STATE OF CONNECTICUT *v.* JEAN JACQUES (SC 19783)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Convicted of the crime of murder, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain evidence discovered during a warrantless search of his apartment. The defendant had entered into a month-to-month lease for the apartment, paid the first month's rent, and moved in with all of his personal belongings. Five days into that lease, the defendant was arrested on unrelated drug charges and was unable to post bond. The defendant never returned to the apartment, and did not pay the second month's rent or ask the landlord for an extension of his lease. The defendant also never contacted his family or friends to ask them to pay his rent or to secure his personal belongings, even though he had the ability to do so. Although the landlord never commenced eviction proceedings, he entered into the apartment and removed all of the defendant's personal belongings prior to the search in question. The police subsequently received a tip indicating that the defendant had hidden the murder victim's cell phone inside of a bathroom wall in the apartment. Five days after the term of the defendant's lease expired, the police obtained written consent from the landlord to enter the apartment, conducted a warrantless search, and ultimately discovered the victim's cell phone in a hole in the bathroom wall. The defendant claimed in his motion to suppress that the cell phone was inadmissible under the exclusionary rule because the warrantless search of his apartment had violated his right to be free from unreasonable search and seizures under the federal constitution. At an evidentiary hearing on his motion, the defendant testified that the apartment was his home, the landlord had never contacted him, and he would have asked a friend to retrieve his belongings if he had been instructed to vacate the apartment. The defendant testified that his

intention was to stay in the apartment for a long time, and that he never gave anyone, including the landlord, permission to enter. In denying the motion to suppress, the trial court concluded that the defendant did not meet his burden of demonstrating that he had a subjective expectation of privacy in the apartment at the time of the search. In reaching its conclusion, the trial court relied on the expiration of the lease before the search, the nonpayment of rent, and the fact that the defendant had not asked his family or friends to maintain the apartment or his personal belongings contained therein while he was incarcerated. On appeal from the judgment of conviction, *held* that the trial court improperly denied the defendant's motion to suppress, and, accordingly, the judgment of conviction was reversed and the case was remanded for a new trial: this court's scrupulous review of the record led it to conclude that the trial court's determination that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search was not supported by the substantial evidence and, therefore, was clearly erroneous, as the record was devoid of any evidence that the defendant affirmatively had intended to relinquish his expectation of privacy in the apartment, and the defendant's incarceration and his failure to pay rent five days past the due date, without more, were insufficient to divest him of that expectation; moreover, the defendant's subjective expectation of privacy was objectively reasonable in light of, inter alia, a statutory (§ 47a-15a) nine day grace period for the nonpayment of rent that had not yet lapsed before the search in question, the lack of formal eviction proceedings, and the fact that the defendant's absence was due solely to his incarceration; furthermore, because the state did not advance any claim that the admission of the evidence discovered during the challenged search was harmless, this court declined to address whether the defendant's conviction could be upheld on that ground.

(*Two justices concurring separately in one opinion*)

Argued October 17, 2018—officially released July 16, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Jongbloed, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *new trial.*

S. Max Simmons, assigned counsel, for the appellant (defendant).

David J. Smith, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

MULLINS, J. After a jury trial, the trial court convicted the defendant, Jean Jacques, of murdering the victim, Casey Chadwick, in violation of General Statutes § 53a-54a. The defendant now appeals from that conviction. The subject of this appeal is the trial court's denial of his motion to suppress incriminating evidence linking him to the murder, which the police obtained from a search of his apartment without a warrant. The defendant had a month-to-month lease for the apartment and had paid only the first month's rent. Five days into that lease, the defendant was arrested for certain drug offenses and, shortly thereafter, the murder of the victim. The defendant never posted bond or made any arrangements to pay for a second month of rent.

Five days after his rent was due for a second month, the police searched his apartment without a warrant and discovered the victim's cell phone hidden in a bathroom wall. The defendant moved to suppress that evidence on the ground that the search violated his right to be free from unreasonable searches and seizures under the fourth amendment to the United States constitution.[1] In denying his motion to suppress, the trial court explained that the defendant had failed to "maintain the apartment as his own" because the lease had expired, the defendant had not made any further rent payments, and the defendant did not make arrange-

[1] The fourth amendment's protections against unreasonable searches and seizures are made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

ments to secure his belongings in the apartment. Thus, the court concluded that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search.

The question before us is whether the trial court properly denied the defendant's motion to suppress on the ground that he did not have a subjective expectation of privacy in the apartment at the time of the search. We conclude that, under the specific facts of this case, the defendant established that the apartment was his home and that neither his incarceration nor his failure to pay rent five days after it was due divested him of his subjective expectation of privacy in his apartment. Therefore, we further conclude that the trial court improperly denied the defendant's motion to suppress and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our analysis. On January 16, 2015, the defendant was released from incarceration to supervised parole.[2] Upon being released, he lived with a friend until June 10, 2015. On that date, the defendant secured his own apartment in Norwich. He entered into a month-to-month tenancy and paid the landlord $450 for the first month of rent, which ran from June 10 to July 10, 2015. After securing the apartment, the defendant moved all of his belongings into the apartment and began living there.

On June 15, 2015, the defendant was arrested on drug charges unrelated to this case. At the time of his arrest, the police noticed blood on his sneakers. That same day, police officers discovered the body of the victim stuffed into a closet in her apartment. She had been stabbed multiple times. Subsequent forensic testing

[2] The defendant had been incarcerated following a judgment of conviction in 1997 on the charges of attempted murder and carrying a pistol without a permit.

indicated that some of the blood on the defendant's shoes had come from the victim.[3]

The following day, on June 16, 2015, the police, accompanied by the defendant's parole officer, searched the defendant's apartment. Inside, they discovered blood on the walls and a mattress. Forensic testing indicated that this blood came from the defendant, who had various cuts on his hands. The defendant was subsequently arrested for the murder of the victim while he was incarcerated on the drug charges.

While the defendant was in jail on the pending drug and murder charges, the police received a tip from a confidential informant that the defendant had hidden the victim's cell phone and some drugs in a hole in the wall of the bathroom of his apartment. As a result, on July 15, 2015, police officers conducted a second search of the defendant's apartment in order to investigate whether there was a hole in the bathroom wall. This time, the officers were not accompanied by the defendant's parole officer. Instead, the officers went to the apartment alone and without a warrant. They obtained written consent from the landlord to search the apartment. After obtaining that consent, the officers entered the defendant's apartment and confirmed the presence of a hole in the bathroom wall with a bag inside of it. Inside the bag, the officers found the victim's cell phone and some drugs.[4]

Prior to trial, the defendant filed a motion to suppress the victim's cell phone and the drugs, asserting that this evidence was inadmissible under the exclusionary rule

[3] The state also presented testimonial evidence placing the defendant in the victim's apartment on the night of the murder. Additionally, forensic testing indicated that the victim's blood was on certain articles of defendant's clothing found inside of his gym bag, and that the defendant's blood was in the victim's living room and kitchen.

