (C), the only ground alleged in the operative petition. Indeed, I surmise that the petitioner was aware of this dilemma when she unsuccessfully

sought to amend the petition to allege, as an additional ground, the respondents' failure to rehabilitate under § 17a-112 (j) (3) (B), following our decision reversing and remanding this case in the first appeal. See *In re Egypt E.*, 322 Conn. 231, 140 A.3d 210 (2016); see generally *In re Gabriella A.*, 319 Conn. 775, 800, 127 A.3d 948 (2015) (termination proper when respondent mother's inability to acknowledge impact that her past trauma had on her parenting ability prevented her rehabilitation).

Certainly, in many cases, the petitioner may establish multiple grounds for termination of a respondent's parental rights. See, e.g., *In re Brian T.*, 134 Conn. App. 1, 3, 38 A.3d 114 (2012) (failure to rehabilitate and denial of care, guidance or control); *In re Kezia M.*, 33 Conn. App. 12, 19, 21–22, 632 A.2d 1122 (abandonment and lack of parent-child relationship), cert. denied, 228 Conn. 915, 636 A.2d 847 (1993). And, to be clear, the petitioner is not required to present a *completely independent* factual basis for each ground alleged. The legislature, however, created the separate statutory grounds for termination to address different conduct. The majority's analysis effectively collapses those grounds and renders the legislature's attempt to differentiate conduct meaningless. A parent's failure to rehabilitate while his or her child is in the department's custody necessarily extends the period of separation. Because such separation invariably is harmful to the child, under the majority's analytical framework, the two grounds are established by virtue of the same conduct.

A parental act of commission or omission, however, is one that causes harm to the child's well-being independent of the child's removal and continuing separation from the respondent parent. Compare *In re Shane M.*, 318 Conn. 569, 589, 122 A.3d 1247 (2015) (sufficient personal rehabilitation requires respondent to correct factors that led to initial commitment, including

acknowledgment of underlying personal issues that form basis for department's involvement), and *In re Kelly S.*, 29 Conn. App. 600, 613–14, 616 A.2d 1161 (1992) (petitioner should have alleged failure to rehabilitate and not parental act of commission or omission when child was removed from parent at birth and, although parent's denial of her serious mental health issues prevented her from benefiting from treatment or providing parental care necessary for her high-risk infant with special needs, there was no proof of specific conduct that caused serious injury to child), with *In re Felicia D.*, 35 Conn. App. 490, 502, 646 A.2d 862 (parental act of commission or omission established when child suffered serious head injuries from third party while in mother's care, mother failed to take action to protect child and violated terms of protective supervision, and mother failed to acknowledge that likely perpetrator of injuries to child was her husband), cert. denied, 231 Conn. 931, 649 A.2d 253 (1994), and *In re Sean H.*, 24 Conn. App. 135, 144–45, 586 A.2d 1171 (parental act of commission or omission established when father stabbed mother to death in full view of children, leaving children homeless, with no caregiver, and permanent emotional injury), cert. denied, 218 Conn. 904, 588 A.2d 1078 (1991). Indeed, the placement of a child in a competent foster home while the child was in the petitioner's custody is evidence that the child is being provided the care, guidance, or control necessary for his or her well-being. See, e.g., *In re Kezia M.*, supra, 33 Conn. App. 19–20; *In re Kelly S.*, supra, 613–16. The majority cannot point to any direct act or omission by the respondents that is specific to Egypt, but, rather, point only to the respondents' failure to accept responsibility for their respective roles in causing harm to Mariam. It is only by focusing on the *consequence* of that failure, namely, the respondents' continued separation from Egypt, that allows the majority to avoid the fatal flaw of terminating

the respondents' parental rights with respect to Egypt based on predictive harm.

The issue of whether the trial court properly denied the petitioner's request to amend the petition to add the ground of failure to rehabilitate is not before this court. This court should not hammer a square peg into a round hole to work around the fact that the petitioner was only able to proceed on the basis of § 17a-112 (j) (3) (C). See, e.g., *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 671–73, 420 A.2d 875 (1979) (requiring strict compliance with statutory criteria for termination of parental rights). To do so would not only permit the petitioner to prevail on an unalleged ground for termination, but would also relieve her of the obligation to prove all of the elements of that ground, namely, that the respondents had been provided with specific court-ordered steps necessary to achieve rehabilitation and that they had failed to attain a sufficient degree of personal rehabilitation as would reasonably encourage a belief that at some future date they could assume a responsible position in Egypt's life. See, e.g., *In re Shane M.*, supra, 318 Conn. 591. In addition, it collapses the distinctions between the two independent statutory grounds and frustrates the policy objectives that undergird the legislative scheme. I recognize that reversing the judgment in the present case would further delay establishing the stability that is undoubtedly in Egypt's best interest. However regrettable that outcome would be in this case, it is outweighed by the concern that it sets a bad precedent to effectively permit the petitioner to prevail on a ground neither alleged in the petition nor supported by the requisite proof. I am not persuaded that the facts in the present case are so unique that our courts will not be required to apply this precedent in future cases. Accordingly, I respectfully dissent.

EMILY BYRNE *v.* AVERY CENTER FOR OBSTETRICS AND GYNECOLOGY, P.C.
(SC 19873)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson and D'Auria, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant health care provider for, inter alia, negligence and negligent infliction of emotional distress in connection with the defendant's allegedly improper release of certain confidential medical records in responding to a subpoena issued in the course of a separate paternity action filed against the plaintiff. The defendant filed a motion for summary judgment arguing, inter alia, that it was entitled to judgment on the plaintiff's negligence claims because Connecticut's common law did not recognize a cause of action against health care providers for breach of the duty of confidentiality in the course of responding to a subpoena. The trial concluded that this state had not yet recognized a common-law privilege for communications between physicians and their patients, and, accordingly, granted summary judgment in favor of the defendant on the plaintiff's negligence claims. On the plaintiff's appeal, *held* that, in light of applicable principles of public policy, case law from other jurisdictions, relevant provisions of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq., and the statute (§ 52-146o) recognizing an evidentiary privilege arising from the physician-patient relationship, a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law, and that, because there was a genuine issue of material fact as to whether the defendant violated that duty of confidentiality by the manner in which it disclosed the plaintiff's medical records in response to the subpoena, the trial court improperly granted summary judgment for the defendant on the plaintiff's negligence claims; moreover, the defendant could not prevail on its claim that summary judgment should nevertheless be granted in this case because the plaintiff's medical records were disclosed in response to a subpoena and § 52-146o does not require a patient's consent for such a disclosure, as the mere existence of a subpoena does not preclude recovery for breach of confidentiality, the fact that a disclosure is in response to a subpoena does not necessarily ensure compliance with § 52-146o, and the defendant apparently complied neither with the

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

face of the subpoena nor with the federal regulation (45 C.F.R. § 164.512 [e]) governing responses to such subpoenas.

