JILL K. LEVIN, ADMINISTRATRIX (ESTATE OF MARGARET ROHNER) *v.* STATE OF CONNECTICUT (SC 19935)

McDonald, Robinson, Mullins, Kahn and Vertefeuille, Js.*

Syllabus

The plaintiff, the administratrix of the estate of a woman who was fatally stabbed by her son, R, filed a notice of claim with the claims commissioner, pursuant to the statute (§ 4-160 [b]) governing claims of malpractice against the state, seeking permission to bring an action against the defendant, the state, for medical malpractice. At the time of the stabbing, R had been on an approved home visit from a residential mental health-

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

care facility operated by the Department of Mental Health and Addiction Services. The claims commissioner granted permission to the plaintiff to bring an action limited to that portion of the plaintiff's claim alleging medical malpractice. The plaintiff subsequently brought an action against the state, alleging that the health-care facility was negligent in its diagnosis, care, treatment and custody of R, and that its level of care was below that of a reasonably prudent health-care provider. The state filed a motion to strike the plaintiff's complaint. The trial court granted the motion, noting that its subject matter jurisdiction was predicated on the claim's character as a medical malpractice claim, and that the claim failed in light of the holding in this court's decision in *Jarmie* v. *Troncale* (306 Conn. 578) that a medical malpractice action can be brought only by a patient against a health-care provider. The trial court also noted that, even if the complaint could be construed as asserting a common-law negligence claim, the court would lack subject matter jurisdiction because there was no basis for finding that the claims commissioner authorized a negligence claim. The trial court granted the plaintiff's motion for judgment in favor of the state and rendered judgment thereon, from which the plaintiff appealed, claiming that *Jarmie* did not control because she was alleging medical negligence, and there was no meaningful difference between her negligence claim and the medical malpractice claim presented to and authorized by the claims commissioner. *Held* that the trial court properly granted the defendant's motion to strike the complaint, as that court lacked jurisdiction over the plaintiff's action: it was undisputed that the woman on whose behalf the action was brought was not a patient of the state, and, because there is no legally cognizable cause of action in Connecticut for medical malpractice by a nonpatient against a health-care provider, and the claim presented to and authorized by the claims commissioner was solely one of medical malpractice, the plaintiff's medical malpractice claim was barred by *Jarmie*; moreover, even if the plaintiff's claim was construed as sounding in negligence, the trial court would have lacked subject matter jurisdiction to consider such a claim, as the claims commissioner's waiver of sovereign immunity on behalf of the state was for a claim of medical malpractice rather than negligence.

Argued November 16, 2017—officially released August 14, 2018

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendant's motion to strike; thereafter, the court, *Shapiro*, *J.*, granted the

plaintiff's motion for judgment and rendered judgment for the defendant, from which the plaintiff appealed. *Affirmed.*

Steven L. Seligman, for the appellant (plaintiff).

Nicole A. Demers, assistant attorney general, with whom were *Linsley Barbato*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Michael R. Bullers*, assistant attorney general, for the appellee (defendant).

Opinion

KAHN, J. The sole question presented in this appeal is whether an action authorized by the claims commissioner, limited to medical malpractice, may survive a motion to strike where the plaintiff was not a patient of the defendant, as required by *Jarmie* v. *Troncale*, 306 Conn. 578, 587, 50 A.3d 802 (2012). The plaintiff, Jill K. Levin, administratrix of the estate of Margaret Rohner (decedent), appeals[1] from the judgment rendered in favor of the defendant, the state of Connecticut, after the trial court granted the defendant's motion to strike. The plaintiff argues that *Jarmie* does not control in the present case because she is not alleging medical malpractice but, rather, "medical negligence," resulting from the care, treatment, and custody of a patient, and from a failure to warn the decedent of the patient's dangerous propensities. Simultaneously, the plaintiff asserts that there is no meaningful difference between her negligence claim and the medical malpractice claim presented to, and authorized by, the claims commissioner. The defendant counters that the trial court properly struck the plaintiff's claim under *Jarmie*, because it is a medical malpractice action filed by a nonpatient plaintiff. Alternatively, the defendant contends that,

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

even if the plaintiff's claim is one sounding in negligence, the trial court lacked subject matter jurisdiction because the claims commissioner granted permission to bring an action only for medical malpractice. We agree with the defendant and affirm the trial court's judgment in favor of the defendant rendered following the granting of the defendant's motion to strike.

The following procedural background is relevant to our resolution of this appeal. The plaintiff alleges that Robert O. Rankin fatally attacked and stabbed the decedent, Rankin's mother, while on an approved home visit from River Valley Services (River Valley), a residential mental health-care facility operated by the Department of Mental Health and Addiction Services. The plaintiff thereafter filed a notice of claim with the Office of the Claims Commissioner, seeking permission to bring an action against the defendant for medical malpractice based on mental health services and treatment given to Rankin. The claims commissioner thereafter issued his finding and order, granting permission to the plaintiff to bring an action against the defendant under General Statutes § 4-160 (b).[2] The order specified that "[t]his grant of permission to sue is limited to that portion of the 'claim alleging malpractice against the [defendant], a state hospital or a sanitarium or against a physician, surgeon, dentist, podiatrist, chiropractor, or all other licensed health-care providers employed by the [defendant].' "

[2] General Statutes § 4-160 (b) provides: "In any claim alleging malpractice against the state, a state hospital or against a physician, surgeon, dentist, podiatrist, chiropractor or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim."

We note that although § 4-160 has been amended by the legislature since the events underlying the present case; see Public Acts 2016, No. 16-127, § 19; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

The plaintiff subsequently brought this action, alleging that River Valley was negligent in its diagnosis, care, treatment, and custody of Rankin, and that its level of care was below that of a reasonably prudent health-care provider. Specifically, the plaintiff asserted that River Valley failed to secure psychiatric hospitalization for Rankin despite being aware of his emotional deterioration, allowed Rankin to visit the decedent unsupervised despite knowing that he was acting in an increasingly threatening manner toward her, reassured the decedent that it was safe to have Rankin visit despite knowing otherwise, and failed to warn the decedent that Rankin posed a threat to her safety.

The defendant filed a motion to strike the complaint, contending that Connecticut does not recognize medical malpractice claims brought by nonpatient third parties. The trial court granted the motion to strike, observing in its memorandum of decision that "the plaintiff's argument suffers from a dual dilemma." First, the trial court noted that its "subject matter jurisdiction is predicated on the claim's character as a medical malpractice action, which then fails in light of . . . *Jarmie*. Second, even if the complaint could be construed as a common-law negligence action, then the court would be forced to consider and ultimately determine that it is without subject matter jurisdiction [because] there is no basis for finding that the [c]laims [c]ommissioner specifically authorized it as such." Following the trial court's ruling granting the motion to strike, the plaintiff sought to appeal rather than file a new pleading. Thus, pursuant to Practice Book § 10-44, the plaintiff moved for judgment in favor of the defendant on the stricken complaint. Accordingly, the trial court rendered judgment for the defendant. This appeal followed.

The issue presented is whether *Jarmie* prohibits an action, limited by the claims commissioner to medical

malpractice, where the plaintiff was not a patient of the defendant. We begin by setting forth the standard of review, which in the context of "an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 583.

"We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532–33, 911 A.2d 712 (2006).

The limitation that the claims commissioner placed on his authorization of the plaintiff's action—restricting that authorization to the plaintiff's medical malpractice claim—created a quandary for the plaintiff. On the one hand, Connecticut does not permit medical malpractice actions to be brought by a nonpatient against a healthcare provider. See *Jarmie* v. *Troncale*, supra, 306 Conn.

587. On the other hand, the plaintiff did not receive authorization to pursue a general negligence claim.

In *Jarmie*, this court held that "a cause of action alleging medical malpractice must be brought by a *patient* against a health care provider because the language of the statute specifically provides that the alleged negligence must have occurred in the care or treatment of the claimant." (Emphasis in original; internal quotation marks omitted.) Id. Thus, there is no legally cognizable cause of action in Connecticut for medical malpractice by a nonpatient against a health-care provider.

The present case is exactly the sort of nonpatient medical malpractice action that *Jarmie* forbids. It is undisputed that the decedent was not the defendant's patient. That the plaintiff's claim sounds in medical malpractice is evident from the way the claim was presented to, and authorized by, the claims commissioner. First, in her notice of claim to the claims commissioner, the plaintiff described the basis of the claim as "medical malpractice." Second, the plaintiff filed the notice of claim pursuant to § 4-160 (b), together with the requisite certificate of good faith. The plaintiff's decision to file under that subsection of the statute is notable because § 4-160 (b) governs claims of "malpractice against the state," and requires the claims commissioner to "authorize suit" if a certificate of good faith is filed. By contrast, if the plaintiff had intended to bring an action against the defendant for negligence, she would have filed a notice of claim pursuant to § 4-160 (a). Section 4-160 (a) gives the claims commissioner discretion to "authorize suit against the state on any claim [that] . . . presents an issue of law or fact under which the state, were it a private person, could be liable," assuming that the action is deemed "just and equitable" by

the claims commissioner.[3] That is, § 4-106 (a) governs, inter alia, claims sounding in common-law negligence that are brought against the state. Thus, the plaintiff designated the action as one of medical malpractice, by filing a notice of claim and good faith certificate pursuant to the subsection governing medical malpractice actions, § 4-160 (b), rather than the subsection governing negligence actions, § 4-160 (a).

Accordingly, the claims commissioner understood the plaintiff to be bringing a medical malpractice action and authorized it as such. This is evident in the claims commissioner's order permitting the plaintiff to bring an action pursuant to § 4-160 (b), "limited to that portion of the 'claim alleging malpractice against the [defendant], a state hospital or a sanitarium or against a physician, surgeon, dentist, podiatrist, chiropractor, or all other licensed health care providers employed by the state.' "[4] Therefore, the claim presented to, and author-

[3] Thus, § 4-160 (b) presents a marked departure from the discretion afforded to the claims commissioner under § 4-160 (a). Indeed, "the effect of § 4-160 (b) was to deprive the claims commissioner of his broad *discretionary* decision-making power to authorize suit against the state in cases where a claimant has brought a medical malpractice claim and filed a certificate of good faith. Instead, § 4-160 (b) *requires* the claims commissioner to authorize suit in all such cases. In other words, the effect of the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the claims commissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements." (Emphasis in original; footnote omitted.) *D'Eramo* v. *Smith*, 273 Conn. 610, 622, 872 A.2d 408 (2005). Thus, in the present case, the plaintiff could have sought permission to bring an action pursuant to § 4-160 (a), but the authority to bring the action would have been subject to the discretion of the claims commissioner. By filing pursuant to the requirements of § 4-160 (b), the plaintiff bypassed this discretion, but the result was authorization to bring an action limited to medical malpractice as dictated by that statutory subsection.

[4] Although the claims commissioner's use of qualifying language—the phrase "limited to that portion of the 'claim alleging malpractice' "—might suggest that he thought that the plaintiff's filing included claims other than malpractice, our review of the record does not support that conclusion.

ized by, the claims commissioner was solely one of medical malpractice, which is barred by *Jarmie*.

If the plaintiff's action does not sound in medical malpractice but, rather, negligence, as the plaintiff asserts, then the trial court lacked subject matter jurisdiction over the claim.[5] "It is well established that, [w]hen the doctrine of sovereign immunity is applicable, the state must consent to be sued in order for a claimant to pursue any monetary claim against the state. . . . The claims commissioner may waive that immunity pursuant to . . . § 4-160 (a) and consent to suit, but until that occurs, the Superior Court has no jurisdiction to hear any such monetary claim." (Internal quotation marks omitted.) *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 91, 74 A.3d 1242 (2013). "Thus, a claimant who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner. . . . [T]he Superior Court does not have the authority to waive sovereign immunity on behalf of the state . . . ." (Internal quotation marks omitted.) Id., 91–92. Furthermore, "[a]ny statutory waiver of immunity must be narrowly construed . . . and its scope must be confined strictly to the extent the statute provides." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 289, 21 A.3d 759 (2011). In the present case, the waiver granted by the claims commissioner was for a claim of medical malpractice only. Therefore, the Superior Court would have lacked subject matter

[5] Given our conclusions that (1) this claim is one of medical malpractice, and (2) the trial court would not have subject matter jurisdiction to consider the merits of a negligence claim, we need not address the plaintiff's arguments supporting the substantive merits of such a claim, including her comparison of the present case to *Fraser* v. *United States*, 236 Conn. 625, 674 A.2d 811 (1996). *Fraser* addressed the duty of psychotherapists to control outpatients in the context of *negligence* jurisprudence. Id., 629–30.

jurisdiction to consider a negligence claim[6] because it would have been beyond the scope of the action authorized by the claims commissioner under § 4-160 (b).