[4] After the officers confirmed the existence of the hole in the wall, they secured the apartment and obtained a warrant to search the inside of the bag.

as the fruit of prior police illegality. An evidentiary hearing on the motion was held during which both parties presented evidence related to the defendant's lease of the apartment and the contested search.

In its memorandum of decision on that motion, the trial court made the following explicit findings of fact. The defendant had entered into a month-to-month lease for the apartment and paid rent for the first month. Five days into his lease, on June 15, 2015, he was arrested on the drug charges. His bond was set at $100,000, which he was not able to post. While incarcerated on the drug charges, he was arrested for the murder of the victim, and his bond was increased to $1 million. He did not post that bond either. Thus, the defendant was incarcerated and never returned to the apartment following his arrest on June 15, 2015. The defendant did not make any further rent payments for any period beyond the first month. Nor did the defendant contact the landlord or attempt to have his lease extended. Despite having the ability to do so, the defendant also did not contact his friends or family to ask them to pay his rent. The trial court also found that the search at issue occurred on July 15, 2015, five days after the date of expiration of the lease term. Despite not receiving rent for a second month, the landlord did not initiate eviction proceedings. In fact, the court credited the landlord's testimony that, if the defendant had been released from jail in July and had the money to pay his rent, the landlord would have permitted him to continue to stay in the apartment.

On the basis of these findings, the court determined that the defendant did not show an interest in the apartment and, thus, did not meet his burden of demonstrating a subjective expectation of privacy in it at the time of the second search. In making that determination, the court considered that the lease had expired five days before the second search occurred, the defendant nei-

ther made any further rent payment nor any arrangements to have his rent paid, and the defendant made no effort to "maintain the apartment as his own." The trial court further explained that, even though the defendant had been incarcerated, he could have exhibited some interest in the apartment by asking his family or friends to maintain the apartment or the personal belongings within it. The court acknowledged the defendant's testimony that he would have gone back to the apartment if he had been released from jail. It determined, however, that his expressing this view many months later did not rise to the level of exhibiting an actual subjective expectation of privacy in the apartment.

The trial court denied the defendant's motion to suppress, and, following a nine day trial, the jury returned a verdict of guilty on the charge of murder. The trial court subsequently rendered judgment in accordance with that verdict and sentenced the defendant to sixty years incarceration. This appeal followed. Additional facts will be set forth below as necessary.

On appeal, the defendant asserts that the trial court improperly denied his motion to suppress the evidence obtained during the second search of his apartment, which occurred on July 15, 2015.[5] Specifically, he claims

[5] The defendant also filed a motion to suppress evidence obtained as a result of the first search that occurred on June 16, 2015, which was denied by the trial court. The court reasoned that, because the defendant was on parole at the time of that search, his parole officer, who was present during the search, had authority to conduct the search. The defendant does not challenge the trial court's decision regarding the first search on appeal.

Significantly, the state does not make the same argument on appeal regarding the second search. The state explained that it did not attempt to justify the second search on the basis of the defendant's status as a parolee because the state could not definitively determine what the defendant's parole status was at the time of the second search. Because of that uncertainty, the state represented to this court at oral argument that it was not attempting to justify the second search on the basis that the defendant had a reduced expectation of privacy as a parolee. Because the state has made no such claim, and in fact expressly disclaimed any reliance on the notion that this search could be justified on the basis of the defendant's status as a parolee,

that he had a reasonable expectation of privacy in the apartment because it was his home and he had never been evicted from it or otherwise abandoned it. We agree with the defendant.

We begin by setting forth the relevant principles of law and the standard of review governing the defendant's claim. "The fourth amendment to the United States constitution . . . provides that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." (Internal quotation marks omitted.) *State* v. *Saturno*, 322 Conn. 80, 88, 139 A.3d 629 (2016). "The capacity to claim the protection of the fourth amendment does not depend upon a property interest, permanency of residence, or payment of rent but upon whether the person who claims fourth amendment protection has a reasonable expectation of privacy in the invaded area." *State* v. *Reddick*, 207 Conn. 323, 330, 541 A.2d 1209 (1988); see id., 329 ("[a] person is entitled to fourth amendment protection anywhere he resides where he has a reasonable expectation of privacy"); see also *Rakas* v. *Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

"To receive fourth amendment protection against unreasonable searches and seizures, a defendant must have a legitimate expectation of privacy in the [subject of the search]. . . . Absent such an expectation, the subsequent police action has no constitutional ramifications." (Internal quotation marks omitted.) *State* v. *Pink*, 274 Conn. 241, 258, 875 A.2d 447 (2005). To determine whether a defendant has a reasonable expectation of privacy in an invaded place, we follow the test laid

we have no occasion to address that issue as an alternative basis upon which the second search could be justified.

out by the United States Supreme Court in *Katz* v. *United States*, supra, 389 U.S. 347. "The *Katz* test has both a subjective and an objective prong: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018).

It is well settled that "[w]hen reviewing a trial court's denial of a motion to suppress, [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights . . . and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the [trial court's] memorandum of decision . . . ." (Internal quotation marks omitted.) Id., 339–40.

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . We must defer to the trier of fact's assessment of

the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014).

In the present case, the trial court's factual finding that the defendant had no subjective expectation of privacy in the apartment at the time of the search implicates the defendant's constitutional rights. Thus, we undertake a scrupulous review of the record to determine whether the trial court's finding is supported by substantial evidence in the record. See, e.g., id.

A review of the record reveals the following. At the suppression hearing, the defendant testified that the apartment was his "home."[6] He explained that, after verbally entering into a lease and paying his first month of rent on June 10, 2015, he moved all of his personal belongings into the apartment and began living there. He was living there when he was arrested and incarcerated five days later. When he missed his rent payment for the next month, he did not make arrangements to have his belongings removed from the apartment because he did not think that his landlord would kick him out for not paying rent.

He also expressed his uncertainty as to whether his lease had expired at the time of the search on July 15, 2015.[7] In the five days preceding the search in which

[6] The state asserts in its brief that the defendant never expressly indicated that the apartment was his home. The following exchange belies that assertion:

"[The Prosecutor]: Was [the apartment], was that your home?

"[The Defendant]: Yes."

[7] The following colloquy took place during the state's cross-examination of the defendant:

"[The Prosecutor]: In July of 2015, your lease had run, correct? Your rental agreement was over, correct?

"[The Defendant]: I don't know. I don't know . . . that."

After an objection by defense counsel on the ground that the question was a legal one, which was overruled by the court, the following exchange occurred:

"[The Prosecutor]: Had it run?

"[The Defendant]: I don't know about that."

the defendant's rent payment was overdue, the landlord neither contacted him nor gave him any reason to believe that he had to vacate the apartment. The defendant testified that, if his landlord had told him that he needed to leave the apartment, he would have contacted a friend to remove his belongings from the premises, but the landlord never did so. He stated that it was his intention to stay in the apartment for a long time. He also stated that he had a key to the apartment and did not give permission for anyone, including the landlord, to enter.