(*One justice concurring separately*)

Argued May 1, 2017—officially released January 16, 2018

Procedural History

Action to recover damages for breach of contract, negligence, negligent misrepresentation and negligent infliction of emotional distress, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold, J.*, granted the defendant's motion for summary judgment on the counts alleging negligence and negligent infliction of emotional distress; subsequently, the court granted the plaintiff's motion for an immediate appeal, and the plaintiff appealed. *Reversed*; *further proceedings*.

Bruce L. Elstein, for the appellant (plaintiff).

James F. Biondo, for the appellee (defendant).

Opinion

EVELEIGH, J. The plaintiff, Emily Byrne,[1] appeals from the judgment of the trial court rendered in favor of the defendant, Avery Center for Obstetrics and Gynecology, P.C., on two counts of the operative complaint alleging, respectively, negligence and negligent infliction of emotional distress.[2] On appeal, the plaintiff

[1] We note that Byrne filed a petition for bankruptcy and that Douglas J. Wolinsky, the trustee subsequently appointed by United States Bankruptcy Court for the District of Vermont, was added as a plaintiff in the present case. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 436 n.2, 102 A.3d 32 (2014). For the sake of convenience, we refer to Byrne as the plaintiff in this opinion.

[2] We note that the trial court's partial award of summary judgment in the present case would not ordinarily constitute a final judgment for the purpose of appeal. *Kelly* v. *New Haven*, 275 Conn. 580, 594, 881 A.2d 978 (2005). The plaintiff has, however, obtained permission to appeal from the trial court's decision to the Appellate Court pursuant to Practice Book § 61-4. This appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

asserts that the trial court incorrectly granted summary judgment in favor of the defendant on these counts because it incorrectly concluded that the defendant, as a health care provider, owed the plaintiff no common-law duty of confidentiality. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

This case returns to us for a second time. The facts and procedural history are set forth in this court's prior decision. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 436–44, 102 A.3d 32 (2014). "Before July 12, 2005, the defendant provided the plaintiff [with] gynecological and obstetrical care and treatment. The defendant provided its patients, including the plaintiff, with notice of its privacy policy regarding protected health information and agreed, based on this policy and on law, that it would not disclose the plaintiff's health information without her authorization.

"In May, 2004, the plaintiff began a personal relationship with Andro Mendoza, which lasted until September, 2004.[3] . . . In October, 2004, she instructed the defendant not to release her medical records to Mendoza. In March, 2005, she moved from Connecticut to Vermont where she presently lives. On May 31, 2005, Mendoza filed paternity actions against the plaintiff in Connecticut and Vermont." (Footnote in original; internal quotation marks omitted.) Id., 437. Thereafter, the defendant received a subpoena instructing the custodian of its records to appear before the issuing attorney on July 8, 2005, at the New Haven Regional Children's Probate Court and to produce "all medical records" pertaining to the plaintiff. "The defendant did not alert the plaintiff of the subpoena, file a motion to quash it

[3] "We note that the operative complaint in the present case alleges that the plaintiff discovered she was pregnant around the same time she terminated her relationship with Mendoza." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.4.

or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. In September, 2005, [Mendoza] informed [the] plaintiff by telephone that he reviewed [the] plaintiff's medical [record] in the court file. On September 15, 2005, the plaintiff filed a motion to seal her medical file, which was granted. The plaintiff alleges that she suffered harassment and extortion threats from Mendoza since he viewed her medical records.[4] . . .

"The plaintiff subsequently brought this action against the defendant. Specifically, the operative complaint in the present case alleges that the defendant: (1) breached its contract with her when it violated its privacy policy by disclosing her protected health information without authorization; (2) acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o[5] and

[4] "We also note that, according to the operative complaint, Mendoza has utilized the information contained within these records to file numerous civil actions, including paternity and visitation actions, against the plaintiff, her attorney, her father and her father's employer, and to threaten her with criminal charges." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.5.

[5] General Statutes § 52-146o provides: "(a) Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure.

"(b) Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or

the [federal] regulations implementing [the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq.], (3) made a negligent misrepresentation, upon which the plaintiff relied to her detriment, that her medical file and the privacy of her health information would be protected in accordance with the law; and (4) engaged in conduct constituting negligent infliction of emotional distress. After discovery, the parties filed cross motions for summary judgment." (Footnotes altered; internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437–39.

"With respect to the plaintiff's negligence based claims in counts two and four of the complaint, the trial court agreed with the defendant's contention that 'HIPAA preempts "any action dealing with confidentiality/privacy of medical information,' " which prompted the court to treat the summary judgment motion as one seeking dismissal for lack of subject matter jurisdiction. In its memorandum of decision, the trial court first considered the plaintiff's negligence claims founded on the violations of the regulations implementing HIPAA. The court first observed the 'well settled' proposition that HIPAA does not create a private right of action, requiring claims of violations instead to be raised through . . . administrative channels. The trial court then relied on *Fisher* v. *Yale University*, Superior

such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected."

We note that the legislature made certain technical changes to § 52-146o subsequent to the events underlying the present appeal. See, e.g., Public Acts 2013, No. 13-208, § 63. For the sake of simplicity, all references to § 52-146o within this opinion are to the current revision of the statute.

Court, judicial district of New Haven, Complex Litigation Docket, Docket No. X10-CV-04-4003207-S (April 3, 2006), and *Meade* v. *Orthopedic Associates of Windham County*, Superior Court, judicial district of Windham, Docket No. CV-06-4005043-S (December 27, 2007), and rejected the plaintiff's claim that she had not utilized HIPAA as the basis of her cause of action, but rather, relied on it as ' "evidence of the appropriate standard of care" for claims brought under state law, namely, negligence.' Emphasizing that the courts cannot supply a private right of action that the legislature intentionally had omitted, the trial court noted that the 'plaintiff has labeled her claims as negligence claims, but this does not change their essential nature. They are HIPAA claims.' The trial court further determined that the plaintiff's statutory negligence claims founded on a violation of § 52-146o were similarly preempted because the state statute had been superseded by HIPAA, and thus the plaintiff's state statutory claim 'amount[ed] to a claim for a HIPAA violation, a claim for which there is no private right of action.'

"The trial court concluded similarly with respect to the plaintiff's common-law negligence claims, observing that, under the regulatory definitions implementing HIPAA's preemption provision[6] . . . to 'the extent that

[6] Title 45 of the Code of Federal Regulations (2016), § 160.202, implement's HIPPA's preemption provision, 42 U.S.C. § 1320d-7, and provides: "For purposes of this subpart, the following terms have the following meanings:

"*Contrary*, when used to compare a provision of [s]tate law to a standard, requirement, or implementation specification adopted under this subchapter, means:

"(1) A covered entity or business associate would find it impossible to comply with both the [s]tate and [f]ederal requirements; or

"(2) The provision of [s]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191, or sections 13400-13424 of Public Law 111-5, as applicable.