The plaintiff attempts to resolve this dilemma by arguing that there was no material variance between the claim presented to the claims commissioner and the negligence claim actually brought. We reject this theory. For the reasons previously discussed, the claim presented to, and authorized by, the claims commissioner was one of medical malpractice, which is distinct from the negligence claim the plaintiff now claims she is maintaining.[7]

Accordingly, the trial court properly granted the defendant's motion to strike. Either the plaintiff's claim is one of medical malpractice by a nonpatient, in which case it is barred by *Jarmie*, or it is a negligence claim that the claims commissioner did not authorize, in

[6] The plaintiff asserts that the trial court improperly considered this lack of subject matter jurisdiction in the context of a motion to strike, because that evaluation goes beyond the legal sufficiency of the complaint and is therefore within the purview of a motion to dismiss. This argument is unpersuasive for two reasons. First, "[t]he subject matter jurisdiction requirement . . . may be raised by a party, *or by the court sua sponte*, at any stage of the proceedings, including on appeal." (Emphasis added; internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, supra, 280 Conn. 533. Indeed, "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." Id. Second, the trial court granted the motion to strike because of its conclusion that the medical malpractice claim was barred by *Jarmie*, and specifically did not rule on the issue of subject matter jurisdiction. It merely observed that were the claim to be construed as a medical negligence claim, as the plaintiff asserts, "the court would be forced to consider and ultimately determine that it is without subject matter jurisdiction . . . ."

[7] The plaintiff's argument that the claims commissioner was cognizant of the negligence claim because he was apprised of the facts and theory on which the plaintiff would proceed is completely undercut by the plaintiff's own submission to the claims commissioner, which characterized this claim as one of medical malpractice.

which case the trial court would not have subject matter jurisdiction. It fails either way.

The judgment is affirmed.

In this opinion the other justices concurred.

ERIC THOMAS KELSEY *v.* COMMISSIONER OF CORRECTION (SC 19945)

Palmer, Robinson, D'Auria, Mullins, Kahn and Vertefeuille, Js.*

Syllabus

Pursuant to statute (§ 52-470 [d] [1] and [e]), in a case in which a habeas petitioner files a subsequent petition more than two years after the date on which judgment on a prior habeas petition challenging the same conviction is deemed final, there is a rebuttable presumption of delay without good cause, and the habeas court, upon the request of the Commissioner of Correction, shall issue an order to show cause why the petition should be permitted to proceed.

The petitioner, who had been convicted of various crimes, filed a petition for a writ of habeas corpus after he had exhausted his direct appeals. The habeas court denied the petition, and his subsequent appeal from that denial was unsuccessful. The petitioner filed a second habeas petition more than two years after judgment on his prior petition was final. Pursuant to § 52-470 (e), the respondent Commissioner of Correction requested that the habeas court issue an order to show cause why the petition should be permitted to proceed when the petitioner filed the second petition beyond the applicable two year limitation period. The habeas court ruled that, pursuant to § 52-470 (b) (1), which governs motions seeking a determination of whether there is good cause for trial on a habeas petition, it would take no action on the respondent's request until after the pleadings had closed. Following the court's decision not to act, the respondent appealed pursuant to the statute (§ 52-265a) permitting the Chief Justice to certify an interlocutory appeal involving a matter of substantial public interest. *Held* that the habeas court incorrectly determined that, because the pleadings in the case were not yet closed, it lacked discretion to act on the respondent's request for an order to show cause why the untimely petition should be permitted to proceed: the habeas court mistakenly relied on § 52-470 (b) (1), rather than § 52-470 (e), in concluding that it lacked discretion

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

to act on the respondent's request for an order to show cause, as the respondent was not challenging whether there was good cause for trial but, rather, was requesting that the habeas court address the timeliness of the habeas petition; moreover, under § 52-470 (e), although a habeas court must issue an order to show cause for delay when the respondent requests such an order, the court has the discretion to act on that request when it deems it appropriate given the circumstances of the case, even before the close of pleadings, and is not required to do so immediately upon the respondent's request.

Argued February 20—officially released August 14, 2018

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver, J.*, declined to act on the respondent's request for an order to show cause why the petition should be permitted to proceed; thereafter, the court granted the respondent's motion for reconsideration but denied the relief requested, and the respondent, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was involved, appealed to this court. *Reversed*; *further proceedings.*

Jo Anne Sulik, supervisory assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellant (respondent).

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

Opinion

KAHN, J. The sole question presented in this certified public interest appeal is whether General Statutes § 52-470 divests the habeas court of discretion to determine when it should act on a motion by the respondent, the Commissioner of Correction, for an order to show cause why an untimely petition should be permitted to proceed. In the present case, the habeas court took no action on the motion of the respondent requesting the

court, pursuant to § 52-470 (d) and (e), to order the petitioner, Eric Thomas Kelsey, to show cause why his petition should be permitted to proceed despite his delay in filing it. The court interpreted § 52-470 to deprive it of discretion to act on the respondent's motion prior to the close of all pleadings. Upon concluding both that this matter involved issues of substantial public interest and that further delay may work a substantial injustice, the Chief Justice granted the respondent's request to file an interlocutory appeal pursuant to General Statutes § 52-265a.[1]

In this appeal, we are presented with three proposed interpretations of § 52-470 regarding the degree to which, if at all, that statute constrains the discretion of the habeas court as to when it may act on the respondent's motion for an order to show good cause why a petition should be permitted to proceed when a petitioner has delayed in filing the habeas petition. The habeas court believed that § 52-470 (b) (1) required the court to wait until the close of all pleadings to act on the respondent's motion. The respondent contends that the court mistakenly relied on § 52-470 (b) (1) in declining to act on his motion. The respondent argues that § 52-470 (e) controls and requires that, once the court is presented with a timeliness challenge to the petition, the court must resolve that question before the action is allowed to proceed further. The petitioner agrees with the respondent that § 52-470 (e), rather than § 52-470 (b), applies, but argues that, under that subsection, the habeas court retains discretion to decide when to issue the order. We conclude that § 52-470 (e) applies and does not limit the discretion of the habeas court

[1] This court has construed § 52-265a to allow the Chief Justice to certify an appeal in matters of public importance even if the order challenged is not a final judgment. See, e.g., *State* v. *Elias G.*, 302 Conn. 39, 40 n.1, 23 A.3d 718 (2011); *Laurel Park, Inc.* v. *Pac*, 194 Conn. 677, 678–79 n.1, 485 A.2d 1272 (1984).

as to when it may act on a motion for an order to show cause why an untimely petition should be permitted to proceed. Accordingly, we conclude that the habeas court improperly determined that it lacked discretion to act on the respondent's motion for an order to show cause because the pleadings in the case were not yet closed. We therefore reverse the determination of the habeas court that it could not act on the respondent's motion for an order to show cause why the petition should be permitted to proceed.

The following procedural background is relevant to our resolution of this appeal. The petitioner, following a jury trial, was convicted of felony murder in violation of General Statutes § 53a-54c and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3). After the petitioner exhausted his direct appeals, he filed a petition for a writ of habeas corpus in August, 2007. Following a trial on the merits, the habeas court denied his petition in 2010. The Appellate Court dismissed his appeal from the judgment of the habeas court; *Kelsey* v. *Commissioner of Correction*, 136 Conn. App. 904, 44 A.3d 224 (2012); and this court denied certification to appeal from the Appellate Court's judgment. *Kelsey* v. *Commissioner of Correction*, 305 Conn. 923, 47 A.3d 883 (2012).

The petitioner filed his second habeas petition in March, 2017, more than two years after the judgment was final on his prior petition. The respondent moved for an order directing the petitioner to show cause why his petition should be permitted to proceed when he filed his subsequent petition outside the two year limit set forth in § 52-470 (d) (1). In a brief order issued one week after the respondent filed the motion, the habeas court ruled that, pursuant to § 52-470 (b) (1), it would take no action on the motion until after the pleadings had closed. Shortly thereafter, the respondent moved

for reconsideration, which the habeas court granted. In its memorandum of decision, issued seven days after the respondent filed the motion for reconsideration, the court denied the requested relief, explaining that the court interpreted § 52-470 to deprive it of discretion to act on the respondent's motion prior to the close of the pleadings. Relying on § 52-470 (b) (1), the court stated that "the language of . . . § 52-470 is clear and unambiguous as to the requirement that the pleadings be closed before a request for an order to 'show cause' may be entertained." Accordingly, the court upheld its earlier decision to take no action on the respondent's motion. This public interest appeal followed.

The issue before the court is whether § 52-470 divests the habeas court of discretion to determine when it should act on a respondent's motion for an order to show cause why an untimely petition should be permitted to proceed. That issue presents a question of statutory interpretation over which we exercise plenary review, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent).

We recently recognized that the 2012 amendments to § 52-470 were the result of "comprehensive habeas reform," and that the new provisions of § 52-470 "are intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals. See Public Acts 2012, No. 12-115, § 1 [P.A. 12-115]." *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 566–67, 153 A.3d 1233 (2017). Mindful of that legislative purpose, we begin our analysis with the language of § 52-470, which is comprised of seven subsections, five of which—§ 52-470 (a) through (e)—are relevant to our analysis.

We first review subsection (a), which existed in substantially identical form prior to the 2012 amendments to § 52-470; see General Statutes (Rev. to 2011) § 52-470 (a); and pertains to the proceedings during a trial on the merits. That subsection provides: "The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require." General Statutes § 52-470 (a). Subsection (a) makes clear that the primary goal of § 52-470 is to ensure that habeas actions "proceed in a summary way . . . ." This court previously has construed the phrase "in a summary way" to mean that habeas proceedings must be conducted in a manner that is "prompt and without unreasonable and unnecessary delay." (Internal quotation marks omitted.) *Hogewoning* v. *Hogewoning*, 117 Conn. 264, 265, 167 A. 813 (1933).[2]

The language of § 52-470 (a), which was not substantively altered by P.A. 12-115, provides a helpful backdrop for understanding the remainder of the statute. As *Hogewoning* illustrates, the statute has always had the legislative purpose of ensuring the efficient and expeditious resolution of habeas petitions. We consider it significant that, notwithstanding the comprehensive nature of the 2012 habeas reform, through which five entirely new subsections were added to the statute, the legislature left intact the final clause of § 52-470 (a), which provides that the habeas court "shall . . . dispose of the case as law and justice require." Thus, the legislature retained language that makes clear that the expeditious resolution of habeas petitions must be accomplished in a manner that does not curtail a petitioner's right to due process. In other words, the two

[2] In that case, this court construed General Statutes § 5897, a predecessor to § 52-470 (a). *Hogewoning* v. *Hogewoning*, supra, 117 Conn. 265.

principles of expediency and due process must be balanced in effectuating the legislative intent of the 2012 habeas reform.

The 2012 amendments are significant not because they effectuate an entirely new purpose, but because they provide tools to effectuate the original purpose of ensuring expedient resolution of habeas cases. The 2012 habeas reform added two procedural mechanisms to assist the habeas court in resolving the case "in a summary way . . . ." General Statutes § 52-470 (a). The amendments to § 52-470 set forth procedures by which the habeas court may dismiss meritless petitions and untimely ones. Specifically, § 52-470 (b) addresses the dismissal of meritless petitions, whereas § 52-470 (c), (d) and (e) provide mechanisms for dismissing untimely petitions.

We turn to § 52-470 (b), which the trial court relied on in concluding that it lacked discretion to act on the respondent's motion for an order to show cause. That subsection authorizes the habeas court to render a "summary dismissal without a trial" of all or part of a habeas petition if the court determines, either on motion by a party or sua sponte, that there is no good cause for trial. *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn. 568. In order to establish "good cause for trial," the petitioner must "allege the existence of specific facts which, if proven, would entitle the petitioner to relief under applicable law . . . ." General Statutes § 52-470 (b) (3). Section 52-470 (b) (1) expressly requires that the habeas court's "good cause for trial" determination be made "[a]fter the close of all pleadings" in the proceeding. The plain language of the statute, accordingly, makes clear that prior to the close of all pleadings, a habeas court would lack discretion to take action on a respondent's motion—or to act sua sponte—to issue an order to show good cause for trial pursuant to § 52-470 (b) (1).

This constraint on the court's discretion is consistent with the nature of the court's inquiry. In order to determine whether there is good cause for trial, the court must by necessity wade—albeit in a preliminary manner—into the merits of the petition. The determination of whether good cause exists turns on the ultimate question of whether the petitioner would be entitled to relief under applicable law. As a practical matter, because that inquiry is a substantive one, the question would be premature prior to the close of all pleadings. Addressing the question of whether good cause for trial exists on the basis of incomplete information would, in turn, be inconsistent with the requirement of § 52-470 (a) that the court "dispose of the case as law and justice require."