While the defendant acknowledged that he knew he might be incarcerated for a long time and made no attempt to contact his landlord when rent became due for a second month, he testified that he thought he could easily talk to the landlord and get his apartment when he got out of jail. When testifying about his expectations with regard to the apartment in the event that he was released from jail, the defendant stated that "I . . . think about when I get out, this is where I'm going . . . where I'm going [to] go."[8]

The landlord also testified at the suppression hearing, and his testimony supported the defendant's contention that he had a subjective expectation of privacy in the apartment. The landlord testified that he never communicated to the defendant in any way that he had to leave

[8] We note that, in its memorandum of decision, the trial court does not expressly discredit any portion of the defendant's testimony. It does, however, state that, "[a]lthough the defendant testified that he would have gone back to [the apartment] if he were released [from jail] in July, 2015, [t]he subjective test does not rest on the absolute subjective perception of the individual defendant. . . . Expressing a view, many months later, that he would have gone back if he could, does not rise to the level of exhibiting an actual subjective expectation of privacy in a location." (Citations omitted; internal quotation marks omitted.) Because the trial court did not expressly discredit the defendant's testimony, we consider it in our analysis. See *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016) (under a more probing review of constitutional issue, this court takes into account testimony that was not expressly discredited by trial court); see also *State* v. *DeMarco*, supra, 311 Conn. 520.

the apartment. He made no attempt to get the keys back from the defendant prior to the time of the search. Nor did he commence eviction proceedings. Although he never notified the defendant, prior to the search, the landlord took it upon himself to put all of the defendant's personal belongings in bags and remove them from the apartment.

We are aware that the first prong of *Katz* focuses on the defendant's actions and beliefs as opposed to those of the landlord. Nevertheless, we find it significant that the landlord's conduct supports the defendant's testimony that he actually believed he had a privacy right in the apartment at the time of the search. The defendant heard nothing from the landlord suggesting that he was in danger of losing the apartment or his possessions therein.[9] Cf. *United States* v. *Miller*, 387 Fed. Appx. 949, 951–52 (11th Cir. 2010) (concluding that defendant could not have subjective expectation of privacy where defendant knew property manager would give him only three weeks to remove belongings if he failed to pay rent, and search occurred after three week period elapsed).

A scrupulous examination of the record reveals that the trial court's determination that the defendant did not have a subjective expectation of privacy in his apartment at the time of the search is not supported by sub-

[9] This court recently had occasion to address the first prong of the *Katz* test and clarified that, when determining whether a defendant has a subjective expectation of privacy in property that is not his residence, it is appropriate to examine the record for conduct demonstrating an intent to preserve something as private and free from knowing exposure to the view of others. See *State* v. *Houghtaling*, supra, 326 Conn. 348. In that case, this court concluded that the owner of property who did not reside there, but instead rented it to a tenant, did not have a subjective expectation of privacy in the property because he failed to adduce evidence sufficient to establish his intent to keep the property private. Id. Because the evidence in the present case established that the apartment was the defendant's residence, we find *Houghtaling* to be distinguishable from the present case.

stantial evidence. Instead, the evidence demonstrates that the apartment was the defendant's home and that he, therefore, had an expectation of privacy in the apartment. The record shows that, the defendant entered into a month-to-month lease and paid for the first month. He was given the keys to the apartment, moved all of his possession into the place, and testified that he never gave anyone, including the landlord, permission to enter. See, e.g., *State* v. *Reddick*, supra, 207 Conn. 331–32 (holding that defendant had legitimate expectation of privacy in mother's apartment when defendant had key). He also expressly testified that the apartment was his home, and the landlord's behavior was consistent with that belief. Even though the defendant was five days late on his second rent payment in this month-to-month lease, the landlord did not initiate any eviction proceedings.

Neither the fact that the defendant was overdue on his rent nor the fact that he was incarcerated during his tenancy is sufficient, without more, for the defendant to have lost his subjective expectation of privacy in his apartment. Indeed, the failure to pay rent, on its own, does not result in the loss of one's expectation of privacy. See *United States* v. *Robinson*, 430 F.2d 1141, 1143–44 (6th Cir. 1970); *Browning* v. *State*, 176 Ga. App. 420, 422, 336 S.E.2d 41 (1985); *State* v. *Hodges*, 287 N.W.2d 413, 415 (Minn. 1979); *State* v. *Clark*, 105 N.M. 10, 13, 727 P.2d 949 (App.), cert. denied, 104 N.M. 702, 726 P.2d 856 (1986). Similarly, the defendant's incarceration and subsequent absence from the apartment did not, without more, result in the loss of his expectation of privacy. See *United States* v. *Robinson*, supra, 1143; *Browning* v. *State*, supra, 422; *State* v. *Hodges*, supra, 415; *State* v. *Clark*, supra, 952.

The trial court faulted the defendant for not exhibiting any interest in the apartment and for failing to "maintain the apartment as his own." We construe this

as an abandonment analysis. In such an analysis, however, the burden of proof is not placed on the defendant to show that he maintained his privacy interest but, rather, on the state to show "an element of conduct manifesting [an] intent to relinquish an expectation of privacy in the [item or area searched]." (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 396, 40 A.3d 290 (2012); see also *United States* v. *Brazel*, 102 F.3d 1120, 1147–48 (11th Cir.) (explaining that defendant bears burden of proving legitimate expectation of privacy in area searched, and government has burden of proving abandonment), cert. denied, 522 U.S. 822, 118 S. Ct. 79, 139 L. Ed. 2d 37 (1997).

Moreover, abandonment "must be established by clear and unequivocal evidence." *United States* v. *Harrison*, 689 F.3d 301, 307 (3d Cir. 2012), cert. denied, 568 U.S. 1242, 133 S. Ct. 1616, 185 L. Ed. 2d 602 (2013). To show that the defendant abandoned his expectation of privacy in his apartment, the law generally requires affirmative conduct on the part of the defendant. See, e.g., *United States* v. *Stevenson*, 396 F.3d 546, 544 (4th Cir.) (defendant showed intent to relinquish his privacy interest in apartment while he was incarcerated by writing letter to his girlfriend in which he gave her all of his personal belongings and referred to himself as "former renter"), cert. denied, 544 U.S. 1067, 125 S. Ct. 2534, 161 L. Ed. 2d 1122 (2005); see also *United States* v. *Ruiz*, 664 F.3d 833, 841 (10th Cir. 2012) (defendant sent letter to his landlord stating he would no longer be renting home and she could keep all of his furniture).

In the present case, the record is devoid of any evidence demonstrating that the defendant affirmatively intended to relinquish his expectation of privacy in his apartment. He neither expressed to his landlord that he no longer wanted the apartment nor expressed to anyone else an intention to abandon his possessions. Failure to make arrangements for the security of his

possessions a mere five days after his rent was due is not evidence that he intended to relinquish his expectation of privacy in his apartment. Rather, the defendant's conduct was consistent with his stated belief that his possessions were secure and that he was not in danger of losing his apartment five days after the rent was due.

On the basis of the foregoing, we conclude that, under the specific facts of this case, the trial court's finding that the defendant lacked a subjective expectation of privacy in the apartment at the time of the search is not supported by substantial evidence and, thus, is clearly erroneous. Instead, we conclude that the defendant met his burden of showing that he had a subjective expectation of privacy in the apartment at the time of the search.