"*More stringent* means, in the context of a comparison of a provision of [s]tate law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a [s]tate law that meets one or more of the following criteria:

common-law negligence permits a private right of action for claims that amount to HIPAA violations, it is a contrary provision of law and subject to HIPAA's preemption rule. Because it is not more stringent, according to the definition of 45 C.F.R. § 160.202, the preemption exception does not apply.' For the same reasons, the trial court dismissed count four of the complaint, claiming negligent infliction of emotional distress.

"(1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:

"(i) Required by the Secretary in connection with determining whether a covered entity or business associate is in compliance with this subchapter; or

"(ii) To the individual who is the subject of the individually identifiable health information.

"(2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable.

"(3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.

"(4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

"(5) With respect to recordkeeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.

"(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

"*Relates to the privacy of individually identifiable health information* means, with respect to a [s]tate law, that the [s]tate law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.

"*State law* means a constitution, statute, regulation, rule, common law, or other [s]tate action having the force and effect of law." (Emphasis in original.)

"With respect to the remainder of the pending motions, the trial court first denied, on the basis of its previous preemption determinations, the plaintiff's motion for summary judgment, which had claimed that the defendant's conduct in responding to the subpoena violated the HIPAA regulations, specifically 45 C.F.R. § 164.512 (e), as a matter of law. The trial court denied, however, the defendant's motion for summary judgment with respect to the remaining counts of the complaint, namely, count one alleging breach of contract and count three alleging negligent misrepresentation, determining that genuine issues of material fact existed with respect to contract formation through the defendant's privacy policy, and whether the plaintiff had received and relied upon that policy. Thus, the trial court denied the defendant's motion for summary judgment as to counts one and three of the complaint, and dismissed counts two and four of the complaint for lack of subject matter jurisdiction." (Citations omitted; footnotes added and omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 439–44.

Thereafter, pursuant to Practice Book § 61-4, the plaintiff obtained permission to file an appeal from the judgment of the trial court dismissing counts two and four of the complaint to the Appellate Court. The appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal to this court, the plaintiff asserted that the trial court improperly concluded that her state law claims for negligence and negligent infliction of emotional distress were preempted by HIPAA. Id., 436. In examining the plaintiff's claim, this court explained: "We note at the outset that whether Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality, including in the context of responding to a subpoena, is not an issue

presented in this appeal. Thus, assuming, without deciding, that Connecticut's common law recognizes a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas, we agree with the plaintiff and conclude that such an action is not preempted by HIPAA and, further, that the HIPAA regulations may well inform the applicable standard of care in certain circumstances." (Footnote omitted.) Id., 446–47.

This court concluded that, "to the extent that Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA does not preempt the plaintiff's state common-law causes of action for negligence or negligent infliction of emotional distress against the health care providers in this case and, further, that regulations of the Department of Health and Human Services (department) implementing HIPAA may inform the applicable standard of care in certain circumstances." Id., 436. Accordingly, this court reversed the judgment of the trial court and remanded the case to that court for further proceedings. Id., 463.

On remand, the defendant filed a motion for summary judgment on the counts of the operative complaint alleging negligence and negligent infliction of emotional distress. As grounds for its motion, the defendant claimed that no Connecticut court had ever recognized a common-law cause of action against a health care provider for breach of its duty of confidentiality for its response to a subpoena. The trial court granted the defendant's motion for summary judgment, determining that "no courts in Connecticut, to date, recognized or adopted a common-law privilege for communications between a patient and physicians. Any recognition of this cause of action is best addressed to our Supreme and Appellate Courts or the legislature. Accordingly the motion for summary judgment is granted as to counts two and

four of the plaintiff's operative complaint." This appeal followed. See footnote 2 of this opinion.

We begin with general principles and the standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016); see also *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 255, 125 A.3d 172 (2015).

In the present appeal, the plaintiff asserts that the trial court incorrectly granted summary judgment in favor of the defendant on the counts of the operative complaint alleging negligence and negligent infliction of emotional distress. Specifically, the plaintiff asserts that Connecticut's common law recognizes a duty of confidentiality arising from the physician-patient relationship and that this duty extends to compliance with a subpoena. The plaintiff further asserts that recognition of such a duty is supported by public policy considerations, as reflected in § 52-146o and HIPAA, and case law from other jurisdictions. In response, the defendant asserts that there is no common-law duty of confidentiality between a health care provider and a patient in the context of responding to a subpoena. The defendant further asserts that such a duty is not supported by public policy considerations or recognized in other

jurisdictions. We conclude that recognizing a cause of action for the breach of the duty of confidentiality in the physician-patient relationship by the disclosure of medical information is not barred by § 52-146o or HIPAA and that public policy, as viewed in a majority of other jurisdictions that have addressed the issue, supports that recognition.

The dispositive issue in this appeal is whether a patient has a civil remedy against a physician if that physician, without the patient's consent, discloses confidential information obtained in the course of the physician-patient relationship. Although we have not had the opportunity to address this question before, this court has recognized that "[t]he principle of confidentiality lies at the heart of the physician-patient relationship . . . ." *Jarmie* v. *Troncale*, 306 Conn. 578, 607, 50 A.3d 802 (2012). "Physician-patient confidentiality is described as a 'privilege.' . . . When that confidentiality is diminished to any degree, it necessarily affects the ability of the parties to communicate, which in turn affects the ability of the physician to render proper medical care and advice." Id., 608–609. "[T]he purpose of the privilege is to give the patient an incentive to make full disclosure to a physician in order to obtain effective treatment free from the embarrassment and invasion of privacy which could result from a doctor's testimony." *State* v. *White*, 169 Conn. 223, 234–35, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975), citing C. McCormick, Evidence (2d Ed. 1972) § 98, p. 213. Additionally, the Appellate Court has recognized the fiduciary nature of the physician-patient relationship, which is based on trust and confidence that develops as medical service is provided. *Rosenfield* v. *Rogin, Nassau, Caplan, Lassman & Hirtle, LLC*, 69 Conn. App. 151, 163, 795 A.2d 572 (2002) ("There is a marked resemblance between the continuous treatment of a patient's condition by a physician

and the continuous representation of a client by an attorney. . . . In both situations, the relationship between the parties is demarcated by the fiduciary relationship of trust and confidence, which continues to develop as the service is provided." [Citations omitted.]).