The procedures available for the "good cause for trial" inquiry confirm our conclusion that the court's threshold inquiry is substantive in nature. For example, § 52-470 (b) (2) contemplates that the parties may submit evidence to assist the court in making its determination, including, but not limited to "documentary evidence, affidavits and unsworn statements." Our conclusion is also consistent with the requirement that the petition and exhibits must "provide a factual basis upon which the court can conclude that evidence in support of the alleged facts exists and will be presented at trial . . . ." General Statutes § 52-470 (b) (3). Finally, if the petition and the exhibits do not establish such good cause, "the court shall hold a preliminary hearing to determine whether such good cause exists." General Statutes § 52-470 (b) (3). The preliminary hearing is one at which the court considers "any evidence or argument by the parties . . . ." General Statutes § 52-470 (b) (3). Essentially, § 52-470 (b) provides the habeas court with a means—short of holding a trial on the merits—to screen out meritless petitions in a manner that allows the petitioner every opportunity to meet the required

good cause showing. Unlike § 52-470 (b), § 52-470 (c), (d) and (e) together address whether the petitioner can establish good cause for a delay in filing a petition. Accordingly, because the respondent's motion in the present case did not challenge whether there was good cause for trial, but, instead, requested that the court address the timeliness of the petition, we conclude that the habeas court incorrectly applied § 52-470 (b) to the respondent's motion.

We now consider the provisions that set forth the applicable procedures for addressing a delay in filing the petition. Subsections (c) and (d) of § 52-470 establish a "rebuttable presumption" of delay without good cause for petitions filed outside the time limits set forth therein.[3] Section 52-470 (d), which applies in the present

[3] General Statutes § 52-470 provides in relevant part: "(c) Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction.

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in

case, sets forth several different time limits, depending on the circumstances of the case, for filing a petition subsequent to a judgment on a prior petition challenging the same conviction. The relevant time limit for purposes of this appeal is set forth in § 52-470 (d) (1), which requires that a petitioner file a subsequent petition within two years of the final judgment on the prior petition. Because the petitioner in the present case filed his petition outside that time limit, the "rebuttable presumption" of delay without good cause applied to his petition.[4] See General Statutes § 52-470 (d) (1).

In § 52-470 (e), the legislature outlined the procedure by which the respondent may rely on the rebuttable presumption established by § 52-470 (c) and (d) that no good cause exists for a delay in filing the petition. Section 52-470 (e) provides in relevant part: "In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. . . ." We begin with two observations about § 52-470 (e). First, in contrast to the court's inquiry as to whether good cause exists for trial, which the court may undertake either on its own motion or by the motion of any party; General Statutes § 52-470 (b) (1); the court's duty to inquire whether there is good cause for a delay is triggered only upon the request of the respondent. If the respondent makes such a request, the court "shall" issue an order to show cause.[5] Second,

this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law. . . ."

[4] General Statutes § 52-470 (f), which creates an exception to subsections (c) through (e) for petitioners "asserting actual innocence . . . challeng[ing] the conditions of confinement," or challenging capital convictions resulting in a death sentence, is not at issue in this appeal.

[5] The respondent contends that the language of § 52-470 (e) requires the habeas court to issue the show cause order immediately upon the respondent's request. Specifically, the respondent relies on the provision of that subsection that "the court, upon the request of the respondent, *shall* issue an order to show cause . . . ." (Emphasis added.) General Statutes § 52-

and more important, nothing in the language of § 52-470 (e) expressly clarifies or limits the *timing* of that order. As opposed to the language of § 52-470 (b), which specifically and expressly requires that the court wait until after the close of all pleadings to address whether there is good cause for trial, § 52-470 (e) contains no such time limit. If the legislature had intended to incorporate a time constraint into § 52-470 (e), it could have done so. "We are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 119, 830 A.2d 1121 (2003); id. (refusing to read into Connecticut's utility statute language that would limit application of statute).

Notably, as compared to the procedures available under § 52-470 (b) to demonstrate that good cause exists for trial, § 52-470 (e) provides significantly less detail regarding the procedures by which a petitioner may rebut the presumption that there was no good cause for a delay in filing the petition. Specifically, § 52-470 (e) merely provides in relevant part that "[t]he petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this sub-

470 (e). The respondent argues that the word "shall" creates a mandatory, temporal restraint on the court's power to act on the respondent's motion. As we already have explained, however, nothing in the text of § 52-470 (e) refers to any time limit on the habeas court's authority to act on a motion requesting an order to show cause when there has been a delay—the respondent does not point to any language that expressly defines a time constraint on the court's power to act. The reasonable reading of the statutory language is that it merely clarifies that if the respondent requests that the habeas court address the issue of untimeliness, the court must do so. Nothing in the statute, however, requires that the court do so immediately.

section, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."

Nothing in subsection (e) expressly addresses whether the petitioner may present argument or evidence, or file exhibits, or whether and under what circumstances the court is required to hold a hearing, if the court should determine that doing so would assist it in making its determination. The only express procedural requirement is stated broadly. The court must provide the petitioner with a "meaningful opportunity" both to investigate the basis for the delay and to respond to the order to show cause. General Statutes § 52-470 (e). The phrase "meaningful opportunity" is not defined in the statute. That phrase typically refers, however, to the provision of an opportunity that comports with the requirements of due process. See, e.g., *State* v. *Fay*, 326 Conn. 742, 754 n.12, 167 A.3d 897 (2017) ("[w]hether rooted directly in the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment or in the [c]ompulsory [p]rocess or [c]onfrontation [c]lauses of the [s]ixth [a]mendment, the [c]onstitution guarantees criminal defendants a *meaningful opportunity* to present a complete defense" [emphasis added; internal quotation marks omitted]); *State* v. *Harris*, 277 Conn. 378, 380, 397, 890 A.2d 559 (2006) (trial court's admission into evidence of report by Psychiatric Security Review Board at continued commitment hearing did not deprive insanity acquittee of due process because he received "meaningful opportunity to be heard"); see also *Mathews* v. *Eldridge*, 424 U.S. 319, 348–49, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet

it. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard . . . to [e]nsure that they are given a *meaningful opportunity* to present their case." [Citations omitted; emphasis added; internal quotation marks omitted.]) The lack of specific statutory contours as to the required "meaningful opportunity" suggests that the legislature intended for the court to exercise its discretion in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption.

We envision that, in the majority of cases, the question of whether a petitioner has demonstrated good cause for delay will not require that the habeas court engage in an inquiry that is similar in scope to the one required for the screening of meritless petitions pursuant to § 52-470 (b). The absence of detailed procedural requirements in § 52-470 (e), as compared with those identified in § 52-470 (b), is consistent with that general expectation. In many cases, the habeas court will likely be able to resolve the question of whether there was good cause for delay soon after the respondent files a motion requesting an order to show cause. In some instances, however, the basis for a delay may be inextricably intertwined with the merits of the petition. Under such circumstances, the court will be required to engage in a more substantive inquiry, which will more closely resemble the type of inquiry contemplated under § 52-470 (b). Section 52-470 (e) expressly recognizes that possibility by stating "good cause" for delay may include "the discovery of new evidence *which materially affects the merits of the case* and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection

(c) or (d) of this section." (Emphasis added.) A classic example in which the basis for delay and the merits of the petition will be inextricably intertwined is when a petitioner has alleged that the state violated its duty to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In such a case, the inquiry into the basis for delay and the merits of the petition are one and the same.[6]

In applying § 52-470 (a), this court has stated that a "habeas court must fashion a remedy appropriate to the constitutional right it seeks to vindicate." *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 148, 712 A.3d 947 (1998). That same principle guides our interpretation of § 52-470 (e). In the absence of any language in that subsection cabining the discretion of the habeas court with respect to the timing of the issuance of an order to show cause for delay, we conclude that the legislature intended that the court exercise its discretion to do so when the court deems it appropriate given the circumstances of the case. This conclusion strikes the appropriate balance between the principles of expediency and due process. See General Statutes § 52-470 (a). Our conclusion that the habeas court is not required to wait until the close of all pleadings to issue an order to show cause why the petition should be permitted to proceed when there is a rebuttable presumption of delay is consistent with the purpose underlying P.A. 12-115—to screen out meritless and untimely petitions in an expeditious manner. See *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn.

[6] The respondent presumes that, in keeping "presumptively untimely petitions pending," the habeas court would let cases sit for years. We disagree. Accompanying the habeas court's enjoyment of discretion, however, is its responsibility to exercise that discretion appropriately. The statute requires that the habeas court ensure that the action proceed "in a summary way . . . ." General Statutes § 52-470 (a). We are confident that the habeas court would exercise its discretion in a manner consistent with the statutory mandate.

566–67 (2012 amendments were "intended to supplement [§ 52-470's] efficacy in averting frivolous habeas petitions and appeals"). Our conclusion also protects the petitioner's right to due process by giving proper effect to the requirement in § 52-470 (e) that the habeas court provide the petitioner with a "meaningful opportunity" to rebut the presumption that he lacked good cause for the delay. As we have explained, in some instances, the provision of such "meaningful opportunity" will require the habeas court to determine whether, under the particular circumstances of the case, the basis for delay is intertwined with the merits of the petition.

Our statutory construction is also consistent with the bedrock principle that "[t]he trial court possesses inherent discretionary powers to control pleadings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Internal quotation marks omitted.) *Downs* v. *Trias*, 306 Conn. 81, 102, 49 A.3d 180 (2012); see also Practice Book § 23-29 (3) ("[t]he judicial authority may, *at any time* . . . [determine] that . . . the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition" [emphasis added]); *James L.* v. *Commissioner of Correction*, supra, 245 Conn. 143 ("Decisions concerning abuse of the writ are addressed to the sound discretion of the trial court . . . . [T]heirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." [Internal quotation marks omitted.]). Finally, we observe that the rules of practice expressly recognize the habeas court's discretion over scheduling. See Practice Book § 23-34 ("[t]he judicial authority may establish such additional procedures as it determines will aid in the fair and summary disposition of habeas corpus

petitions, including, but not limited to, scheduling orders").

The habeas court's exercise of its discretion to manage the case remains the best tool to guarantee that the case is disposed of "as law and justice require"; General Statutes § 52-470 (a); as the habeas judge is in the best position to balance the principles of judicial economy and due process. These concerns are particularly salient for writs of habeas corpus, the principal purpose of which is "to serve as a bulwark against convictions that violate fundamental fairness." (Internal quotation marks omitted.) *Lozada* v. *Warden*, 223 Conn. 834, 840, 613 A.2d 818 (1992). In the present case, the habeas court's decision to take no action on the respondent's motion was predicated on its mistaken belief that it lacked discretion to act. It is well established that when a court has discretion, it is improper for the court to fail to exercise it. See, e.g., *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion").

The decision of the habeas court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

JENNIFER HELMEDACH *v.* COMMISSIONER OF CORRECTION (SC 19836)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

The petitioner, who had been convicted of felony murder, among other crimes, sought a writ of habeas corpus, claiming that her criminal trial counsel, R, had rendered ineffective assistance when he delayed pre-

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

senting a favorable plea offer to her and that offer was subsequently withdrawn. Earlier in the day on which the petitioner was scheduled to begin testifying at her criminal trial, the prosecutor contacted R and offered to let the petitioner plead guilty in exchange for a ten year prison sentence. Although R believed that this was a great offer, he was concerned about relaying it to the petitioner before she testified because he thought she was flustered and that hearing about the offer might negatively impact her testimony. The prosecutor agreed to allow R to convey the offer to the petitioner after she testified. Two and one-half days later, when the petitioner's testimony concluded, R presented the offer to the petitioner, and he informed the prosecutor that the petitioner was interested in the offer, but the prosecutor responded that the offer was withdrawn. The habeas court concluded that R's delay in conveying the offer fell below an objective standard of reasonableness and that the petitioner was prejudiced by this deficient performance because, if the offer had been presented sooner, the petitioner would have accepted it and the trial court would have agreed to sentence the petitioner accordingly. On the granting of certification, the respondent, the Commissioner of Correction, appealed to the Appellate Court, which affirmed the judgment of the habeas court. Thereafter, the respondent, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly determined that R's delay in conveying the plea offer to the petitioner until after she testified amounted to deficient performance, and, in light of the fact that the respondent did not contest on appeal to this court that the petitioner was prejudiced, the Appellate Court's judgment was affirmed: R had a duty to convey the plea offer to the petitioner before she began her testimony, as the federal constitutional guarantee of effective assistance of counsel during plea negotiations requires that defense counsel communicate promptly, on the basis of the context and the circumstances of the case, all formal plea offers so that the defendant can exercise his or her right to decide whether and when to plead guilty and resolve the case; moreover, any knowledge that the prosecutor had offered to resolve the case with a favorable plea agreement could have impacted the petitioner's decision whether to testify, and, therefore, R's decision to delay in communicating that offer was unreasonable, as it interfered with the petitioner's right to make an informed decision about whether to testify; furthermore, this court declined to defer to R's strategic decision to postpone conveying the offer until after the petitioner testified because R, in making that decision, usurped the petitioner's right to decide whether and when to enter into a plea agreement, the petitioner was not fully informed of the circumstances of the case before she made the decision to testify, and R failed to take adequate steps to protect the petitioner by extracting a formal agreement to keep the prosecutor's plea offer open until after she testified.