Having concluded that the defendant satisfied his burden of proving that he had a subjective expectation of privacy in the apartment, we must now consider the second prong of the *Katz* test, namely, whether that expectation was reasonable, as measured by society's values, at the time of the search. See *Katz* v. *United States*, supra, 389 U.S. 361 (Harlan, J., concurring). This is a question of law over which our review is plenary. See, e.g., *United States* v. *Stevenson*, supra, 396 F.3d 545.

"A reasonable expectation of privacy is one that is legitimate." (Internal quotation marks omitted.) *State* v. *Zindros*, 189 Conn. 228, 239, 456 A.2d 288 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984). "The test of legitimacy is not whether the individual chooses to conceal assertedly private activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the [f]ourth [a]mendment." (Footnote omitted; internal quotation marks omitted.) *Oliver* v. *United States*, 466 U.S. 170, 182–83, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

"Legitimate expectations of privacy derive from concepts of real or personal property law or [from] understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." (Citation omitted; internal quotation marks omitted.) *State* v. *Hill*, 237 Conn. 81, 94 n.19, 675 A.2d 866 (1996); see also *Rakas* v. *Illinois*, supra, 439 U.S. 144 n.12. "Of course, one need not have an 'untrammeled power to admit and exclude' in order to claim the protection of the fourth amendment, so long as the place involved is one affording an expectation of privacy that society regards as reasonable." *State* v. *Hill*, supra, 94 n.19; see also *State* v. *Mooney*, 218 Conn. 85, 95–96, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

Moreover, it is well established that "a home is a place in which a subjective expectation of privacy virtually always will be legitimate . . . ." *California* v. *Ciraolo*, 476 U.S. 207, 220, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (Powell, J., dissenting); see also 1 W. LaFave, Search and Seizure (5th Ed. 2012) § 2.3, p. 724 ("one's dwelling has generally been viewed as the area most resolutely protected by the [f]ourth [a]mendment"). Thus, "even under the *Katz* [justified expectation of privacy] approach, it is . . . useful to view residential premises as a place especially protected against unreasonable police intrusion." 1 W. LaFave, supra, § 2.3, p. 725; see *Payton* v. *New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("[i]t is a basic principle of [f]ourth [a]mendment law that searches and seizures inside a home without a warrant are presumptively unreasonable" [internal quotation marks omitted]); see also *State* v. *Fausel*, 295 Conn. 785, 793, 993 A.2d 455 (2010).

Because the trial court determined that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search, it did not reach the issue of whether the expectation was reasonable. It noted, however, that it would have concluded that the expectation was not one that society would consider reasonable. The court reasoned that the defendant's tenancy had expired prior to the search and that the defendant failed to comply with General Statutes § 47a-16a, which requires a tenant to notify his landlord of any anticipated absence from the leased premises.[10]

The defendant contends, however, that the trial court failed to consider other portions of Connecticut's landlord tenant statutes, such as those concerning summary process, that are equally relevant to the issue of reasonableness. In particular, the defendant directs our attention to several specific statutory provisions. See General Statutes § 47a-11b (a) (providing that abandonment of premises by occupant means occupant has left premises without notice to landlord as evidenced by removal of all personal belongings from premises and either nonpayment of more than two months of rent or express statements by occupant of intention to leave); General Statutes § 47a-15a (providing nine day grace period before landlord may terminate month-to-month lease for nonpayment of rent); General Statutes § 47a-23 (providing requisite steps for landlord to follow to formally initiate eviction proceedings).

We recognize that property law concepts do not necessarily control our fourth amendment inquiry. They are, however, "clearly a factor to be considered." *United States* v. *Salvucci*, 448 U.S. 83, 91, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); see also *United States* v.

[10] General Statutes § 47a-16a provides in relevant part: "[T]he tenant shall be required to notify the landlord of any anticipated extended absence from the premises . . . ."

Fields, 113 F.3d 313, 320 (2d Cir.) ("a defendant's property or possessory interest in the place searched is a factor generally considered in determining the reasonableness of a defendant's expectation of privacy"), cert. denied, 522 U.S. 976, 118 S. Ct. 434, 139 L. Ed. 2d 334 (1997); *State* v. *Houghtaling*, supra, 326 Conn. 346 n.10, 348–49 (considering defendant's property interest in fourth amendment analysis and explaining that "property rights may be the beginning and the end of a fourth amendment analysis when the police have physically intruded on a person's residence").

In the present case, the trial court made a finding that the landlord did not initiate formal eviction proceedings as required by statute. See General Statutes §§ 47a-23 through 47a-23b.[11] Moreover, the search occurred before the nine day statutory grace period for payment of rent had elapsed. See General Statutes § 47a-15a.[12] Thus, at the time of the search, the defendant had a legal right to occupy the premises and exclude others, notwithstanding his failure to pay rent.[13]

[11] General Statutes §§ 47a-23 through 47a-23b require, *inter alia*, that landlords first provide each lessee or occupant of the premises with advance written notice to quit, which then provides proper basis for a summary process action upon service.

[12] General Statutes § 47a-15a provides in relevant part: "If rent is unpaid when due and the tenant fails to pay rent within nine days thereafter . . . the landlord may terminate the rental agreement *in accordance with the* [*summary process provisions*]." (Emphasis added.)

[13] We note that the landlord could not have initiated eviction proceedings on the basis of nonpayment of rent until the statutory grace period had lapsed. See General Statutes § 47a-23 (a) ("[w]hen the owner . . . desires to obtain possession or occupancy of . . . any apartment . . . and (1) when a rental agreement or lease of such property . . . terminates [due to] . . . (D) nonpayment of rent within the grace period . . . such owner . . . shall give notice to each lessee or occupant to quit possession or occupancy of such . . . apartment"); see also *Kligerman* v. *Robinson*, 140 Conn. 219, 222, 99 A.2d 186 (1953) ("While the tenant's nonpayment of rent did not automatically terminate the lease, his failure to make a tender for the months of September and October entitled the landlord to end the tenancy by some unequivocal act. . . . That act . . . was the service of the notice to quit." [Citation omitted.]). Thus, the defendant's right of possession could not have ended until a notice to quit was served.

See, e.g., *State* v. *Johnson*, 110 Idaho 516, 523, 716 P.2d 1288 (1986) (concluding that defendant had legitimate and reasonable expectation of privacy in premises and that defendant was "entirely justified in expecting his landlord to resort to the eviction procedures required by law rather than resorting to self-help in seeking rent payment if he was in fact behind in his rent"); *State* v. *Dennis*, 182 Ohio App. 3d 674, 683–84, 914 N.E.2d 1071 (2009) (holding that defendant had reasonable expectation of privacy in apartment where defendant received multiple eviction notices, but legal procedures for eviction had not yet been completed); see also *United States* v. *Botelho*, 360 F. Supp. 620, 626 (D. Haw. 1973) (concluding that court was "not prepared to hold that a defendant with a perfectly legal right to possession or occupancy of leased premises can be found to have an 'unreasonable' expectation of privacy").