The importance of confidentiality in the physician-patient relationship has been recognized by courts in numerous jurisdictions throughout the country. Courts have repeatedly used the common law to recognize "a patient's valid interest in preserving the confidentiality of medical facts relayed to a physician." *Bratt* v. *International Business Machines Corp.*, 392 Mass. 508, 522, 467 N.E.2d 126 (1984). "A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled." *Hague* v. *Williams*, 37 N.J. 328, 336, 181 A.2d 345 (1962). "The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health." Id., 335–36. "Notwithstanding the concern that application of the patient-physician privilege may bar the admissibility of probative testimony, there is a clear recognition that, in general, a physician does have a professional obligation to maintain the confidentiality of his patient's communications. . . . This obligation to preserve confidentiality is recognized as part of the Hippocratic Oath." (Citation omitted.) *Stempler* v. *Speidell*, 100 N.J. 368, 375, 495 A.2d 857 (1985).

Indeed, this court has explained that "[t]he principle of confidentiality lies at the heart of the physician-patient relationship and has been recognized by our

legislature. [Section] 52-146o was enacted in 1990; see Public Acts 1990, No. 90-177; to address the need 'to protect the confidentiality of communications in order to foster the free exchange of information from patient to physician . . . .' " *Jarmie* v. *Troncale*, supra, 306 Conn. 607–608, quoting *Edelstein* v. *Dept. of Public Health & Addiction Services*, 240 Conn. 658, 666, 692 A.2d 803 (1997).

Section 52-146o (a) provides: "Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure."

Subsection (b) of § 52-146o further provides as follows: "Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider

in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected."

At the outset, we recognize that, although § 52-146o creates an evidentiary privilege arising from the physician-patient relationship, it does not explicitly provide a cause of action or any other remedy for improper disclosure of the confidential communications obtained in the course of that relationship. Contrary to HIPAA, which "expressly provides a method for enforcing its prohibition upon use or disclosure of [an] individual's health information—the punitive imposition of fines and imprisonment for violations"; (internal quotation marks omitted) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 452; § 52-146o does not provide for any penalty for its violation.[7]

[7] We also note that nothing in the legislative history surrounding the enactment of § 52-146o demonstrates that recognition of a cause of action for breach of the physician-patient duty of confidentiality would thwart the purpose of the act. Section 52-146o was enacted in 1990. See Public Acts 1990, No. 90-177 (P.A. 90-177). The statutory language, in its original form, is substantially similar to the current version of § 52-146o. In describing the bill, Senator Richard Blumenthal explained: "This bill would provide protection against disclosure by a health care provider of records and other communications between the patient and physician or other health care provider without the consent of the individual who is being treated. This kind of protection ordinarily exists at present, but in rare circumstances, where the health care provider is approached by an insurance adjuster or a lawyer, on occasion, the records are provided without the consent of the patients. This bill would prevent that kind of disclosure and would codify what now is and should be the existing practice." 33 S. Proc., Pt. 8, 1990 Sess., p. 2620. Representative Janet Polinsky likewise explained that "the bill is designed to insure that patient/doctor confidentiality is maintained and only disclosed pursuant to particular rules when there is a court case going on and not one person [comes] in and [gets] it." 33 H.R. Proc., Pt. 14, 1990 Sess., p. 4860. During a committee hearing on the underlying bill, Attorney Carl Secola remarked that "I think that a very basic tenet of any patient, physician relationship is that there has to be that trust between the patient and the physician so that the patient feels comfortable talking to the

"An exhaustive search of Connecticut case law reveals no hard and fast test that courts apply when determining whether to recognize new causes of action. We do have the inherent authority, pursuant to the state constitution, to create new causes of action. . . . Moreover, it is beyond dispute that we have the power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law." (Citation omitted.) *ATC Partnership* v. *Coats North America Consolidated, Inc.*, 284 Conn. 537, 552–53, 935 A.2d 115 (2007). "When we acknowledge new causes of action, we also look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action. . . . To determine whether existing remedies are sufficient to compensate those who seek the recognition of a new cause of action, we first analyze the scope and applicability of the current remedies under the facts alleged by the plaintiff. . . . Finally, we are mindful of growing judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent." (Citations omitted.) Id., 553.

We begin by examining the currently available judicial sanctions. In *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 433, this court

physician, telling them whatever's bothering them. It enables the physician to treat the patient properly and I don't think a patient should have to worry about possible consequences later on down the line that someone is going to obtain completely immaterial, irrelevant and most importantly, personal and confidential information that has absolutely nothing to do with that action." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1990 Sess., p. 1163. We conclude, therefore, that the legislative history of P.A. 90-177 manifests the legislature's intention that the confidentiality of medical records be maintained and protected by a requirement that the health care provider be required to follow a specific procedure prior to disclosing the records. See 33 H.R. Proc., supra, p. 4861, remarks of Representative Edward C. Krawiecki (explaining that "[t]his sets parameters on how you get information").

undertook a thorough analysis of the criminal and civil sanctions provided by HIPAA. "It is by now well settled that the statutory structure of HIPAA . . . precludes implication of a private right of action. [Section] 1320d-6 [of title 42 of the United States Code] expressly provides a method for enforcing its prohibition upon use or disclosure of individual's health information—the punitive imposition of fines and imprisonment for violations." (Footnote omitted; internal quotation marks omitted.) Id., 451–52. In that case, we further explained that "one commenter during the rulemaking process had raised the issue of whether a private right of action is a greater penalty, since the proposed federal rule has no comparable remedy." Id., 453. "[HIPAA] provides for only two types of penalties: fines and imprisonment. Both types of penalties could be imposed in addition to the same type of penalty imposed by a state law, and should not interfere with the imposition of other types of penalties that may be available under state law. Thus, we think it is unlikely that there would be a conflict between state and federal law in this respect . . . ." Id., 453 n.19, quoting Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,582 (December 28, 2000).

As explained previously in this opinion, when acknowledging new causes of action, "we are mindful of growing judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent." *ATC Partnership* v. *Coats North America Consolidated, Inc.*, supra, 284 Conn. 553. Therefore, we next turn to federal law and law from other jurisdictions regarding the duty of health care providers to maintain the confidentiality of medical records.

Federal law regarding the privacy of medical information is codified in HIPAA. As we explained in *Byrne*,

"[r]ecognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996. . . . Within the Administrative Simplification section, Congress included another provision . . . outlining a two-step process to address the need to afford certain protections to the privacy of health information maintained under HIPAA. First, [Congress] directed [the department] to submit . . . within twelve months of HIPAA's enactment detailed recommendations on standards with respect to the privacy of individually identifiable health information. . . . Second, if Congress did not enact further legislation pursuant to these recommendations within thirty-six months of the enactment of HIPAA, [the department] was to promulgate final regulations containing such standards. . . . Because Congress ultimately failed to pass any additional legislation, the department's final regulations implementing HIPAA, known collectively as the Privacy Rule, were promulgated in February 2001, with compliance phased in over the next few years." (Citations omitted; internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 448–49; see also *South Carolina Medical Assn.* v. *Thompson*, 327 F.3d 346, 348 (4th Cir.), cert. denied, 540 U.S. 981, 124 S. Ct. 464, 157 L. Ed. 2d 371 (2003).