Argued December 18, 2017—officially released August 14, 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, *Cobb, J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Prescott*, and *Mihalakos*, *Js.*, which affirmed the judgment of the habeas court, and the respondent, on the granting of certification, appealed to this court. *Affirmed.*

Robert J. Scheinblum, senior assistant state's attorney, with whom were *Adrienne Russo*, assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, for the appellant (respondent).

Conrad Ost Seifert, assigned counsel, for the appellee (petitioner).

Daniel M. Erwin and *Christopher Duby* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

D'AURIA, J. In this certified appeal, we consider whether the attorney for the petitioner, Jennifer Helmedach, rendered ineffective assistance when, during trial, he delayed presenting to the petitioner a favorable plea offer from the prosecutor, an offer the prosecutor later withdrew before it could be accepted. We agree with the habeas court and Appellate Court that counsel's delay amounted to deficient performance pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and, in light of the fact that the respondent, the Commissioner of Correction, does not contest that the petitioner was prejudiced, we therefore affirm the Appellate Court's judgment.

I

The following facts, as found by the habeas court, and procedural history are relevant to this appeal. The charges in this case stem from the murder of Faye Bennett. The state alleged that the petitioner had helped her romantic partner, David Bell, lure the victim to an apartment in Meriden where Bell robbed and murdered her. The state further alleged that the petitioner helped Bell flee the scene in the victim's vehicle. They were later apprehended in New York.

The state charged the petitioner with felony murder, robbery in the first degree, and conspiracy to commit robbery in the third degree.[1] The trial court appointed Richard Reeve to represent the petitioner. The petitioner denied participating in the crime or having prior knowledge of Bell's intention to rob or to murder the victim, and she claimed that she fled with him under duress.

The petitioner and prosecutor discussed the possibility of disposing of the case pursuant to a plea agreement. During a pretrial conference, the prosecutor offered to agree to a sentence of fifteen to twenty years incarceration in exchange for a guilty plea on the charge of robbery or conspiracy to commit robbery, thus having the petitioner avoid the twenty-five year mandatory minimum sentence for felony murder. Reeve stated that he would discuss the offer with the petitioner, and the prosecutor indicated his intention to review the offer with the victim's family. Reeve later replied to the prosecutor that the petitioner wanted to accept the offer, but the prosecutor withdrew the offer because the victim's family opposed it. The petitioner moved the trial court to enforce specific performance of that plea agreement, but the trial court denied the motion.

[1] The specific charges were felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), and conspiracy to commit robbery in the third degree in violation of General Statutes §§ 53a-48 and 53a-136.

The case proceeded to trial. During jury selection, the prosecutor made a second offer of twenty-two years incarceration, execution suspended after seventeen years, which the petitioner declined. The prosecutor made a third offer, near the start of the trial, of fourteen years to serve, which the petitioner once again rejected. The petitioner rejected the second and third offers because the state's case had been weakened when a critical witness recanted an earlier oral statement to the police establishing that the petitioner had spoken to that witness about helping to arrange for the robbery of the victim. The witness' testimony was the only evidence the state had to directly tie the petitioner to the robbery.

The prosecutor made a fourth and final plea offer after resting the state's case. The state rested its case on a Friday, and the trial was set to resume with the defense's case on the following Tuesday. Reeve spent substantial time during the weekend with the petitioner, who was incarcerated pending trial, preparing her for her anticipated testimony. On Tuesday morning, the day the petitioner was expected to take the stand, the prosecutor called Reeve and offered a plea agreement of ten years to serve. Reeve thought the offer was "a great offer" for his client, but he was concerned about relaying it to her right before her testimony. According to the habeas court, Reeve thought that because the petitioner was young and "flustered" about testifying, hearing the offer would negatively impact her testimony. Reeve asked the prosecutor if he could convey the offer to the petitioner after she testified, and the prosecutor replied " 'that's okay.' "

On his way to court, Reeve discussed the offer with his law partner. His partner agreed that the offer of ten years was favorable and advised Reeve not to delay in telling the petitioner about the offer. Because the prosecutor had indicated he would leave the offer open,

however, the habeas court found that Reeve decided to follow "his instincts" and wait to tell her.

Reeve presented the offer to his client, but he had waited to do so until after her testimony concluded two and one-half days later. The petitioner indicated that she wanted to accept it but first wanted to discuss it with her mother and Reeve together. Reeve then informed the prosecutor that his client was interested in accepting the offer. The prosecutor, however, responded that the offer was withdrawn. Reeve did not attempt to specifically enforce that plea agreement.

The trial proceeded and, after the close of evidence, the jury returned a verdict of guilty as to all charges. The trial court rendered judgment of conviction according to the verdict and sentenced the petitioner to thirty-five years incarceration.

The petitioner later filed this habeas action, alleging, among other things, that Reeve rendered ineffective assistance under the sixth amendment to the United States constitution as a result of his delay in informing the petitioner of the plea offer until after her testimony, which ultimately led the prosecutor to withdraw it before it could be accepted. According to the petitioner, Reeve had a duty to promptly inform her of the prosecutor's offer, irrespective of his thoughts about the potential impact to her emotional state in advance of her testimony. The petitioner asserted that Reeve's delay in presenting the offer to her, despite having the opportunity to present and to discuss it with her before her testimony, breached this duty and caused her prejudice because she would have accepted the offer.

The habeas court agreed with the petitioner. It determined that "Reeve's failure to relay the favorable offer in a timely manner before it was withdrawn fell below the objective standard of reasonableness required by attorneys under the state and federal constitutions."

The court further found that the petitioner was prejudiced by Reeve's deficient performance because, had the offer been presented sooner, the petitioner would have accepted the offer, and the trial court would have agreed to sentence the petitioner accordingly. The habeas court then ordered that the matter be returned to the criminal trial docket for a determination of the appropriate remedy. See *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 361–62, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d (2013).

The habeas court granted permission for the respondent to appeal from the judgment to the Appellate Court, which affirmed. *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 441, 148 A.3d 1105 (2016). We granted the respondent's petition for certification to appeal.[2] *Helmedach* v. *Commissioner of Correction*, 323 Conn. 941, 151 A.3d 845 (2016). Although, on appeal, we will defer to the habeas court's factual findings and not disturb them unless they are clearly erroneous, we review de novo whether the facts found by the habeas court establish ineffective assistance of counsel. *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

II

The sixth and fourteenth amendments to the United States constitution guarantee criminal defendants the right to have counsel for their defense in state prosecutions. *Strickland* v. *Washington*, supra, 466 U.S. 668; *Horn* v. *Commissioner of Correction*, 321 Conn. 767,

[2] We granted certification specifically on the following questions: "[1] Did the Appellate Court properly conclude that [Reeve's] strategic decision to delay informing the petitioner of a midtrial plea offer was not within the realm of strategic decisions that an attorney is allowed to make?

"[2] If the answer to question one is 'no,' did the Appellate Court properly conclude that [Reeve's] strategic decision was not reasonable?" *Helmedach* v. *Commissioner of Correction*, 323 Conn. 941, 941–42, 151 A.3d 845 (2016).

775, 138 A.3d 908 (2016). Implicit in this guarantee is the right to have *effective* assistance of counsel. *Strickland* v. *Washington*, supra, 686.

A defendant seeking habeas relief for ineffective representation must prove two elements. "First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense." (Internal quotation marks omitted.) *Williams* v. *Taylor*, 529 U.S. 362, 390, 120 S. Ct. 495, 146 L. Ed. 2d 389 (2000), quoting *Strickland* v. *Washington*, supra, 466 U.S. 687.

The parties in the present case agree that the delay in conveying the offer to the petitioner caused the petitioner prejudice in light of the habeas court's findings that the petitioner would have agreed to the offer for a ten year sentence of incarceration, had the offer been presented to the petitioner before her testimony, and that the court would have accepted it. Because the parties do not contest whether counsel's performance harmed the petitioner, or whether the habeas court ordered the appropriate remedy, the only issue presented for our resolution is whether counsel's delay amounted to constitutionally deficient representation.

A

The defendant's right to effective representation applies to all "critical stages" of a criminal prosecution, which extends to any plea negotiations. (Internal quotation marks omitted.) *Missouri* v. *Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). "[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the [s]ixth [a]mendment right to effective assistance of counsel." *Padilla* v. *Kentucky*,

559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). After all, guilty pleas account for about ninety-four percent of all convictions in state prosecutions. *Missouri* v. *Frye*, supra, 143 (citing federal Department of Justice statistics); see *Padilla* v. *Kentucky*, supra, 372. This statistic has led the United States Supreme Court to observe, quoting scholars, that, "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." (Emphasis in original; internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 144, quoting R. Scott & W. Stuntz, "Plea Bargaining as Contract," 101 Yale L.J. 1909, 1912 (1992). Plea bargaining holds benefits for both the state and the defendant—it allows the state to "conserve valuable prosecutorial resources" while providing defendants a chance to obtain "more favorable terms at sentencing . . . ." *Missouri* v. *Frye*, supra, 144. "In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations." Id.

Precisely defining counsel's duties during plea negotiations is, however, a difficult task. "The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions farther removed from immediate judicial supervision. . . . The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." (Citation omitted; internal quotation marks omitted.) Id., 144–45. The court in *Strickland* itself acknowledged that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent

a criminal defendant." *Strickland* v. *Washington*, supra, 466 U.S. 688–89.

Nevertheless, despite the unstructured nature of plea bargaining, the United States Supreme Court has determined that counsel at least has a duty to present to the defendant any plea offer received from the prosecution. In *Missouri* v. *Frye*, supra, 566 U.S. 138–39, the defendant's attorney received two formal plea offers from the prosecutor but did not relay those offers to the defendant, and the offers later expired without the defendant ever being made aware of them. Id., 138–39. Although the court declined to set forth specific rules governing plea bargaining, it held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Id., 145. The court also concluded that, "[w]hen defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the [c]onstitution requires." Id.

Although *Frye* specifically addressed only *whether* defense counsel must relay offers received, not *when* they must be relayed, the court's rationale in *Frye* strongly suggests that counsel must relay offers to plea bargain *promptly*, according to the circumstances of the case. The court in *Frye* reached its holding by looking to professional codes of conduct from the American Bar Association and various state bars. The court observed that, although counsel's obligations are not defined "solely by reference to codified standards of professional practice, these standards can be important guides." Id., 145. The court began by looking to the American Bar Association Standards for Criminal Justice, which provide that defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attor-

ney, and should *promptly* communicate and explain to the defendant all plea offers made by the prosecuting attorney." (Emphasis added.) A.B.A., Standards for Criminal Justice: Pleas of Guilty (3d Ed. 1999) standard 14-3.2 (a), p. 116. The court then explained that "numerous state and federal courts over the last [thirty] years" had adopted that standard. *Missouri* v. *Frye*, supra, 566 U.S. 145–46 (citing cases). In addition, the court observed that "[t]he standard for *prompt* communication and consultation is also set out in state bar professional standards for attorneys." (Emphasis added.) Id., 146 (citing rules of professional conduct from several states).

As the Appellate Court observed in the present case, the duty of prompt communication with a client permeates our own Rules of Professional Conduct, including, specifically, prompt communication with a client to determine how to plead in a criminal matter, which is a decision the client is entitled to make. See *Helmedach* v. *Commissioner of Correction*, supra, 168 Conn. App. 458–59 (surveying relevant provisions in Rules of Professional Conduct). Most notably, rule 1.3 of the Rules of Professional Conduct requires the lawyer to "act with reasonable diligence and promptness in representing a client." Rule 1.4 more specifically requires an attorney to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules . . . ." Rules of Professional Conduct 1.4 (a) (1). And rule 1.2 (a) of the Rules of Professional Conduct requires the client's informed consent for the entry of a plea, explaining that a lawyer must "abide by a client's decision whether to settle a matter" and, specifically in the criminal context, that "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive [a] jury trial and whether the client will testify." Rule 1.4 also requires the lawyer

to "keep the client reasonably informed about the status of the matter . . . ." Rules of Professional Conduct 1.4 (a) (3). According to the commentary to that rule, this includes keeping the client informed about "significant developments affecting the timing or the substance of the representation." Rules of Professional Conduct 1.4 (a) (3), commentary.