The very existence of the statutory landlord tenant scheme in Connecticut is significant in our analysis for objective standards in this context. "[S]tatutes may . . . help to define the contours of constitutional rights . . . . Because [l]egislative enactments are expressions of this state's public policy . . . they may be relevant to the resolution of whether the defendant's expectation of privacy is one that Connecticut citizens would recognize as reasonable." (Citations omitted; internal quotation marks omitted.) *State* v. *Bernier*, 246 Conn. 63, 72–73, 717 A.2d 652 (1998). Indeed, this court previously has "considered the presence of state regulation in determining whether a defendant's expectation [of privacy] was one that Connecticut citizens would consider reasonable . . . ." Id., 73; see also id., 73–74 (looking to statutory scheme regarding fire investigations in order to determine reasonableness of defendant's privacy expectations in flooring samples taken from his home); *State* v. *DeFusco*, 224 Conn. 627, 636–38, 620 A.2d 746 (1993) (considering existence of statutes

regulating garbage collection, recycling, and disposal informative to issue of reasonableness of defendant's expectation of privacy in garbage).

This state, as well as every other state in the nation, has a comprehensive statutory scheme in place detailing the process through which a landlord may retake possession of leased property from a tenant. See 2 Restatement (Second), Property, Landlord and Tenant § 14.1, note 1, p. 3 (1977). The existence of these statutes demonstrate that society expects landlords to follow the mandatory legal processes in order to lawfully retake possession of a premises, which, in turn, indicates to us that a tenant's expectation of privacy is valid, or at least reasonable, until the time that the landlord complies with the statutory procedure and regains the right of possession. In this case, the defendant's landlord did not even begin to pursue the legal statutory process. Thus, we conclude that it was reasonable for the defendant to have believed that he had the right to privacy in his apartment a mere five days after rent was due.

The state contends that the defendant's failure to pay or arrange for the payment of rent demonstrates his lack of any reasonable expectation of privacy. As we explained previously, the nonpayment of rent, by itself, does not divest a tenant of his expectation of privacy in the premises. See 79 C.J.S., Searches and Seizures § 32 (2019) ("the tenant of leased premises may maintain an expectation of privacy . . . after the termination of the tenancy, and this is so even if the tenant falls behind in [his] obligation to pay rent" [footnote omitted]); see also *United States* v. *Washington*, 573 F.3d 279, 284–85 (6th Cir. 2009) (reasoning that, "[i]f a landlord's unexercised authority over a lodging with overdue rent alone divested any occupant of a reasonable expectation of privacy, millions of tenants . . . would be deprived of [f]ourth [a]mendment protection,"

and concluding that "paying late is a common occurrence . . . and [thus, there is no merit to] the notion that the [c]onstitution ceases to apply in these circumstances"); *United States* v. *Botelho*, supra, 360 F. Supp. 625 (concluding that nonpayment of rent alone is insufficient to deem defendant's expectation of privacy in home unreasonable because "[t]o hold otherwise would abolish the protections of the [f]ourth [a]mendment for a potentially large group of persons renting homes and apartments" [internal quotation marks omitted]); *State* v. *Taggart*, 7 Or. App. 479, 482–84, 491 P.2d 1187 (1971) (concluding that defendant had reasonable expectation of privacy in premises where he failed to pay rent, search occurred before five day grace period expired, and landlord had not initiated eviction proceedings).

To be clear, a tenant may, under certain circumstances, lose an expectation of privacy in his leasehold even before he loses his legal right of possession under applicable law, and nonpayment of rent may be one factor in arriving at that determination. See *United States* v. *Stevenson*, supra, 396 F.3d 547 (any expectation defendant had in apartment was unreasonable where defendant fell behind on rent payments prior to becoming incarcerated, disposed of all of his belongings, and referred to himself as "former renter" of apartment); *United States* v. *Hoey*, 983 F.2d 890, 891–93 (8th Cir. 1993) (holding that defendant had no reasonable expectation of privacy in apartment where defendant was six weeks late on rent, defendant told landlord she was leaving and held moving sale, and neighbor saw defendant leave).

We also consider the length of time that elapsed after rent was due and before the contested search took place. The defendant's rent was due on July 10, 2015, and the search took place on July 15, 2015. Importantly, the defendant was only five days overdue on his rent at the time of the search. While we recognize that there

are limits as to how far in arrears in the payment of rent a defendant may become before his privacy expectation becomes unreasonable, we do not need to define what those limits are under the facts of the present case. Instead, we conclude that, given the record before us, the fact that the defendant's rent was five days overdue is not sufficient to render his expectation of privacy in the apartment unreasonable. See, e.g., *People* v. *Sedrel*, 184 Ill. App. 3d 1078, 1081, 540 N.E.2d 792 (acknowledging that defendant's rent was only three days overdue at time of search, which was insufficient time for landlord to believe that defendant had abandoned apartment), appeal denied, 127 Ill. 2d 636, 545 N.E.2d 126 (1989).

Indeed, in the present case, the landlord testified that, had the defendant shown up at the apartment on the day of the search and been able to pay rent, the landlord would have let him stay. Moreover, as we explained previously, § 47a-15a provides tenants with a nine day grace period in which to pay overdue rent, thus suggesting that five days is within the amount of time that society would consider reasonable for a defendant to believe that he has an expectation of privacy in his home notwithstanding the failure to pay the next month's rent. See footnote 12 of this opinion.

Aside from property law concepts, other factors aid our analysis of whether the defendant's privacy expectation was reasonable. "Absence due to arrest and incarceration while awaiting trial is not of itself a sufficient basis upon which to conclude that the accused has abandoned any reasonable expectation of privacy in his home. To hold otherwise would make permissible warrantless searches of the homes of those awaiting trial and unable to post bond." *Commonwealth* v. *Strickland*, 457 Pa. 631, 637, 326 A.2d 379 (1974); see also *United States* v. *Robinson*, supra, 430 F.2d 1143 (rejecting government's argument that defendant's

absence from apartment indicates relinquishment of privacy rights when absence was due to incarceration); *Browning* v. *State*, supra, 176 Ga. App. 422 (concluding defendant maintained reasonable expectation of privacy in apartment despite being in jail and failing to pay rent). In the present case, the defendant was living at the apartment at the time he was arrested. His absence from the apartment was solely a result of his incarceration. Further, the defendant's rent, which was only five days late at the time of the search, came due only *after* he became incarcerated. On the basis of the foregoing, we cannot conclude that, under the facts of the present case, the defendant did not have a reasonable expectation of privacy in the apartment at the time of the search.[14]

Because we conclude that the defendant had a reasonable expectation of privacy in the apartment at the

[14] Although the argument in its brief is not entirely clear, the state raises the claim that the police had consent to search the apartment. With respect to this issue, in its memorandum of decision, the trial court stated that, "[i]n this case, not only did the defendant lack any actual subjective expectation of privacy in the apartment, but also the police entered the apartment after the expiration of the month-to-month tenancy, with permission from the landlord, who signed a formal consent to search and who opened the door for them." We do not conclude—and more importantly, the state has not argued—that this determination by the trial court amounted to a finding that the warrantless search was justified because the police had obtained the consent of the landlord. Indeed, the state does not argue that any exception to the warrant requirement applies here. Rather, the state appears to argue that, because the defendant had no expectation of privacy, the landlord was the proper authority to consent to a search of the now vacant apartment. Similarly, we read the trial court's decision on consent the same way.