In *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 458–59, this court "conclude[d] that, if Connecticut's common law recognizes claims arising from a health care provider's alleged breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA and its implementing regulations do not preempt such claims. We further conclude that, to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering ser-

vices to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena." Therefore, this court has previously concluded that recognition of a private cause of action for breach of the duty of confidentiality of medical records is not preempted by, or inconsistent with, HIPAA.

Indeed, this court further explained that "[t]he availability of such private rights of action in state courts, to the extent that they exist as a matter of state law, do not preclude, conflict with, or complicate health care providers' compliance with HIPAA. On the contrary, negligence claims in state courts support at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record." (Internal quotation marks omitted.) Id., 459; see also *Yath* v. *Fairview Clinics, N.P.*, 767 N.W.2d 34, 49–50 (Minn. App. 2009) (concluding that state statutory cause of action for improper disclosure of medical records was not preempted by HIPAA because, "[a]lthough the penalties under the two laws differ, compliance with [the Minnesota statute] does not exclude compliance with HIPAA," and "[r]ather than creating an 'obstacle' to HIPAA, [the Minnesota statute] supports at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record"). Therefore, we conclude that the federal law regarding privacy and confidentiality of medical records supports our recognition of a common-law cause of action for breach of the duty of confidentiality of medical records by a health care provider.

Although the question of whether to recognize a common-law cause of action for breach of the duty of confidentiality of medical records by a health care provider is one of first impression in this court, many other

jurisdictions have addressed this question.[8] A review of case law from other jurisdictions that have addressed this issue demonstrates that a majority of jurisdictions have recognized a common-law cause of action for breach of the confidentiality of medical records by health care providers. "Although the common law did not bestow a privilege on the doctor-patient relationship and no cause of action existed for divulgence of any confidences, the clear modern consensus of the case law has imposed a legal duty of confidentiality or a fiduciary duty under the common law's continuing power and competence to answer novel questions of law arising under ever changing conditions of the society." (Footnotes omitted; internal quotation marks omitted.) D. Elder, Privacy Torts (2017) § 5:2; see also annot., 48 A.L.R. 4th 668, § 2 (a) (1986) ("Although at common law neither the patient nor the physician has the privilege that a communication of one to the other not be disclosed to a third party, courts have generally upheld or recognized the right of a patient to recover damages from a physician for unauthorized disclosure concerning the patient on the ground that such disclosure constitutes an actionable invasion of the patient's privacy . . . . Another basis of a physician's liability for unauthorized disclosure of confidential information about a patient is breach of the physician-patient confidential relationship. Although a few jurisdictions have refused to recognize this cause of action . . . it gener-

[8] In *Skrzypiec* v. *Noonan*, 228 Conn. 1, 9, 633 A.2d 716 (1993), this court affirmed the judgment of the trial court in favor of the defendant on a firefighter's claim for negligence and violation of General Statutes (Rev. to 1993) §§ 52-146d and 52-146e against his psychiatrist for improper release of confidential medical information regarding psychiatric treatment. In *Skrzypiec*, this court affirmed the judgment of the trial court on the ground that the jury could have found that the plaintiff suffered no harm as a result of the alleged breach. Id., 11. Therefore, it assumed but did not decide whether the psychiatrist owed the plaintiff a duty to honor his request for confidentiality in the context of a request for disclosure under the Workers' Compensation Act, General Statutes (Rev. to 1987) § 31-294. Id., 9 n.6.

ally has been held or recognized that a patient may have such a cause of action against the physician . . . .'' [Footnotes omitted.]).

A review of cases from other jurisdictions reveals that courts have recognized causes of action for breach of confidentiality of medical records by health care providers on a variety of bases. The most common basis for recognizing such a cause of action is that health care providers enjoy a special fiduciary relationship with their patients and that recognition of the privilege is necessary to ensure that this bond remains.

For instance, the Court of Appeals of New York explained that ''in New York, the special relationship akin to a fiduciary bond, which exists between the physician and patient, is reflected in [N.Y. C.P.L.R. 4504 (McKinney 2007)]. The basis of the evidentiary privilege is that patients will be forthcoming and encouraged to provide complete data to assist a medical provider in diagnosis and treatment . . . . An additional motivation for the existence of the privilege is the avoidance of a Hobson's choice for physicians: choosing between honoring their professional obligation with respect to their patients' confidences or their legal duty to testify truthfully. By law and by oath, a physician warrants that any confidential medical information obtained through the relationship will not be released without the patient's permission. The physician-patient relationship thus operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations . . . .'' (Citation omitted.) *Aufrichtig* v. *Lowell*, 85 N.Y.2d 540, 546, 650 N.E.2d 401, 626 N.Y.S.2d 743 (1995).

Similarly, the Massachusetts Supreme Judicial Court addressed whether a patient has a nonstatutory, civil remedy against a physician for the disclosure of confidential medical information without the patient's con-

sent in *Alberts* v. *Devine*, 395 Mass. 59, 479 N.E.2d 113, cert. denied sub nom. *Carroll* v. *Alberts*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985). In that case, the court recognized that "[f]ew cases consider the out-of-court physician-patient privilege. That is undoubtedly due to the fact that the confidentiality of the relationship is a cardinal rule of the medical profession, faithfully adhered to in most instances, and thus has come to be justifiably relied upon by patients seeking advice and treatment. . . . Of the courts that have considered the question, most have held that a patient can recover damages if the physician violates the duty of confidentiality that plays such a vital role in the physician-patient relationship." (Citation omitted; internal quotation marks omitted.) Id., 66.

The Massachusetts Supreme Judicial Court reasoned as follows: "We continue to recognize a patient's valid interest in preserving the confidentiality of medical facts communicated to a physician or discovered by the physician through examination. The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health. . . . To foster the best interest of the patient and to insure a climate most favorable to a complete recovery, men of medicine have urged that patients be totally frank in their discussions with their physicians. To encourage the desired candor, men of law have formulated a strong policy of confidentiality to assure patients that only they themselves may unlock the doctor's silence in regard to those private disclosures. The result which these joint efforts of the two professions have produced . . . has been urged or forecast in una voce by commentators

in the field of medical jurisprudence." (Citation omitted; internal quotation marks omitted.) Id., 65–66.

In considering whether to recognize the new cause of action, the Massachusetts Supreme Judicial Court reasoned as follows: "[T]he [l]egislature has demonstrated its recognition of a policy favoring confidentiality of medical facts by enacting [statutes] to limit the availability of hospital records. Furthermore, [the legislature has also created] an evidentiary privilege as to confidential communications between a psychotherapist and a patient. The fact that no such statutory privilege obtains with respect to physicians generally and their patients . . . does not dissuade us from declaring that in this Commonwealth all physicians owe their patients a duty, for violation of which the law provides a remedy, not to disclose without the patient's consent medical information about the patient, except to meet a serious danger to the patient or to others." (Citation omitted.) Id., 67–68.