Although these rules are not dispositive in setting forth counsel's duty of effective representation, we find their command of promptness to be a compelling and appropriate standard for measuring the constitutional adequacy of defense counsel's performance in this context. The defendant, not defense counsel, holds the ultimate decision-making power on whether to resolve his or her criminal case through a plea agreement rather than a trial. Rules of Professional Conduct 1.2 (a); see also *Jones* v. *Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ("[i]t is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury [trial], testify in his or her own behalf, or take an appeal"). The defendant, alone, as the party with the constitutional right to a trial by jury, may waive this right and choose to enter a guilty plea. Rules of Professional Conduct 1.2 (a); see also *Jones* v. *Barnes*, supra, 751. A defendant's authority to decide whether to settle the case logically also must extend to deciding when to settle it. And the defendant's authority to decide whether and when to settle cannot meaningfully be exercised unless and until the defendant is made aware of the existence of any plea offers. Unjustified delay in alerting the defendant to the existence of a plea offer thus interferes with a defendant's exercise of his rights.[3]

[3] In addition, the circumstances of a case may change after an offer is made, especially during trial. New evidence may be discovered, and witnesses may alter their statements or may perform better or worse than expected when testifying. Changes of this nature will naturally affect the relative bargaining power of the parties and may lead to the retraction of an offer before it is

We therefore conclude that counsel's duty to convey to the defendant all formal offers from the prosecutor to resolve the case through a plea agreement also includes a duty to promptly convey an offer to the defendant. We acknowledge that a defendant does not have a right to receive a plea offer from the state in the first place or to have a guilty plea accepted by the court. *Weatherford* v. *Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *North Carolina* v. *Alford*, 400 U.S. 25, 38 n.11, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). But when the prosecutor chooses to extend to the defendant an offer to accept a plea of guilty on terms favorable to the defendant, the sixth amendment's guarantee of the effective assistance of counsel during any plea negotiations requires that the defendant's counsel promptly communicate that offer to the defendant.

Of course, what is prompt does not depend on any rigid time frame but, instead, depends on what is reasonable in the context and according to the circumstances of the case. Webster's Third New International Dictionary (1961) p. 1816, defines "prompt," when used as an adjective, as "ready and quick to act *as occasion demands* . . . ."[4] (Emphasis added.) This meaning is consistent with cases referencing the common meaning of the term "promptly." See, e.g., *Rierson* v. *State*, 188 Mont. 522, 526, 614 P.2d 1020 (1980) (" 'Promptly' is a

accepted. A delay in conveying the offer, therefore, may result in its lapse because of a changed circumstance, even if defense counsel expected the offer to remain valid for a longer period.

[4] Although the dictionary definition also contains other meanings suggesting immediacy—"performed readily or immediately," and "given without delay or hesitation"—we do not believe the standard of reasonably competent representation requires the *immediate* transmittal of all plea offers. Webster's Third New International Dictionary (1961) p. 1816. This may, in fact, not be practicable in some circumstances. Instead, we are persuaded that the definition most applicable to the present context is the reference to action "as occasion demands." Id. The context and the circumstances of the case, not timing, should drive what may be considered prompt.

common word with a plain and well known meaning. That meaning is ready and quick to act, depending on the circumstances."), on rehearing, 191 Mont. 66, 622 P.2d 195 (1981). And cases acknowledge that what qualifies as prompt often depends on the circumstances, not a fixed time frame. See, e.g., *Irvin* v. *Koehler*, 230 F. 795, 797 (2d Cir. 1916) ("Promptly does not have any exact definition that can be regulated with respect to a period of time. It depends, of course, in its definition largely on the circumstances surrounding the facts which are adduced in each case . . . ."); see also Black's Law Dictionary (6th Ed. 1990) p. 1214 (defining "[p]romptly" as "ready and quick to act as occasion demands" and explaining "[t]he meaning of the word depends largely on the facts in each case, for what is 'prompt' in one situation may not be considered such under other circumstances or conditions").

The speed with which counsel reasonably may convey an offer will, therefore, depend on the circumstances and the context of the case when the offer is made. A particular delay in conveying an offer to enter into a plea agreement that might be justified if the offer is made during pretrial proceedings, when no developments are reasonably expected, might not be justified if the same offer is made at trial, on the eve of the jury's commencement of deliberations.

B

In the present case, we have no occasion to delve more precisely into the meaning of prompt communication than the circumstances here demand. Under these circumstances, Reeve had a duty to convey the prosecutor's fourth offer to the petitioner, and he should have conveyed it before she began her testimony. Reeve's failure to do so rendered his assistance ineffective under the sixth amendment.

A defendant is entitled to decide whether to testify in his or her own case and is further entitled to have advice from counsel concerning that decision. See *Jones* v. *Barnes*, supra, 463 U.S. 751 (defendant's decision-making authority extends to whether to "testify in his or her own behalf"); see also Rules of Professional Conduct 1.2 (a) (decision on whether to testify lies with client, in consultation with lawyer). Counsel's duty to advise includes the duty to keep the defendant informed of all developments in the case material to the defendant's decision to testify.[5] See *Lewis* v. *Commissioner of Correction*, 89 Conn. App. 850, 870, 877 A.2d 11 ("[i]t is axiomatic that [i]t is the right of every criminal defendant to testify on his own behalf . . . and to make that decision after full consultation with trial counsel" [citation omitted; internal quotation marks omitted]), cert. denied, 275 Conn. 905, 882 A.2d 672 (2005). Deciding whether to testify on one's own behalf is often among the most difficult choices a criminal defendant must make during trial. Testifying can present a risky and difficult ordeal for a defendant. Defense counsel therefore must keep the defendant apprised of all material information known to counsel in order to help the defendant in making that decision.

[5] Once again, the Rules of Professional Conduct further elucidate counsel's responsibilities in this regard. As we previously have explained, rule 1.4 (a) (1) of the Rules of Professional Conduct requires the attorney to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0 (f), is required by these Rules . . . ." The commentary to rule 1.4 directs the reader to "[s]ee Rule 1.2 (a)" for the decisions requiring a client's informed consent. Rules of Professional Conduct 1.4, commentary. Rule 1.2 (a) includes among those decisions the client's right to decide "after consultation with the lawyer . . . whether the client will testify." Rules of Professional Conduct 1.2 (a). And rule 1.0 (f) of the Rules of Professional Conduct defines "[i]nformed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of *and reasonably available alternatives to the proposed course of conduct*." (Emphasis added.)

In the present case, Reeve's failure to convey the offer to the petitioner before she took the stand amounted to deficient performance. The knowledge that the prosecutor had offered to resolve the case with a plea agreement of ten years incarceration could have impacted the petitioner's decision whether to testify, and she had a right to learn of that offer sooner than it was given to her. The failure to convey the offer to the petitioner before she took the stand left her unaware that the prosecutor had made an offer to resolve the case on terms more favorable to her than any prior offer. Reeve's decision to nevertheless delay in communicating that offer therefore interfered with the petitioner's decision about whether to testify by preventing her from making an informed choice. There is no indication that Reeve was prevented from conveying the offer before the petitioner's testimony. Because the offer came during trial, Reeve would have seen the petitioner shortly after receiving the offer and, thus, would have had the opportunity to speak with his client on the morning she was to begin her testimony. If Reeve thought he would have needed additional time to discuss with his client the offer and its potential effect on her decision whether to testify, he could have sought additional time from the court. He did not. Reeve instead decided not to tell the petitioner at all and waited two and one-half days—until the petitioner finished her testimony—to convey to her the prosecutor's favorable offer. True, Reeve had asked the prosecutor whether he could wait until after the petitioner's testimony to communicate the offer, and the prosecutor responded, " 'that's okay,' " which Reeve understood as a promise to keep the offer open until that time. But Reeve's choice to delay was nevertheless unreasonable because it interfered with the petitioner's ability to exercise her right to knowingly decide, on the basis of all material information available, whether to testify.

C

The respondent agrees that "[t]here is no question that criminal defense attorneys have an obligation to promptly communicate formal plea offers to their clients" but, nevertheless, asserts that Reeve "promptly conveyed the [prosecutor's] plea offer to the petitioner because he presented it to her and conveyed her acceptance to the [prosecutor] before the offer expired." Relying on *Frye*, the respondent contends that presenting the offer to the client before its expiration "is all that the sixth amendment requires."

But *Frye* does not establish that to timely convey an offer counsel need only convey it to the defendant sometime before its expiration. *Frye* held only that the failure to convey an offer at all violated the sixth amendment's right to the effective assistance of counsel. *Missouri* v. *Frye*, supra, 566 U.S. 145. The court stated that "[a]s a result of that deficient performance, the offers lapsed." Id., 147. At most, *Frye* established that conveyance before expiration may be a necessary condition for establishing promptness, but it did not hold that it was sufficient to establish promptness standing on its own.

Rather, the court in *Frye* relied on guidance from bar associations establishing that offers must be conveyed promptly, but it did not expound on what "promptly" meant in this context and did not need to under the facts of that case. See id., 145–46. We have reached that question in the present case, and, as we have already established, the duty of prompt conveyance is not met in all cases simply by conveying a formal offer before its expiration. Promptness instead may depend on a number of circumstances, beyond just the expiration date of the offer, that can impact the plea bargaining process. In the present case, because the offer was conveyed to Reeve during trial and just before the peti-

tioner decided whether to testify, we have concluded that Reeve had a duty to convey the offer to the petitioner before her testimony. This was necessary to fulfill his duty of timely providing the petitioner information relevant to a decision that required her informed consent, specifically, her decision to testify.

The respondent further argues, however, that Reeve was reasonably concerned about the effect that the offer might have on the petitioner's testimony, given her anxious emotional state, and that waiting to tell her until after she testified was a reasonable way to ensure that the offer did not interfere with her performance, thus maximizing the strength of the defense's case. The respondent asserts that Reeve's reason for delay can be justified because the prosecutor had signaled he was amenable to keeping the offer open, allowing Reeve to first see how the petitioner performed on the witness stand and to size up her chances of an acquittal before deciding whether to accept the offer. "In essence," according to the respondent, "Reeve believed that his client could have the best of both worlds if he waited to convey the [prosecutor's] ten year plea offer to her because the [prosecutor] had agreed to leave the offer open until after the petitioner testified." Accordingly, the respondent argues that we must defer to counsel's reasonable strategic decision to delay conveying the offer. See *Strickland* v. *Washington*, supra, 466 U.S. 689. We disagree.

First, delaying the conveyance of the offer so Reeve could assess the petitioner's performance on the stand was not a decision Reeve was at liberty to make under these circumstances. Although this perhaps could be a reason for advising the petitioner to delay accepting the offer, it does not justify the delay in telling the petitioner in the first place. If this was Reeve's strategy, he should have told the petitioner of the offer and then advised her to wait. It then would have been the petitioner's decision how to proceed. But by deciding to

delay telling her at all, Reeve usurped her right to decide whether and when to enter into a plea agreement and end the case, and, also, he failed to fully inform her of the circumstances of the case before she made her decision to testify. A defendant seeming "flustered" or "anxious" before taking the stand in her own defense is hardly an uncommon occurrence and does not justify burdening that defendant's right to make critical decisions concerning her defense. Indeed, if the petitioner were anxious about testifying, she might well have decided to accept the favorable offer rather than prolong the trial and endure giving testimony. That was her choice to make—not her counsel's.

Second, even if we assume that Reeve's concerns about the offer's impact on the petitioner's testimony could justify an exception to his duty to convey the offer sooner, we would nevertheless conclude that Reeve failed to take adequate steps to protect his client by firming up the prosecutor's offer—the most favorable offer to date—and extracting a formal agreement to keep it open until after the petitioner's testimony. That is something that could have been done with the aid of the court and on the record to protect the petitioner. To be sure, defense counsel often relies on a prosecutor's promise to keep an offer open. But in the present case, the prosecutor's response of " 'that's okay' "—which Reeve took as a suggestion that he could wait to discuss the offer with the petitioner—was vague at best. And the offer came during trial, just before the petitioner's testimony—a significant event with uncertain consequences. Depending on how the testimony proceeded, the parties' bargaining positions could have changed dramatically, leaving doubt about the viability of the offer. Even if Reeve's concerns about the petitioner's anxiety before her testimony could justify not telling her of the offer just before she took the stand, Reeve nevertheless had the opportunity to inform her of the offer later in the day, after she finished her

first day of testimony, when he would have had additional time to discuss the offer and her anxiety might have dissipated to some degree. Additionally, the prosecutor had already withdrawn an earlier offer, despite the petitioner's attempt to accept it. Even if Reeve's concerns about his client's anxiety could justify a delay, his reliance on the prosecutor's vague response, without taking any other steps to protect his client and preserve the offer pending her testimony, thus was not reasonable. Put simply, Reeve's concerns, even if valid, would not justify a two and one-half day delay in conveying the prosecutor's offer to the petitioner without more significant assurances that the offer would remain open despite any developments in the matter during her testimony.[6]

For these reasons, the habeas court and Appellate Court properly determined that Reeve's performance fell below the minimum required for effective assistance under the circumstances.