To be sure, because the trial court's determination that the landlord had authority to consent to the search was premised on its conclusion that, because the defendant did not have an expectation of privacy in the apartment, there was no violation of fourth amendment rights that the defendant would have had standing to assert. In light of our conclusions to the contrary, the landlord's authority to consent to the search was restricted by the general rule of law prohibiting such consent. *Chapman* v. *United States*, 365 U.S. 610, 616–17, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) (landlord does not retain right to enter rented premises for purpose of conducting search during term

time of the search, we conclude that the trial court improperly denied the defendant's motion to suppress.

On appeal, the state does not claim that, in the event this court determines that the trial court improperly denied the defendant's motion to suppress, any error was harmless. Thus, we have no occasion to address whether the error here was harmless. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 387, 908 A.2d 506 (2006) (acknowledging that state did not argue that violation of defendant's confrontation rights was harmless error and reversing judgment of trial court).

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

In this opinion the other justices concurred.

KAHN, J., with whom ROBINSON, C. J., joins, concurring. I agree with and join the judgment of the well reasoned majority opinion reversing the judgment of conviction of the defendant, Jean Jacques. That is, given the absence in the current record of any evidence or argument regarding the effect of the defendant's parole status on his expectation of privacy in his apartment, I agree that we are compelled to conclude that the trial court improperly denied the defendant's motion to suppress evidence obtained during a warrantless search of his apartment. Moreover, in light of the state's waiver of the claim that any error by the trial court was harmless, we are also compelled to reverse the judgment of conviction. I write separately to clarify two points: First, in my view, the state's case, even without the evidence obtained from the July 15, 2015 search of the defendant's apartment, was a strong one. My review

of tenancy, even when tenant may be temporarily absent, or have authority to grant consent to police to enter and to search). Therefore, the landlord's consent in the present case was not a valid justification for the warrantless search of the defendant's home.

of the record persuades me that the state would have readily been able to demonstrate that any error was harmless beyond a reasonable doubt. Second, and more importantly, I write to emphasize that a parolee's expectation of privacy in his or her dwelling does not increase upon being arrested and incarcerated for another offense during the period of parole.

I

HARMLESS ERROR

Before I proceed to the primary point I wish to make in this concurring opinion—that the defendant's expectation of privacy in his apartment did not increase as a result of his incarceration—I observe that, even without the evidence obtained from the July 15, 2015 search that is at issue in this appeal, the state had an overwhelming case against the defendant. The state's theory of the case was that the defendant went to the victim's apartment on the night of June 14, 2015, stabbed her to death, and then stole the crack cocaine and marijuana that the victim had on the premises, with the intent to sell the stolen drugs.

The state's evidence that the defendant had been in the victim's apartment and murdered her was compelling, even without the victim's cell phone and the drugs. Most significantly, the state presented evidence that the defendant's blood was on the victim's living room floor and on her kitchen wall. The state also presented the testimony of the victim's boyfriend, Jean Joseph, that, at approximately 11:20 p.m. on June 14, 2015, the victim texted him to tell him that the defendant was at her apartment. Joseph testified that, after receiving the victim's text, he unsuccessfully tried to call the defendant, but that the defendant immediately returned his call, confirmed that he was at the victim's apartment and asked whether Joseph would be coming there that night. The cell phone records of both Joseph and the

victim, produced by Verizon Wireless' Law Enforcement Resource Team, confirmed Joseph's testimony as to the substance of the victim's text, and the fact that Joseph spoke to the defendant immediately after receiving that text. The jury also viewed the redacted videotaped recording of the defendant's June 25, 2015 interview with Detective Anthony Gomes of the Norwich Police Department (department), who was the lead detective for the case. During that interview, although he denied entering her apartment, the defendant admitted that, on the night of June 14, 2015, he was outside the victim's building.

The state also produced strong evidence that the defendant stabbed the victim to death. The presence of his blood on her living room floor was certainly relevant to that question. When the defendant was arrested for selling crack cocaine on the afternoon of June 15, 2015, his clothing, including the sneakers that he was wearing, was seized. Testing revealed the victim's blood on the defendant's right sneaker. The state also produced the defendant's gym bag, which the police officers recovered from the trunk of a vehicle belonging to the defendant's friend, Indira Barros-Gomes, who had picked the defendant up at a laundromat on June 15, 2015. Inside the gym bag, the officers found a pair of the defendant's jeans, which, when tested, revealed the presence of the victim's blood.

The state produced evidence that the defendant suffered injuries during the commission of the murder. At the time of the defendant's arrest, the officers took photographs of the defendant's hands, revealing that he had bandages on both hands, covering multiple cuts. During their first search of his apartment, which the defendant does not challenge on appeal, the police found his blood in the apartment. Jeffrey Payette, a detective with the Connecticut State Police, testified that, ordinarily, they take samples of items that are

deemed to have evidentiary value, but, because "there was just so much blood around the entire apartment," they decided to simply take representative samples. Testing later confirmed that the blood in his apartment was the defendant's.

The state presented the testimony of Tywan Jenkins, who was the defendant's cellmate at the Corrigan-Radgowski Correctional Center in Uncasville. While they were incarcerated together, the defendant gave Jenkins several accounts related to the victim's murder. In his final version of the events, the defendant told Jenkins that he stabbed the victim and that he cut himself during the attack. He also told Jenkins that, after he had killed the victim, he used a mop and bucket with bleach to clean the crime scene. It is worth noting that when the victim's body was discovered, a mop in a bucket with bleach had been left out in the kitchen, consistent with Jenkins' testimony.

Finally, the state produced the following evidence to prove that, after the defendant had murdered the victim, he stole drugs from her apartment. Jenkins testified that the defendant had told him exactly that, confiding in Jenkins that he removed crack cocaine and the victim's cell phone from the apartment. Additional evidence corroborated Jenkins' account. The evidence established that, at the time of the murder, the victim had both crack and marijuana in her home. Joseph testified that he stored crack cocaine in a blue, nondairy creamer container in the victim's kitchen. He also testified that, during the afternoon of June 14, 2015, he and the victim purchased one-quarter pound of marijuana in Mystic, brought it back to the victim's apartment and smoked some of it while they watched television, including "Game of Thrones." When they had finished watching "Game of Thrones," sometime between 10 and 10:30 p.m., Joseph left, in order to go to the home of Johane Jean-Baptiste, the mother of his child.