In *Alberts*, the defendant asserted that the plaintiff's claims were barred because there was no Massachusetts precedent recognizing a civil remedy against a health care provider for breach of the duty of confidentiality. Id., 68. The Massachusetts Supreme Judicial Court recognized that "[i]t is true, as [the defendant] argues, that no Massachusetts case before this one recognizes such a theory of liability. However, as we said in *George* v. *Jordan Marsh Co.*, [359 Mass. 244, 249, 268 N.E.2d 915 (1971)], a case in which we recognized for the first time the tort of infliction of emotional distress, '[t]hat is true only because the precise question has never been presented to this court for decision. That argument is therefore no more valid than would be an argument by the plaintiff that there is no record of any Massachusetts law denying recovery on such facts. No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial

precedent. It would indeed be unfortunate, and perhaps disastrous, if we were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to answer a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve.' In *Smith* v. *Driscoll*, [94 Wn. 441, 442, 162 P. 572 (1917)], although the court found it unnecessary to determine 'whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications,' the court 'assumed' that 'for so palpable a wrong, the law provides a remedy.' We, too, believe that for so palpable a wrong, the law provides a remedy." *Alberts* v. *Devine*, supra, 395 Mass. 68–69. Accordingly, the Massachusetts Supreme Judicial Court concluded "that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician." Id., 69.

Similarly, the Court of Appeals of South Carolina has also recognized "the [common-law] tort of breach of a physician's duty of confidentiality." *McCormick* v. *England*, 328 S.C. 627, 643, 494 S.E.2d 431 (App. 1997). In *McCormick*, the court explained the fiduciary nature of the physician-patient relationship as follows: "A person who lacks medical training usually must disclose much information to his or her physician which may have a bearing upon diagnosis and treatment. Such disclosures are not totally voluntary; therefore, in order to obtain cooperation, it is expected that the physician will keep such information confidential." Id., 635; see also 61 Am. Jur. 2d 299, Physicians, Surgeons, and Other

Healers § 167 (1981) ("[b]eing a fiduciary relationship, mutual trust and confidence are essential").

The Court of Appeals of South Carolina further reasoned that "[t]he belief that physicians should respect the confidences revealed by their patients in the course of treatment is a concept that has its genesis in the Hippocratic Oath, which states in [relevant] part: 'Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret.' " *McCormick* v. *England*, supra, 328 S.C. 635, quoting Taber's Cyclopedic Medical Dictionary (17th Ed. 1993), p. 902.

Explaining that "[t]he modern trend recognizes that the confidentiality of the physician-patient relationship is an interest worth protecting," the Court of Appeals of South Carolina concluded that "[a] majority of the jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest." *McCormick* v. *England*, supra, 328 S.C. 636.

The Supreme Court of Missouri similarly explained that "[w]e believe a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with . . . treatment of [a] patient. This duty arises out of a fiduciary relationship that exists between the physician and the patient. If such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician. In addition to a physician's legal fiduciary duty, a physician also has a separate ethical duty to maintain the confidentiality of information

received from a patient. While the ethical principles may evidence public policy that courts may consider in framing the specific limits of the legal duty of confidentiality, this legal duty is to be distinguished from the ethical duty. The civil action for damages in tort is the sanction that puts teeth into the physician's duty of confidentiality." (Footnote omitted.) *Brandt* v. *Medical Defense Associates*, 856 S.W.2d 667, 670–71 (Mo. 1993).

The foregoing cases from other jurisdictions reveal that a majority of jurisdictions that have considered the question have recognized a cause of action against a physician for the unauthorized disclosure of confidential medical information obtained in the context of the physician-patient relationship. "In the absence of express legislation, courts have found the basis for a right of action for wrongful disclosure in four main sources: (1) state physician licensing statutes, (2) evidentiary rules and privileged communication statutes which prohibit a physician from testifying in judicial proceedings, (3) [common-law] principles of trust, and (4) the Hippocratic Oath and principles of medical ethics which proscribe the revelation of patient confidences. . . . The jurisdictions that recognize the duty of confidentiality have relied on various theories for the cause of action, including invasion of privacy, breach of implied contract, medical malpractice, and breach of a fiduciary duty or a duty of confidentiality." (Citation omitted; footnote omitted.) *McCormick* v. *England*, supra, 328 S.C. 636–37.

Other jurisdictions that have considered the issue have continued to allow state law causes of action arising from the breach of patient confidentiality by health care providers after the enactment of HIPAA. These cases rely on the premise that "such state-law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance." *R.K.* v. *St. Mary's Medical Center, Inc.*, 229 W. Va. 712,

721, 735 S.E.2d 715 (2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1738, 185 L. Ed. 2d 788 (2013).

In a case with very similar facts to the present case, the Appellate Division of the Superior Court of New Jersey allowed a plaintiff to proceed with a common-law civil action seeking to recover damages against her physician for the disclosure of certain medical records to her husband's attorney in response to a subpoena in the absence of the plaintiff's authorization or a notice to the plaintiff or her attorney. *Crescenzo* v. *Crane*, 350 N.J. Super. 531, 534–35, 796 A.2d 283 (App. Div.), cert. denied, 174 N.J. 364, 807 A.2d 196 (2002). The court rejected the doctor's claim that the subpoena itself was a determination by the court that would authorize disclosure without consent because it commanded him to produce the documents and he was subject to a contempt citation if he did not comply. Id., 540–41. In reaching this conclusion, the court reasoned as follows: "That a physician may find himself in a difficult position when confronted with the imposing language of a subpoena does not warrant a resolution of the problem by simply providing the records without a release or further inquiry, especially when regulatory provisions governing a doctor's conduct recognize and are designed to preserve the confidentiality of a patient's records. We have identified practical alternatives to simply yielding the records—a release, contact with the patient or contact with the attorney—none of which impose[s] a significant or undue burden on the doctor when confidentiality is at stake. We hold that [the] plaintiff may proceed with her cause of action against the doctor." Id., 542.

Although many jurisdictions had recognized an independent tort for the unauthorized disclosure of medical information to a third party prior to the enactment of HIPAA, the trend toward recognition of the cause of action and allowance of such claims has continued after

its enactment in 1996. See *Sorensen* v. *Barbuto*, 143 P.3d 295, 300 (Utah App. 2006) (holding that "ex parte communication between a physician and opposing counsel constitutes a breach of the physician's fiduciary duty of confidentiality" and concluding that "the trial court erred in dismissing [the plaintiff's] claim for breach of confidentiality [and, because] we have determined that a duty exists, the trial court [also] erred in dismissing [the plaintiff's] claim for negligence"); see also, e.g., *Biddle* v. *Warren General Hospital*, 86 Ohio St. 3d 395, 401, 715 N.E.2d 518 (1999) ("[w]e hold that in Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship").