The judgment is affirmed.

In this opinion the other justices concurred.

VIVIAN GAGLIANO ET AL. *v.* ADVANCED SPECIALTY CARE, P.C., ET AL. (SC 19804)

Palmer, McDonald, D'Auria, Mullins and Kahn, Js.*

Syllabus

The plaintiffs, V and her husband, sought to recover damages for, inter alia, medical malpractice, alleging that the defendant B, a surgical resident, was an actual agent of the defendant hospital when he negligently per-

[6] Whether the prosecutor may withdraw an offer despite a promise to keep it open and whether the petitioner could have specifically enforced the prosecutor's promise are questions that are not before us in this appeal.

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, McDonald, D'Auria, Mullins and Kahn. Although Justice McDonald was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

formed a surgical procedure on V under the supervision of G, a member of the hospital's clinical faculty who also was V's surgeon, and that the hospital was vicariously liable for B's negligence. G was not employed by the hospital but maintained staff privileges, allowing him to attend to patients admitted to the hospital. On the day of V's surgery, B was assigned by the chief resident of B's residency program to assist G in performing the surgery. Prior to the surgery, V signed a hospital consent form that authorized a surgical resident to participate in performing V's surgery. G testified at trial that, although he did not request a resident, did not need a second physician to assist him, and did not believe it was in his patient's best interest to allow a resident to participate, he did so to advance the hospital's expectation of involving residents in surgical procedures that are performed by clinical faculty. Following the surgery, it was discovered that V's colon had been perforated during the surgery. The jury returned a verdict for the plaintiffs and against B and the hospital, finding that B was an actual agent of the hospital. The hospital appealed to the Appellate Court from the trial court's judgment in favor of the plaintiffs, claiming that there was insufficient evidence that B acted as the hospital's agent when he performed the surgery. The Appellate Court reversed the trial court's judgment as to the hospital, concluding that the evidence had not established that there was an understanding between B and the hospital that the hospital would be in control of B's performance during the surgery, and that the evidence established that only G controlled B's performance. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the evidence was insufficient to support the jury's finding that B was an actual agent of the hospital when he participated in performing V's surgery and that the hospital, therefore, could not be held vicariously liable for V's injuries: the totality of the evidence, including the hospital's house staff manual, witness testimony, and the patient consent form that V signed, when considered in light of the trial court's charge to the jury on agency, provided a sufficient basis for the jury to conclude that the hospital had the general right to control B as a resident, such that he was the hospital's actual agent prior to and during the course of V's surgery, as the hospital agreed to oversee the provision of a specific medical education for residents in exchange for low cost labor and the prestige attendant to being a teaching hospital, the hospital had the right to constrain the activities in which B could participate and to take disciplinary action against him if he failed to provide patient care that satisfied the hospital's standards, the chief resident acted in furtherance of the hospital's obligations to surgical residents by assigning B to participate in performing V's surgery, and G was acting in his capacity as a hospital faculty member when he allowed B to participate in the surgery; moreover, the mere fact that the hospital did not dictate the precise conditions under which G could permit B to participate in performing the surgery or the limits

thereto did not compel the conclusion that the hospital surrendered its general right to control B's participation in such procedures.

2. The hospital could not prevail on its claim, as an alternative ground for affirming the Appellate Court's judgment, that it was not legally permitted to control the professional judgment of a physician under state statutes governing physicians and hospitals because it was not licensed to practice medicine and, therefore, could not directly engage in the practice of medicine or indirectly engage in the practice of medicine through licensed employees or agents: this court rejected a similar argument in *Cefaratti* v. *Aranow* (321 Conn. 593), in which it held that hospitals can be held vicariously liable for the medical malpractice of their agents and employees; moreover, holding hospitals vicariously liable supports the sound public policy of encouraging hospitals to formulate and implement effective quality control measures and to exercise better oversight of their employees and agents.

Argued February 22—officially released August 14, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the action was withdrawn as against the named defendant et al.; thereafter, the case was tried to the jury before *Ozalis*, *J.*; verdict for the plaintiffs; subsequently, the court denied the motions to set aside the verdict, for remittitur and for judgment notwithstanding the verdict filed by the defendant Danbury Hospital et al.; thereafter, the court, *Ozalis*, *J.*, rendered judgment in accordance with the verdict, from which the defendant Danbury Hospital appealed to the Appellate Court, *Beach*, *Alvord* and *Gruendel*, *Js.*, which reversed in part the trial court's judgment and remanded the case with direction to render judgment for the defendant Danbury Hospital, and the plaintiffs, on the granting of certification, appealed to this court. *Reversed in part; judgment directed.*

Alinor C. Sterling, with whom were *Katherine L. Mesner-Hage* and, on the brief, *Joshua D. Koskoff*, for the appellants (plaintiffs).

Michael G. Rigg, for the appellee (defendant Danbury Hospital).

Roy W. Breitenbach and *Michael J. Keane, Jr.*, filed a brief for the Fairfield County Medical Association as amicus curiae.

Kathryn Calibey, *Sean J. Stokes* and *Brendan Faulkner* filed a brief for the Connecticut Center for Patient Safety as amicus curiae.

Jennifer L. Cox and *Jennifer A. Osowiecki* filed a brief for the Connecticut Hospital Association as amicus curiae.

Opinion

McDONALD, J. The primary issue in this medical malpractice action is whether there was sufficient evidence from which the jury reasonably could have found that the defendant surgical resident, Venkata Bodavula, was an actual agent of the defendant hospital, Danbury Hospital, when he negligently performed a surgical procedure under the supervision of a member of the hospital's clinical faculty who was also the plaintiff's private physician. Upon our grant of certification, Vivian Gagliano (plaintiff) and her husband, Philip Gagliano (collectively, plaintiffs), appeal from the judgment of the Appellate Court reversing the trial court's judgment, in part, as to the hospital's vicarious liability for Bodavula's negligence. We conclude that the trial court properly determined that there was sufficient evidence to establish such an agency relationship, and that imposing vicarious liability on the hospital for Bodavula's actions was not improper.

The opinion of the Appellate Court sets forth the following facts that the jury reasonably could have found, which we supplement in part I of this opinion, and procedural history. "On July 23, 2008, the plaintiff underwent hernia repair surgery at the hospital. The

surgery was to be performed by [Joseph R. Gordon], her physician, who had recommended the procedure to the plaintiff during an examination at his office. [Gordon] was not employed by the hospital, but maintained staff privileges allowing him to attend to his patients admitted to the hospital.

"Prior to the start of the procedure, but without the plaintiff's [specific] knowledge, a fourth year [surgical] resident, [Bodavula], was assigned to assist [Gordon] with the surgery.[1] . . . [Gordon] asked [Bodavula] about his experience with a surgical device called an optical trocar, which was to be used in the surgery. [Bodavula] informed [Gordon] that he knew how to use the device. Under [Gordon's] supervision, [Bodavula] performed the initial insertion of the device into the plaintiff's abdomen.

"As the surgery proceeded, [Gordon] became concerned that [Bodavula] was improperly [applying too much force in] using the optical trocar. At that point, [Gordon] took over for [Bodavula] and completed the plaintiff's surgery. Two days after the surgery, while recovering in the hospital, the plaintiff began to exhibit signs of infection, and her body went into septic shock. It was discovered that the plaintiff's colon had been perforated during the surgery. [As a consequence, the plaintiff ultimately sustained life threatening and life altering injuries.] . . .

"The [plaintiff and her husband, respectively] filed negligence [and loss of consortium] claims against [Gordon], his practice, Advanced Specialty Care, P.C., [Bodavula], and the hospital. The plaintiffs alleged that [Gordon] and [Bodavula] were [actual or apparent] agents of the hospital, and, therefore, the hospital was

[1] As we explain later in this opinion, a consent form signed by the plaintiff was admitted into evidence in which the hospital informed her of the possibility that a resident might assist in portions of the surgery.

vicariously liable for their actions. Prior to the commencement of trial, the plaintiffs settled with [Gordon] and Advanced Specialty Care, P.C., for an undisclosed sum. In May, 2014, a jury trial commenced to address the remaining claims against [Bodavula] and the hospital.

"[At trial, evidence was adduced establishing that Bodavula] was enrolled in the surgical residency program at Sound Shore Medical Center in New Rochelle, New York. The program included rotations at Danbury Hospital. [Bodavula] testified that as a fourth year medical resident he spent approximately 50 percent of his time at the hospital. A rotation at the hospital would last one to two months. On the day of the plaintiff's surgery, the chief resident of the surgical residency program assigned [Bodavula] to assist [Gordon]. There was no evidence presented as to whether the chief resident was an employee of the hospital, but [Bodavula] testified that in regard to the chief resident, 'I'm also the same residence, as the same part of the same pool of residents.'

"During his testimony, [Bodavula] was questioned about the hospital's House Staff Manual (manual). [Bodavula] testified that he could not recall whether he had received a copy of the manual. Despite not being able to recall if he had received the manual, he believed that he was expected to comply with the obligations that it established.

"Later in the trial, the hospital stipulated that the manual had been distributed to residents in 2008. The entire 231 page manual was admitted into evidence as a full exhibit. The trial court ruled that the manual was relevant to the question of whether [Bodavula] was an agent of the hospital. . . .

"The first section of the manual addressed resident policies, including selection to the program, resident evaluations, responsibilities, hospital safety, and bene-

fits. The section on benefits included details about [the hospital's provision of] rent-free housing [or a housing stipend], vacation and sick leave, as well as [professional liability, health, disability, and life] insurance. It also stated: 'Danbury Hospital will provide a salary to the [r]esident, as specified in the Danbury Hospital Resident Agreement.' There was no evidence submitted as to a 'Residency Agreement' between [Bodavula] and the hospital. He testified that he was not paid by the hospital. . . .

"Another section of the manual, titled 'Residency Program Information,' provided details for eight distinct residency programs . . . [including] surgery.

"The chapter on the surgical residency program provided an overview of the program: 'Since 1999 Danbury Hospital has been an integrated part of the surgical residency at Sound Shore Medical Center in New Rochelle, [New York]. The residency is affiliated with New York Medical College. Ten general surgical residents from Sound Shore Medical Center rotate at Danbury Hospital at any given time. Surgical residents have an opportunity to study under attending surgeons who have had their own training at multiple academic institutions.'

"This residency program section of the manual also established the hospital's expectations that residents must satisfy in order to be deemed proficient at six core competencies required by a national accreditation organization. The section goes on to describe the program's assessment procedures including surgical skills evaluation by faculty. . . .

"[Gordon] testified that it was within his discretion to determine the resident's level of involvement during a surgical procedure. He also testified that throughout a surgical procedure he maintained the authority to end the resident's participation: '[A]s the attending surgeon,

I have to sometimes exert my authority and just take over, and I say, I'm taking over, and the resident steps aside.'

"After the plaintiffs rested their case, each defendant moved for a directed verdict. The trial court denied the motions. The jury returned a verdict in favor of the plaintiffs. The jury awarded the plaintiff $902,985.04 in economic damages and $9.6 million in noneconomic damages. Philip Gagliano was awarded $1.5 million in loss of consortium damages. [In its responses to interrogatories, the] jury found that [Bodavula] was an actual agent of the hospital.[2] [Bodavula] and the hospital were found liable for 80 percent of the plaintiffs' damages. The remaining 20 percent of liability was assigned to [Gordon].

"After the verdict, the hospital and [Bodavula] filed separate motions to set aside the verdict, for judgment notwithstanding the verdict, and remittitur. The court denied the six motions. With respect to the hospital's motions, the trial court found that there was sufficient evidence to support the jury's finding that [Bodavula] was an agent of the hospital when he operated on the plaintiff. Specifically, the court found that credible evidence was presented to the jury that showed that [Bodavula] wore a hospital badge; treated patients according to the instructions of the chief resident; reported to and was evaluated by hospital staff; was required to follow hospital obligations, protocols and set rules; and was assigned to the plaintiff's surgery by the chief resident. [The court also substantially relied on the manual as evidence of the hospital's right to control Bodavula.]"

[2] The jury found that Bodavula was not an apparent agent of the hospital. The jury was instructed in relevant part that apparent agency could exist "if the plaintiff accepted services from [Bodavula] in the reasonable belief that [Bodavula] worked for [the hospital] or was supervised or controlled by the hospital . . . ." As we previously indicated, there was no evidence that the plaintiff knew that Bodavula was in fact going to perform part of the surgery.

(Footnotes added and omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 167 Conn. App. 826, 828–35, 145 A.3d 331 (2016).