By the next morning, both the crack and the marijuana had been removed from the victim's apartment. Joseph testified that he had a medical appointment on the morning of June 15, 2015, and that he went to the victim's home immediately thereafter. Upon entering, he immediately noticed that the victim's apartment, which ordinarily was very neat and had been so when he left the night before, was in disarray, and there was a mop and bucket left out in the kitchen. A table had been moved, the cushions on the sofa had been disturbed, kitchen cabinets were left open and items that had been removed from the cabinets were strewn over the counter. In particular, the container of nondairy creamer in which Joseph stored crack had been removed from the kitchen cabinet and left on the counter. When he eventually checked, he noticed that neither the crack nor the marijuana was in the apartment.

The state also produced evidence that the defendant, who had reported to a prospective buyer the previous week that he did not have any drugs to sell, was selling crack on the very day that the victim had been murdered. Specifically, Officer Nathaniel Tondreau of the department, testified that, on June 15, 2015, he reported to the scene of the murder when he heard the dispatch. Tondreau and his partner brought Joseph to the station to interview him. During the course of the interview, Joseph told them that the last text he received from the victim was that "Zo is here."[1] Tondreau testified that the name "Zo" caught his attention because he and his partner had attempted to use a confidential informant during the preceding week to purchase crack cocaine from a person named Zo. The confidential informant successfully contacted Zo, who was unable to sell any crack because he did not have any drugs. On the basis of their belief that Zo and the defendant were

[1] "Zo" is the defendant's nickname.

the same person, Tondreau and his partner instructed the confidential informant to attempt to set up a purchase from Zo on the afternoon of June 15, 2015. The informant contacted Zo, who agreed to sell him $40 of crack cocaine. Tondreau and a team accompanied the informant to the arranged meeting place, where they observed the defendant exchange something with the informant, who returned to them and handed Tondreau a bag of crack cocaine. The officers then arrested the defendant.

In summary, the state produced evidence that, shortly before she was murdered, the victim told Joseph that the defendant was at her apartment. The defendant's blood was at the scene of the crime. He had cuts on his hands and his blood was all over his apartment. He had the victim's blood on his sneakers and on his jeans, which were discovered in his gym bag in the trunk of a friend's vehicle. He told his cellmate that he killed the victim and that he took the crack from her apartment. The police, who had information that the defendant had no drugs to sell the week before, monitored their confidential informant's purchase of crack cocaine from the defendant on the very day that the victim's body was discovered. In light of all of this evidence, I would have concluded, had the state not waived the issue, that the error was harmless beyond a reasonable doubt. See *State* v. *Artis*, 314 Conn. 131, 154, 101 A.3d 915 (2014) (setting forth harmless error standard when error is of constitutional magnitude).

II

PAROLEE STATUS AND REASONABLE EXPECTATION OF PRIVACY

The point I emphasize is a narrow one: whatever reasonable expectation of privacy in his home that the defendant had as a parolee, it did not *increase* as a result of his June 15, 2015 arrest and incarceration. I

acknowledge that, during oral argument before this court, the state waived any claim that the July 15, 2015 warrantless search of the defendant's apartment was proper due to his status as a parolee at the time of his arrest on June 15, 2015. I also acknowledge that the state did not present any evidence in the trial court of the conditions of parole—either standard or specific—to which the defendant had agreed prior to his release to supervised parole on January 16, 2015. My starting point, however, is that, pursuant to the stipulation of the parties and as found by the trial court, when the defendant was arrested on June 15, 2015, he was "indisputably on supervised parole . . . ." Given that starting point, the *highest* reasonable expectation of privacy in his home *possibly* enjoyed by the defendant on July 15, 2015, was the same expectation that he had on June 15, 2015—not higher.

A brief factual and procedural background of the defendant's motions to suppress the two searches provides helpful context. The police and the defendant's parole officer conducted the first search of his apartment shortly after his arrest and incarceration, in the early morning hours of June 16, 2015. Gomes testified that the defendant's parole officer was "checking the residence for possible drug-related activity and contraband . . . ." The second search, on July 15, 2015, took place after Jenkins told the police that the defendant had told him that he had hidden the victim's cell phone and the crack he had stolen from her apartment in a hole in the wall in his bathroom. There is no indication in the record that the police were accompanied by a parole officer during the second search.

The defendant moved to suppress both searches, and the trial court denied both motions in an oral ruling on March 29, 2015, indicating that a memorandum of decision as to each ruling would follow. The court read its decision on its denial of the motion to suppress

the first search into the record during the defendant's sentencing hearing on June 6, 2016. On the same day, the court issued its memorandum of decision as to its denial of the motion to suppress the second search.

As to the first search, notwithstanding his stipulation that the records of the Department of Correction reflected that he was on parole at the time of his arrest, the defendant argued that the parole board lacked jurisdiction over him. Specifically, the defendant argued that, because at that time he was subject to deportation to Haiti, he properly was under the jurisdiction of federal immigration authorities, rather than the parole board. Therefore, the defendant argued, the parole officer lacked authority to search his apartment and the evidence seized from that search should be suppressed. The trial court rejected the defendant's argument, beginning with the fact that there was no dispute that the defendant was on parole at the time of his arrest. The court explained further that "an individual can be under the jurisdiction of more than one entity simultaneously and that, therefore, being subject to the jurisdiction of one entity is not mutually exclusive [of] the jurisdiction of another, or second, entity." The court therefore concluded that the parole officer had authority to search the defendant's home and denied the motion to suppress. Implicit in the court's ruling was that the police officers had the authority to accompany the parole officer and assist in searching the apartment. As I have stated earlier in this concurring opinion, the defendant does not challenge the trial court's ruling regarding the first search in this appeal.

As to the second search, the defendant relied on the federal and state constitutions to argue that the search was unreasonable and the resulting evidence should be

suppressed.[2] The defendant argued that the apartment was his home, and that his incarceration had not changed that. The defendant argued that he had established that he retained a subjective expectation of privacy in the apartment and that his expectation was one that society would deem to be reasonable. In its opposition, the state confined its arguments to rebutting the defendant's claim that he had demonstrated that he held a subjective expectation of privacy in the apartment. Neither the defendant nor the state raised any issue regarding the defendant's parole status at the time of the second search.

The trial court denied the defendant's motion to suppress on the basis of its conclusion that the defendant had failed to demonstrate that he had a subjective expectation of privacy in the premises. See *State* v. *Hill*, 237 Conn. 81, 92, 675 A.2d 866 (1996). The court pointed to the following: the defendant had failed to contact the landlord about maintaining the lease, which was a month-to-month lease; he was in custody and had no income; he had testified that he knew he was going to be incarcerated for a very long time; he did not pay rent; and, he had failed to contact anyone about securing the personal possessions he had left in the apartment. The trial court declined to credit the defendant's testimony during the suppression hearing that he would return to the apartment if he could. Because the court concluded that the defendant had not demonstrated that he had a subjective expectation of privacy in the apartment, it did not reach the question of whether any

[2] The police entered the defendant's apartment twice on July 15, 2015. The first time, they verified that Jenkins' information concerning the hole in the bathroom wall was correct by entering the bathroom and looking into the hole without removing the items within. After securing a search warrant, they returned and removed the items from the hole in the wall. The fact that the police obtained a search warrant before retrieving the items, however, is immaterial, as their admissibility stands or falls on the constitutional propriety of the initial search on July 15, 2015.

expectation he had would be deemed reasonable by society. Finally, in light of its conclusion that the defendant had failed to make the required showing, the court relied on the landlord's consent to the search to conclude that the search was reasonable. Although the trial court referenced the defendant's parole status in its factual findings, it did not rely on that status in denying the motion to suppress.