Our research reveals four jurisdictions that have declined to recognize a cause of action for breach of the physician's duty of confidentiality. See annot., 48 A.L.R 4th, supra, § 7, pp. 691–92. ("[i]n a few jurisdictions, the courts have held that liability for a physician's unauthorized disclosure of confidential information about a patient cannot be based upon a breach of the confidential relationship of physician and patient, where the particular jurisdiction follows the common-law rule that neither patient nor physician has a privilege that a communication of one to the other not be disclosed to a third party, and has no statute providing for such a privilege"); see also *Mikel* v. *Abrams*, 541 F. Supp. 591, 599 (W.D. Mo. 1982) (refusing to follow cases from other states and declining to recognize cause of action for breach of confidential or privileged relationship because no Missouri case had recognized cause of action before), aff'd, 716 F.2d 907 (8th Cir. 1983); *Logan* v. *District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (noting that "[o]ther jurisdictions have recognized a cause of action for unauthorized disclosure of information obtained through the physician-

patient relationship" but concluding that plaintiff had failed to persuade court "that such a cause of action should or would be recognized by the courts of this jurisdiction" and that plaintiff's invasion of privacy claim was "sufficient to redress any breach of the confidentiality of the physician-patient relationship"); *Collins* v. *Howard*, 156 F. Supp. 322, 324 (S.D. Ga. 1957) (The court refused to recognize a cause of action for breach of confidentiality, concluding as follows: "There is no confidential relationship between doctor and patient or hospital and patient in Georgia. The [common-law] rule is followed and no statute has been enacted creating the relationship. . . . In the absence of a statute providing for such privilege, none exists." [Citation omitted.]); *Quarles* v. *Sutherland*, 215 Tenn. 651, 655–57, 389 S.W.2d 249 (1965) (declining to recognize cause of action for breach of confidentiality where state had no common-law or statutory privilege for communications between patient and physician). As this court recognized in *Edelstein* v. *Dept. of Public Health & Addiction Services*, supra, 240 Conn. 662, § 52-146o "created a broad physician-patient privilege," and, therefore, the rationale of these jurisdictions that decline to recognize a common-law action for breach of the duty of confidentiality is not persuasive in Connecticut. Accordingly, we agree with the majority of jurisdictions that have considered the issue, and conclude that the nature of the physician-patient relationship warrants recognition of a common-law cause of action for breach of the duty of confidentiality in the context of that relationship.

We conclude that a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort

against the health care provider, unless the disclosure is otherwise allowed by law.

In the present case, the defendant asserts that, even if this court recognizes a cause of action for breach of the duty of confidentiality in the physician-patient relationship, the defendant's motion for summary judgment in the present case should be granted because the plaintiff's medical records were disclosed in response to a subpoena and § 52-146o (b) does not require the patient's consent for such a disclosure. We disagree.

Section 52-146o (b) provides in relevant part that "[c]onsent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court. . . ." The language of § 52-146o (b) demonstrates that the disclosure must comply with statutes and regulations or the rules of court. Although we recognize, as other jurisdictions do, that the common-law duty of confidentiality is not absolute, we cannot conclude that any disclosure of medical records in response to a subpoena complies with § 52-146o (b) because a subpoena, without a court order, is not a statute, regulation of a state agency, or rule of court. See Practice Book § 7-18 ("Hospital, psychiatric and medical records shall not be filed with the clerk unless such records are submitted in a sealed envelope clearly identified with the case caption, the subject's name and the health care provider, institution or facility from which said records were issued. Such records shall be opened only pursuant to court order."); see also Practice Book § 25-55 ("A party who plans to offer a hospital record in evidence shall have the record in the clerk's office twenty-four hours prior to trial. The judge shall order that all such records be available for inspection in the clerk's office to any counsel of record under the supervision of the clerk. . . . Such records shall be submitted

in accordance with the provisions of Section 7-18."). We also cannot conclude that the mere existence of a subpoena, regardless of the method by which a health care provider chooses to comply, precludes a common-law action for breach of confidentiality.[9]

In the present case, the defendant received a subpoena instructing the custodian of its records to appear, together with the plaintiff's medical records, at the New Haven Regional Children's Probate Court on July 8, 2005. The defendant did not alert the plaintiff of the subpoena, file a motion to quash it or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. The plaintiff was later notified by Mendoza that he was able to review her medical record in the court file. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437.

From our review of the record in the present case, it appears that the defendant did not even comply with

[9] The defendant asserts that the Appellate Court's decision in *Alexandru* v. *West Hartford Obstetrics & Gynecology, P.C.*, 78 Conn. App. 521, 524–25, 827 A.2d 776, cert. denied, 266 Conn. 912, 832 A.2d 68 (2003), is applicable to the present case. We disagree. In *Alexandru*, the Appellate Court concluded that the defendant medical provider did not violate § 52-146o when it disclosed the plaintiff's medical records during a deposition by a physician who had been obtained as the plaintiff's medical expert. Id., 522–25. In affirming the judgment of the trial court granting summary judgment to the defendant, the Appellate Court explained that "[t]he plaintiff's medical records were disclosed by her medical expert at a deposition process governed by the rules of federal procedure attended by her counsel and with no objection to either disclosure or the process." Id., 523. Furthermore, the Appellate Court noted that the plaintiff had exercised a valid authorization for her medical records to be released to her attorney and that "[h]aving authorized release of that information to her attorney, she impliedly gave consent to her attorney to utilize the information on her behalf in advancing her claims in the federal action." Id., 525. As we have explained previously herein, there is a genuine issue of material fact regarding whether the disclosure of the plaintiff's medical records in the present case was in compliance with applicable regulations and the rules of court. Accordingly, we find *Alexandru* inapplicable.

the face of the subpoena, which required the custodian of records for the defendant to appear in person before the attorney who issued the subpoena. Instead, the defendant mailed a copy of the plaintiff's medical records directly to the court.

Furthermore, in *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 458–59, this court concluded "that, if Connecticut's common law recognizes claims arising from a health care provider's alleged breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA and its implementing regulations do not preempt such claims. We further conclude that, to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena."[10]

[10] In support of its claim, the defendant cites to *Givens* v. *Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 407–408 (Tenn. 2002). In *Givens*, the Supreme Court of Tennessee concluded "that an implied covenant of confidentiality can arise from the original contract of treatment for payment [between a physician and a patient]." The court further concluded "it is clear that whatever the terms of this implied covenant of confidentiality may be, a physician cannot withhold such information in the face of a subpoena or other request cloaked with the authority of the court. Undoubtedly, any such contract would be contrary to public policy as expressed in the rules governing [pretrial] discovery and in the relevant medical confidentiality statutes." Id., 408. We agree with the Supreme Court of Tennessee that a physician cannot withhold information lawfully obtained through a subpoena. The plaintiff's complaint in the present case, however, does not raise that issue. Instead, the plaintiff's complaint alleges that the defendant negligently disclosed her medical information in response to a subpoena because it failed to follow HIPAA regulations and our rules of court.