The record reveals the following additional procedural history. The trial court rendered judgment in accordance with the verdict, from which the hospital appealed. In its appeal to the Appellate Court, the hospital claimed that (1) there was insufficient evidence that Bodavula acted as the hospital's agent when performing the surgery, and (2) a conclusion that the hospital had the right to control Bodavula's surgical performance would contravene the public policy expressed in statutes generally barring the corporate practice of medicine. Id., 828–29 and n.3. The Appellate Court agreed with the first ground and, therefore, did not reach the second. Id., 829 n.3. Specifically, the Appellate Court held that the evidence did not establish that there was an understanding between Bodavula and the hospital that the hospital would be in control of Bodavula's performance of the surgery. Id., 838. The court pointed to the plaintiffs' failure to introduce the residency agreement as a "glaring" evidentiary omission; id., 841; and reasoned that the manual and the remaining evidence were insufficient to fill that void. Id., 844. Largely in reliance on *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 687 A.2d 111 (1996), the Appellate Court reasoned that because of the dual functions of residency programs—employment and academic training—the jury lacked any basis to determine whether Bodavula was acting pursuant to the academic relationship, to which the "right to control" agency test would not even apply, without the residency agreement. *Gagliano* v. *Advanced Specialty Care, P.C.*, supra, 840–46. Ultimately, it concluded that the evidence established that only Gordon, not the hospital, controlled Bodavula's performance of the surgery. Id., 843. Accordingly, it

reversed the judgment of the trial court as to the hospital. Id., 851.

We granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly determine that the evidence admitted at trial was insufficient to support the jury's finding of actual agency . . . ." *Gagliano* v. *Advanced Specialty Care, P.C.*, 323 Conn. 926, 150 A.3d 229 (2016). The hospital filed a statement of an alternative ground for affirmance, renewing the legal claim that the Appellate Court did not reach.

I

We begin with the certified issue regarding evidentiary sufficiency. The plaintiffs contend that the Appellate Court improperly drew inferences against the verdict and tested the evidence against different and more demanding standards than the law under which the jury was charged. They further contend that the evidence supported the verdict under the charge given. We agree.

We review a trial court's denial of a motion to set aside the verdict and a motion for judgment notwithstanding the verdict under the same standard. "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . We do not ask whether we would have reached the same result. [R]ather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . If the jury could reasonably have reached its conclusion, the verdict must stand." (Citations omitted; internal quotation marks omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 369–70, 788 A.2d 496 (2002); accord *Doe* v.

Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 370–71, 119 A.3d 462 (2015).

In the absence of a challenge to the trial court's charge to the jury, as in the present case, that charge becomes the law of the case. See, e.g., *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 212, 579 A.2d 69 (1990). The sufficiency of the evidence must be assessed in light of that law of the case. Id.

The trial court's charge reflected the following principles. "The existence of an agency relationship is a question of fact"; *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 133, 464 A.2d 6 (1983); which "may be established by circumstantial evidence based upon an examination of the situation of the parties, their acts and other relevant information." *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 240, 654 A.2d 342 (1995). Three elements are required to show the existence of an agency relationship: "(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." (Internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier, Inc.*, supra, 133. Although stated as a three part test, this court has also acknowledged there are various factors to be considered "in assessing whether [an agency] relationship exists [which] include: whether the alleged principal has the right to direct and control the work of the agent; whether the agent is engaged in a distinct occupation; whether the principal or the agent supplies the instrumentalities, tools, and the place of work; and the method of paying the agent. . . . In addition, [a]n essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal." (Citations omitted; internal quotation marks omitted.) Id.

It is exclusively this third element—an understanding between the parties that the principal will be in control of the undertaking—on which the Appellate Court's decision rested and on which the hospital defends that decision.[3] Before turning to the evidence related to that element, two general points must be made.

First, there can be no doubt that the "undertaking" must *include* Bodavula's performance of the surgery. It is, after all, the sole negligent act on which liability was premised. Nonetheless, we agree with the plaintiffs that the "undertaking" properly can be viewed more broadly as the surgical residency, such that evidence related to the hospital's general right to direct and control Bodavula's conduct as a medical resident could bear on the hospital's right to control his surgical performance. See *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016) ("The decisive test is who has the right to direct what shall be done and when and how it shall be done? Who has the right of *general* control?" [Emphasis added; internal quotation marks omitted.]); *Thompson* v. *Twiss*, 90 Conn. 444, 447, 97 A. 328 (1916) (same). Nonetheless, additional facts might demonstrate that there was an abandonment or change of agency with regard to the particular act giving rise to liability. See, e.g., 1 Restatement (Second), Agency § 227, p. 500 (1958) ("Servant Lent to Another Master"). Indeed, this was precisely the theory that the hospital advanced to the jury in its opening and closing arguments.[4]

[3] As we explain later in this opinion, there was undisputed evidence submitted regarding the benefits to the hospital from the residency program generally and the residents' provision of medical care to the hospital's patients specifically.

[4] In opening argument, the hospital's counsel stated: "It is true that you may find that [Bodavula] for certain purposes was an agent of the hospital. The bigger question is . . . *when he stepped into that surgical arena*, into that operating room with [Gordon], did he remain—if indeed that was your conclusion, *did he remain the agent of the hospital*." (Emphasis added.) During closing argument, counsel stated that he "acknowledge[d] that for

Second, it is only the general *right* to control, and not the actual exercise of specific control, that must be established. See *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 693 n.16, 849 A.2d 813 (2004) ("a fundamental premise underlying the theory of vicarious liability is that an employer exerts control, fictional or not, over an employee acting within the scope of employment, and therefore may be held responsible for the wrongs of that employee"); *Heath* v. *Day Kimball Hospital*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-11-6026678-S (December 16, 2013) (57 Conn. L. Rptr. 381, 383) ("the law does not require proof that the principal look over the agent's shoulder and direct the agent in how to do his work"). Agents may be vested with considerable discretion and independence in *how* they perform their work for the principal's benefit, yet still be deemed subject to the principal's general right to control. 1 Restatement (Third), Agency §1.01, comment (c), p. 20 (2006) ("a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment"); see 1 Restatement (Second), supra, § 220 (2), comment (i), p. 489 (noting that "skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are servants"); 1 Restatement (Second), supra, § 220 (1), comment (d), p. 487 ("[T]he control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the

many purposes at [the hospital, Bodavula] may well have been an agent. . . . Not for this purpose . . . ."

full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking."); see also *Jefferson* v. *Missouri Baptist Medical Center*, 447 S.W.3d 701, 712 (Mo. App. 2014) ("an employer's right to control may be attenuated, and an employee may have a significant degree of discretion in her work"); *Brickner* v. *Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108, 115 (Mo. App. 1988) ("[l]iability premised on the theory of respondeat superior does not require [the] plaintiff to prove the employer had actual control over its employee's discretionary judgment as long as the employee's conduct is within the scope and course of employment"). Thus, the mere fact that resident physicians, like physicians generally, must be free to exercise independent medical judgment; see *Jarmie* v. *Troncale*, 306 Conn. 578, 606–609, 50 A.3d 802 (2012); does not preclude the trier of fact from finding the existence of a principal-agent relationship between a hospital and a resident physician. See *Kelley* v. *Rossi*, 395 Mass. 659, 663–64, 481 N.E.2d 1340 (1985) (resident physician can be servant of hospital even in absence of hospital's control over precise treatment decision).

With these principles in mind, we turn to the evidence proffered by the plaintiffs to establish the agency relationship between Bodavula and the hospital. That evidence emanates from three sources, not all of which were addressed, or fully explored, by the Appellate Court: the hospital house staff manual, witness testimony, and a hospital consent form signed by the plaintiff.[5] With regard to the manual, we underscore the

[5] The Appellate Court placed substantial weight on the plaintiffs' failure to proffer the residency agreement. Although a residency agreement may be significant evidence relevant to the presence or absence of an agency relationship, we have never held that the failure to produce such an agreement precludes a finding of agency. *Gupta* v. *New Britain General Hospital*, supra, 239 Conn. 574, on which the Appellate Court relied for its view, is inapposite. In *Gupta*, a physician brought an action challenging his dismissal from a hospital's surgical residency training program. Id., 575. The physician claimed that the dismissal was a breach of the residency

significance of the fact that the 231 page manual, *in its entirety*, was admitted as a full exhibit, specifically as relevant to the issue of agency. The hospital made no request for any limiting instruction as to its use; see Conn. Code Evid. § 1-4 ("Limited Admissibility"); and no witness testified regarding its application to the present circumstances.[6] Accordingly, the manual falls within the rule that "[a]n exhibit offered and received as a full exhibit is in the case for all purposes"; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 525, 457 A.2d 656 (1983); "and is usable as proof to the extent of the rational persuasive power it may have." (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 817, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

The manual included sections of general applicability to all residents and ones of specific applicability to surgical residents. The general sections set forth the following relevant mandates regarding structure of the clinic program, the program's goals, and the responsibilities of the hospital, the faculty, and the residents.

agreement, which he claimed was an employment contract. Id., 580. Therefore, the terms and characterization of that agreement were necessarily essential to the resolution of that case.

We also note that the Appellate Court's reliance on the hybrid academic and employment functions of a medical residency cited in *Gupta* should have had no bearing on the present case. This distinction was not advanced in the trial court proceedings; there was no request for a jury charge setting forth different standards for agency depending on which function Bodavula was undertaking when the negligent act occurred, as the Appellate Court suggested. See *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, supra, 216 Conn. 212 (claim of insufficient evidence must be examined in light of law of case, as charged to jury).

[6] After it became apparent to the plaintiffs that neither Bodavula nor Gordon had the requisite knowledge to lay a foundation for admission of the manual, a discussion ensued off the record about calling a hospital official as a witness to do so. After it was revealed that the official was unavailable to testify in the near term, the hospital stipulated that the manual could come in as a full exhibit. Accordingly, insofar as the Connecticut Hospital Association, in its amicus brief, attempts to limit the meaning or application of certain parts of the manual, we do not consider these arguments.

With regard to general oversight, the manual provides that the hospital's executive vice president is charged with responsibility for the oversight and administration of the hospital's residency programs. A designated hospital official is "accountable for medical education." The hospital's medical education committee monitors all aspects of residency education and implements an internal review process.

With regard to day-to-day oversight, the manual provides that "[a]ll patient care must be supervised by qualified faculty." The hospital provides such faculty[7] to "ensure that residents receive appropriate supervision for all of the care they provide during their training." (Footnote added.)

The manual sets forth the following compact between the resident physicians and the faculty: "To meet their educational goals, resident physicians must participate actively in the care of patients and must assume progressively more responsibility for that care as they advance through their training. In supervising resident education, faculty must ensure that trainees acquire the knowledge and the special skills of their respective disciplines while adhering to the highest standards of quality and safety in the delivery of patient care services."

[7] The manual does not define "faculty" and provides no information as to the contours of the relationship between the hospital and its faculty. Nonetheless, Gordon admitted in his testimony that, insofar as the manual refers to faculty, it would be referring to the teaching faculty at the hospital, which would have included him with regard to the surgical residency program in 2008. He also acknowledged that, although he could not recall receiving the manual, the manual's recitation of the faculty's general responsibilities was consistent with Gordon's understanding of his role at the hospital as clinical faculty.

Gordon also indicated that, in connection with the surgical residency program in 2008, he had no written agreement to serve in that capacity, and was not paid to perform in that capacity. He indicated that there was a "cultural understanding" that attending surgeons would teach residents. According to Gordon, the hospital executed a formal agreement with him to serve as faculty in 2010.

The manual includes various faculty commitments to residents, including: "to ensure that resident physicians have opportunities to participate in patient care activities of sufficient variety and with sufficient frequency to achieve the competencies required by their chosen discipline"; to "provide resident physicians with opportunities to exercise graded, progressive responsibility for the care of patients"; and to "evaluate each resident's performance on a regular basis . . . ."

With regard to such evaluations and recourse, the manual provides that "[u]nsatisfactory [r]esident evaluation may result in required remedial activities, temporary suspension from duties, or termination of employment and residency education." The resident is afforded a multistep grievance procedure, the first step commencing with the chief resident and the final step terminating with the designated institutional official for the hospital's executive vice president.

In the section of the manual specific to the surgical residency program, the hospital touts the program as an opportunity to use the latest, cutting edge techniques, technology and equipment. Residents rotate among four surgical services. One rotation specifically mentions the performance of hernia surgeries. While on their rotations, residents are provided with "the opportunity for complex open and minimally invasive surgical cases." The chief resident sets the precise structure of the rotation with guidance from the attending staff, the hospital's surgery chairman, the hospital residency liaison and the Sound Shore Medical Center program director.

"Surgical residents are expected to . . . [s]afely and correctly perform appropriate diagnostic and surgical procedures." Residents' "[m]anual dexterity [is] evaluated in the operating room and on the surgical floors by [a]ttending [s]urgeons and [c]hief [r]esidents as

reflected by operative technique, performance of basic bedside procedures and quality of assistance during complex operative procedures." Surgical skills evaluation forms are used by faculty to make these assessments.

The plaintiffs' standard of care expert, Thomas H. Gouge, testified that accreditation for a clinical setting requires that residents be subject to the setting's quality control. Gouge also testified that a teaching hospital benefits from a residency program because it affords such hospitals "highly trained, low cost" physicians to assist nurses and to provide patient care around the clock.

Other proffered evidence demonstrated how the aforementioned obligations and procedures played out with regard to the plaintiff's surgery. A hospital consent form signed by the plaintiff prior to her surgery authorized a surgical resident to participate in performing part of the surgery. The consent form prominently displayed the hospital's name and logo; it provided no other indicia that residents or medical support positions listed on the form had any other affiliation.

Testimony from Bodavula and Gordon established the following facts. The chief surgical resident assigned Bodavula to the plaintiff's surgery. Gordon did not request a resident and did not need a second surgeon to assist him. Gordon did not believe that it was in his patient's best interest to allow a resident to participate, but he did so to advance the hospital's expectation of involving its residents to the extent that it was safe to do so. Gordon understood that part of his responsibility as clinical faculty included his evaluation of resident performance. He acknowledged that, once a resident shows up in the operating room, he puts on the additional hat of being clinical faculty.

Before commencing the surgery, the surgical team followed the hospital's safety checklist protocol. Gordon believed that use of the optical trocar was part of Bodavula's educational experience. Gordon provided Bodavula with instruction and supervision on the use of that device while Bodavula performed the surgical procedure.

This evidence provides a sufficient basis for the jury to have concluded that the hospital had the general right to control Bodavula as a resident, such that he was the hospital's actual agent prior to and after he entered the operating room. The hospital agreed to oversee the provision of a specific medical education for residents in exchange for the provision of low cost labor and the prestige attached to being a teaching hospital. The hospital fulfilled that obligation by implementing systems whereby residents were provided opportunities to participate in progressively more difficult tasks, charging its faculty with executing that mission. Hospital officials overseeing the program had the right to constrain the activities in which Bodavula could participate and to take disciplinary action against him should he fail to provide patient care that satisfied the hospital's standards, which in turn could jeopardize his ability to complete the residency program and become a board certified surgeon.

A reasonable inference from the evidence is that the chief surgical resident who assigned Bodavula to the plaintiff's surgery also was acting in furtherance of the hospital's obligations to surgical residents. The chief resident's alignment with the hospital was established by his or her place in the hospital's chain of command in resolving grievances, as well as his or her status as a member of the same pool of residents as Bodavula. To the extent that the manual suggested that the chief surgical resident also was acting for Sound View Medical Center, the goals of both entities appear to be

squarely aligned such that the chief resident could act for both. See 1 Restatement (Second), supra, § 226, p. 498 ("[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other"); id., § 236, comment (a), p. 523 ("[a]lthough a person cannot, by the same act, properly serve two masters whose wills are opposed, he may, as stated in [§] 226, serve two masters both of whom are interested in the performance of the same act").

Moreover, it was eminently reasonable for the jury to conclude that Gordon was charged with fulfilling the hospital's obligation to afford surgical residents with the opportunity to participate in progressively more difficult surgical procedures. Gordon was acting in his capacity as hospital faculty when he allowed Bodavula to participate in the surgery. Although Gordon could dictate the extent of that participation, Gordon was not acting as Bodavula's principal, as it was not to Gordon's benefit to allow Bodavula to conduct part of the surgery. However, even if Gordon could be deemed to have derived some benefit insofar as his admitting privileges may have been conditioned on acting as clinical faculty, the jury was charged that Bodavula could be an agent for two principals.[8] The mere fact that the hospital did not dictate the precise conditions under which Gordon could permit Bodavula to participate in the surgery or the limits thereto does not compel the conclusion that the hospital surrendered its general right to control Bodavula's participation in such procedures. As we pre-

[8] The jury was given the following instruction: "A person may be the agent of two principals at the same time, so long as his service to one does not involve abandonment of his service to the other. The fact that a principal has permitted a division of control, does not lead to an inference he has surrendered it." This instruction was in accord with § 226 of the Restatement (Second) of Agency. See also 1 Restatement (Second), supra, § 227 ("Servant Lent to Another Master"); 1 Restatement (Second), supra, § 236 ("Conduct Actuated by Dual Purpose").

viously indicated, there is ample authority recognizing that agents may be vested with considerable discretion and independence in how they perform their work for the principal's benefit, yet still be deemed subject to the principal's general right to control.

Finally, we observe that the jury's verdict is in accord with case law from other jurisdictions. For example, the court in *Brickner* v. *Normandy Osteopathic Hospital, Inc.*, supra, 746 S.W.2d 112, 115, concluded there was sufficient evidence to support a jury's finding that a second year resident was acting as a servant of a hospital despite that, at the time of the negligence, he was supervised by an attending physician who participated in the hospital's teaching program. That court explained: "The hospital hired [the resident physician] and allowed him to practice his medical skills by performing operations such as the one performed on [the patient]. [The resident's] employment was controlled by the hospital's 'Department of Surgery Resident's Training Program' syllabus, which set forth in detail the duties of a resident physician . . . . Failure to satisfactorily perform any of his duties, including the performance of his surgical duties, could result in the hospital terminating his employment. . . . [A]t the time of surgery, [the resident] was performing the very work for which the hospital had hired and was paying him.[9] . . . [The hospital] exercised control of each step over a resident physician's progress toward surgical certification. Throughout his resident training program, the hospital directed [the resident's] activities and

[9] There was conflicting evidence as to whether the hospital paid Bodavula's salary. The manual indicated that it paid residents' salaries, but Bodavula testified that the hospital did not pay him. Putting aside the principle that we are required to conclude that the jury credited the manual over Bodavula because such a conclusion lends stronger support to the verdict, we note that there was no evidence to discount provisions in the manual indicating that the hospital provided numerous other financial benefits, in kind or direct, including meal allowances, housing, insurance, and uniforms.

authorized him to perform increasingly complex procedures. The hospital reaped the benefit of [the resident's] labor during his training period. While it did not and could not dictate [the resident's] every move while in surgery, the hospital had supervisory control over his performance as a resident and could at any time dismiss him for poor exercise of his medical judgment. Liability premised on the theory of respondeat superior does not require [the] plaintiff to prove the employer had actual control over its employee's discretionary judgment as long as the employee's conduct is within the scope and course of employment." (Citations omitted; footnote added.) Id., 114–15; see also *Jack & Jill, Inc.* v. *Tone*, 126 Conn. 114, 119, 9 A.2d 497 (1939) (right of discharge is strong indicator of master-servant relationship); *Norland* v. *Poor Sisters of St. Francis Seraph of Perpetual Devotion*, 4 Ill. App. 2d 48, 50, 55–57, 123 N.E.2d 121 (1954) (hospital intern employee was not independent contractor for purposes of workers' compensation because hospital maintained control of intern even when intern assisted in operating room). The hospital has brought no authority to our attention that compels a contrary conclusion.

Accordingly, we conclude that the Appellate Court improperly held that the evidence was insufficient to support the jury's finding of actual agency.

II

We therefore turn to the hospital's alternative ground for affirmance. Specifically, the hospital contends that it was not legally permitted to control the professional judgment of a physician under Connecticut's statutory scheme regarding physicians and hospitals.[10] The grava-

[10] The hospital points out that, by statute, two types of corporate entities permissibly can engage physicians to practice medicine as their employees or agents: professional service corporations; see General Statutes § 33-182a et seq.; and medical foundations. See General Statutes § 33-182aa et seq. The hospital asserts that it is neither type of entity.

men of the hospital's argument is that, because it is not licensed to practice medicine, it cannot (1) directly engage in the practice of medicine, or (2) indirectly engage in the practice of medicine through licensed employees or agents. Thus, it posits that it cannot be vicariously liable for Bodavula's negligence because, as a matter of law, it was precluded, directly and indirectly, from exercising any control over his surgical performance.[11]

This presents a question of law, which we review de novo. See, e.g., *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 294, 914 A.2d 996 (2007). We are not persuaded.

We recently rejected effectively the same argument in *Cefaratti* v. *Aranow*, 321 Conn. 593, 141 A.3d 752 (2016), albeit in the context of liability under the theory of apparent agency. There, it was argued that "[a] hospital cannot practice medicine and therefore cannot be

[11] Contrary to the hospital's argument, *Lieberman* v. *Connecticut State Board of Examiners in Optometry*, 130 Conn. 344, 34 A.2d 213 (1943), does not support the conclusion that a hospital cannot be held vicariously liable for the negligence of its agents and employees, and that case does not adopt the corporate practice of medicine doctrine. *Lieberman* concerned the revocation of an optometrist's license on the basis of his business and compensation structure with a corporation that sold optical goods. A considerable portion of the optometrist's compensation came from commissions he received from the corporation based on his sale of the corporation's glasses to patients to whom he had issued optical prescriptions. Id., 351. This court found that the situation compromised the undivided loyalty an optometrist owes to his patient, as the optometrist might be tempted to act contrary to the true interests of the patient by unnecessarily prescribing glasses or more expensive glasses. Id. This court also found that the store's advertising, done with the knowledge of the optometrist, could create in the public mind the belief that the corporation, and not the optometrist, was offering to render optometric services. Id., 353. Although the board of examiners revoked his license in part on the basis of a finding that the optometrist's actions assisted the corporation in the unlicensed practice of optometry, this court did not reach that ground on appeal. Id., 345, 353. This court upheld the revocation based solely on a finding that the optometrist engaged in unprofessional conduct because his compensation structure could have impaired his independent judgment and undivided loyalty to patients. Id.

held directly liable for any acts or omissions that constitute medical functions.'' (Internal quotation marks omitted.) Id., 610. In rejecting this argument, we stated that ''it has never been the rule in this state that hospitals cannot be held vicariously liable for the medical malpractice of their agents and employees. To the contrary, this court, the Appellate Court and the Superior Court have consistently assumed that the doctrine of respondeat superior may be applied to hold hospitals vicariously liable for the medical malpractice of their agents and employees.'' (Footnote omitted.) Id., 610–11; see, e.g., *Weiss* v. *Surgical Associates, P.C.*, Superior Court, judicial district of Fairfield, Docket No. CV-11-6022546-S (April 30, 2015) (rejecting hospital's argument that it cannot legally exert requisite control necessary to establish agency relationship because it was not created under General Statutes for purpose of practicing medicine); *Noel* v. *Lawrence & Memorial Hospital*, 53 Conn. Supp. 269, 287–88 (2014) (subjecting hospitals to claims of vicarious liability ''does not mean that hospital corporate entities are making individualized medical judgments . . . [only] that hospitals are responsible for the negligence of the doctors who do make them''). We see no reason why *Cefaratti* would not dispose of the hospital's argument in the present case.

Neither the hospital nor the amici curiae that have filed briefs in support of the hospital on this issue have asked this court to overrule or limit *Cefaratti*. Indeed, they did not acknowledge the case in their briefs to this court; nor did the hospital address it at oral argument, despite the fact that the plaintiffs' reply brief substantially relied on it to respond to the alternative ground for affirmance. Insofar as they advance arguments that could bear on the question of whether *Cefaratti* reflects sound public policy, we are not persuaded by such arguments. Holding hospitals vicariously liable continues to support this state's sound public policy of encour-

aging hospitals to formulate and implement effective quality control policies and to exercise better oversight of their employees and agents. We know of no authority to support the proposition that shifting such responsibility to a teaching hospital will, as the amicus curiae Connecticut Hospital Association claims, have an undue chilling effect on the number and scope of residency training opportunities. The evidence established that teaching hospitals receive direct financial benefits, including federal funding for, among other expenses, resident salaries, benefits, and professional liability insurance. Teaching hospitals also receive indirect benefits such as prestige in the health care community, and a group of highly trained, low cost physicians who can provide care to patients in the hospital twenty-four hours a day, seven days a week. As the amicus curiae Connecticut Center for Public Safety points out, national rankings suggest that teaching hospitals are viewed as delivering a higher quality of care, and obtaining better results, than other hospitals. See A. Comarow & B. Harder, "2017-18 Best Hospitals Honor Roll and Overview," U.S. News & World Report (August 8, 2017), available at https://health.usnews.com/health-care/best-hospitals/articles/best-hospitals-honor-roll-and-overview (last visited August 2, 2018).

Finally, we underscore that the question before us is not whether residents or physicians generally are per se agents of hospitals. Rather, it is simply whether there was sufficient evidence in the present case to support the jury's finding that Bodavula was the hospital's actual agent. Given the unfettered use that the jury was permitted to make of the manual and other evidence, we are persuaded that there was sufficient evidence to support the jury's finding of actual agency. Similarly, we decline to create a per se rule that would absolve teaching hospitals of liability for the negligent acts of their employees and agents.

The judgment of the Appellate Court is reversed only with respect to the hospital's liability and the case is remanded to that court with direction to affirm the judgment of the trial court; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.