Furthermore, in *Givens*, the plaintiff alleged that the physician violated the duty of confidentiality by disclosing her medical information in response to a technically defective subpoena. Id., 408. The Supreme Court of Tennessee refused to conclude that a physician is under a duty to discover technical defects in a subpoena. Id. We conclude that *Givens* is distinguishable from the present case because, in the present case, the plaintiff does not allege

The regulations promulgated under HIPAA require specific steps prior to making any disclosure of protected health information pursuant to a subpoena. Section 164.512 (e) (1) of title 45 of the Code of Federal Regulations[11] provides in relevant part: "A covered

that the defendant failed to make the proper legal determination regarding the subpoena, but instead, asserts that the defendant failed to follow the procedures health care providers are obligated to follow under HIPAA. Accordingly, we find *Givens* inapposite.

[11] Section 164.512 (e) of title 45 of the Code of Federal Regulations provides: "*Standard: Disclosures for judicial and administrative proceedings*.

"(1) *Permitted disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

"(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

"(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

"(A) The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

"(B) The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e) (1) (v) of this section.

"(iii) For the purposes of paragraph (e) (1) (ii) (A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

"(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

"(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

"(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

"(1) No objections were filed; or

"(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

"(iv) For the purposes of paragraph (e) (1) (ii) (B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health

entity may disclose protected health information in the course of any judicial or administrative proceeding . . . (ii) [i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal. . . .'' The regulation, however, allows for such a disclosure only if the patient has received adequate notice of the request or a qualified protective order has been sought. See 45 C.F.R. § 164.512 (e); see also 45 C.F.R. § 164.512 (e) (1) (iv). The defendant's own admissions establish that it did not comply with this regulation when it responded to the subpoena in the present case.

We conclude that a duty of confidentiality arises from the physician-patient relationship and that unautho-

information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

''(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

''(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

''(v) For purposes of paragraph (e) (1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e) (1) (ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

''(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

''(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

''(vi) Notwithstanding paragraph (e) (1) (ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e) (1) (ii) of this section without receiving satisfactory assurance under paragraph (e) (1) (ii) (A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e) (1) (iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e) (1) (v) of this section.

''(2) *Other uses and disclosures under this section.* The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.''

rized disclosure of confidential information obtained in the course of that relationship gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law. In the present case, there is a genuine issue of material fact as to whether the defendant violated the duty of confidentiality by the manner in which it disclosed the plaintiff's medical records in response to the subpoena. Accordingly, we conclude that the trial court incorrectly granted summary judgment in favor of the defendant in the present case.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

ROBINSON, J., concurring. I agree with the court's well-reasoned conclusion that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law." I write separately only to emphasize my continuing reticence to recognize new causes of action under Connecticut's common law insofar as it "is not the duty of this court to make law. That is a task properly left to the legislature. To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of [state] government." (Internal quotation marks omitted.) *Campos* v. *Coleman*, 319 Conn. 36, 64, 123 A.3d 854 (2015) (*Zarella*, *J.*, dissenting) (disagreeing with majority's decision to adopt common-law cause of action for minor child's loss of parental consortium). Our decision to recognize a new cause of action in the present case is wholly

consistent with my view, eloquently stated by Justice Zarella, that, although "this court has the authority to change the common law to conform to the times . . . [i]n a society of ever increasing interdependence and complexity, however, it is an authority this court should exercise only sparingly." Id., 65; accord *Sepega* v. *DeLaura*, 326 Conn. 788, 843, 167 A.3d 916 (2017) (*Robinson*, *J.*, concurring) ("Legislative action, as in some of our sister states, would be ideal for making the appropriate findings and articulating the contours of Connecticut's firefighter's rule. . . . Nevertheless, until such time as our legislature can act, I would adopt a formulation of the firefighter's rule as a matter of common law that encourages citizens to seek help in emergencies, while not slamming the courthouse door to appropriate claims of our first responders." [Citation omitted.]); *Sepega* v. *DeLaura*, supra, 835 n.15 (*Robinson*, *J.*, concurring) ("the legislature is the appropriate forum for any reexamination of the legislative facts underlying our common-law decisionmaking").

In viewing our decision in the present case to be an appropriate exercise of our common-law authority to recognize new causes of action, I emphasize in particular that it complements both the limited federal administrative remedies provided by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq., as well as our state legislature's recognition of the importance of confidentiality in a physician-patient relationship through the 1990 adoption of General Statutes § 52-146o, subsection (a) of which furnishes an evidentiary physician-patient privilege in civil, administrative, legislative, and probate proceedings, with limited exceptions provided by subsection (b) of the statute. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 458–59, 102 A.3d 32 (2014). Moreover, although this case presents a legal issue of first impression, providing a common-law remedy for the breach of the physician's

duty of confidentiality does not disturb the settled expectations of physicians or patients given the long-standing ethical and legal bases for that duty.[1] Cf. *Campos* v. *Coleman*, supra, 319 Conn. 76–77 (*Zarella*, *J.*, dissenting) (stating that majority's decision to overrule *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998], which had declined to recognize derivative cause of action for loss of parental consortium by minor children, raised numerous policy and political questions "that [turn] on a number of socioeconomic factors, and it should therefore be left to the legislature"). Put differently, I believe that the expectations of our citizens would be more unsettled had we, in essence, declared the doors of our courthouses closed to patients whose health care providers improperly breached their confidences. Accordingly, I conclude that we properly exercise our common-law authority to recognize a cause of action in the present case, and I agree with the majority's determination that a genuine issue of material fact exists, requiring that we remand the case to the trial court for further proceedings on this point.

Accordingly, I concur in the judgment of the court.

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[1] As the majority aptly points out, and in contrast to the divided case law that confronted us in *Campos* v. *Coleman*, supra, 319 Conn. 73–76 (*Zarella*, *J.*, dissenting), I also emphasize the extremely broad support for recognition of a cause of action in the case law of our sister states. See, e.g., *Horne* v. *Patton*, 291 Ala. 701, 708–709, 287 So. 2d 824 (1973); *Alberts* v. *Devine*, 395 Mass. 59, 69, 479 N.E.2d 113, cert. denied sub nom. *Carroll* v. *Alberts*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985); *McCormick* v. *England*, 328 S.C. 627, 644, 494 S.E.2d 431 (App. 1997); *Fairfax Hospital* v. *Curtis*, 254 Va. 437, 442, 492 S.E.2d 642 (1997); but see *Quarles* v. *Sutherland*, 215 Tenn. 651, 657, 389 S.W.2d 249 (1965).