"To determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy the *Katz* test. See *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The *Katz* test has both a subjective and an objective prong: '(1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant.' " *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018).

It is well established that parolees have a diminished expectation of privacy. The United States Supreme Court has explained that "parolees are on the continuum of state-imposed punishments. . . . On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this [c]ourt has pointed out, parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. . . . In most cases, the [s]tate is willing

to extend parole only because it is able to condition it upon compliance with certain requirements." (Citations omitted; internal quotation marks omitted.) *Samson* v. *California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006).

"Although probationers and parolees are subject to a degree of impingement upon privacy that would not be constitutional if applied to the public at large . . . the law requires that such greater intrusions occur pursuant to a rule or regulation that itself satisfies the [f]ourth [a]mendment's reasonableness requirement . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Newton*, 369 F.3d 659, 665 (2d Cir.), cert. denied, 543 U.S. 947, 125 S. Ct. 371, 160 L. Ed. 2d 262 (2004). For this reason, the particular scope of a parolee's reasonable expectation of privacy depends on the conditions of parole. In *Samson*, the court held that a "condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the [f]ourth [a]mendment." *Samson* v. *California*, supra, 547 U.S. 847. In so holding, the court construed a California statute that required a prisoner eligible for parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067 (a) (West 2000); see *Samson* v. *California*, supra, 846.

Samson involved standard conditions of parole as set forth by statute, but courts also have looked to the specific conditions set forth in the order granting the defendant parole or probation. For example, in *United States* v. *Robertson*, 239 F. Supp. 3d 426, 448 (D. Conn. 2017), appeal withdrawn, United States Court of Appeals, Docket No. 17-1845 (2d Cir. August 25, 2017), the court rejected the government's contention that

the defendant's status on federal supervised release functioned as a forfeiture of "all his constitutional rights to the sanctity of his home." The court looked to the defendant's conditions of supervised release, which provided only that "[t]he defendant shall permit *a probation officer* to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view *by the probation officer*." (Emphasis in original; internal quotation marks omitted.) Id. The court reasoned that the conditions of release did not extend to the police officers who were unaccompanied by a probation officer when they searched the defendant's apartment. Id., 449.

The relevant case law makes clear that the standard and specific conditions of the defendant's release would define the scope of the defendant's reasonable expectation of privacy in his home at the time of the first search, which occurred mere hours after his arrest. The record does not reflect what those conditions were.[3] Because the second search occurred after the defendant had been incarcerated for one month, in all likelihood he was no longer on parole when that search took place.

His conditions of parole, however, remain relevant for purposes of determining whether the July 15, 2015 search violated his reasonable expectation of privacy. As the United States Supreme Court has explained, with respect to one's reasonable expectation of privacy, parole is on a " 'continuum' " with the reasonable expectation of a law-abiding citizen at one end of the continuum and that of an inmate at the opposite end. *Samson* v. *California*, supra, 547 U.S. 850. Thus, although a parolee enjoys a " 'diminished' " expectation of privacy as compared to a law-abiding citizen, he has a greater

[3] The state appears to have had access to some records pertaining to the defendant's parole, but those records do not appear to have been introduced into evidence or marked for identification.

expectation of privacy than that of an incarcerated individual. Id., 849–50. In other words, if the defendant's expectation of privacy changed when he was incarcerated, *that expectation certainly did not increase*. At the very best, the defendant's reasonable expectation of privacy in his home, following his incarceration, was the same expectation he enjoyed while on parole. Accordingly, if the July 15, 2015 search would have complied with the defendant's parole conditions at the time of his arrest—whatever those may have been—it did not constitute an invasion of his reasonable expectation of privacy. Of course, because the state did not create a record of what those conditions were, this court cannot determine whether the search comported with the conditions of parole.

For the foregoing reasons, I respectfully concur.

ROCKSTONE CAPITAL, LLC *v.* JOHN SANZO ET AL. (SC 20041)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff brought an action seeking to foreclose judgment liens on certain real property owned by the defendants J and M. The liens had been recorded to secure a debt owed in connection with a prior judgment rendered against J and M. The parties thereafter entered into a forbearance agreement pursuant to which J and M were to make payments on the debt owed and to grant the plaintiff a mortgage on their property securing those obligations, and the plaintiff was to refrain from pursuing the foreclosure action for as long as J and M made their required payments. The mortgage included a waiver of the statutory (§ 52-352b [t]) homestead exemption for J and M's property. When J and M defaulted on their payments under the forbearance agreement, the plaintiff filed a motion to foreclose on the judgment liens. J and M objected to the motion and invoked the homestead exemption, and the plaintiff withdrew its claim as to the judgment liens and amended its complaint, seeking instead to foreclose on the mortgage. The trial court determined

that the forbearance agreement was void as against public policy and denied the plaintiff's claim to foreclose on the mortgage. The trial court also determined that the homestead exemption should apply. The court rendered judgment for the plaintiff on the judgment liens, subject to the homestead exemption, but did not determine the amount of the debt, the manner of foreclosure or set law days. The plaintiff appealed to the Appellate Court from the denial of its request to foreclose on the mortgage, and J and M cross appealed from that portion of the judgment granting foreclosure of the judgment liens. The Appellate Court concluded that it had jurisdiction over the plaintiff's appeal because the trial court's denial of the plaintiff's claim to foreclose on the mortgage constituted a final judgment and reversed the trial court's judgment on the ground that the homestead exemption did not apply to a consensual lien such as a mortgage. The Appellate Court also concluded that it had jurisdiction over the cross appeal filed by J and M because, although it was not based on a final judgment, it was inextricably intertwined with the plaintiff's appeal, which was based on a final judgment. The Appellate Court reversed the trial court's judgment on the merits of the cross appeal because the plaintiff's operative complaint did not seek foreclosure of the judgment liens. On the granting of certification, J and M appealed to this court. *Held*:

1. The Appellate Court had jurisdiction over the plaintiff's appeal from the trial court's denial of its request to foreclose on the mortgage, as the trial court's denial of that request, which was the only relief the plaintiff sought in its operative complaint, constituted a final judgment, and, contrary to the claim made by J and M that the trial court did not render a final judgment because it ruled sua sponte for the plaintiff on the judgment liens and failed to set the amount of debt, manner of foreclosure or law days, that ruling did not defeat the final judgment rendered on the mortgage, as the plaintiff did not seek foreclosure of the judgment liens in its operative complaint; moreover, this court concluded, after examining the record and considering the briefs and arguments of the parties, that certification was improvidently granted on the issue of whether the Appellate Court had jurisdiction over the cross appeal from the trial court's ruling on the judgment liens, and, therefore, the present appeal was dismissed as to that issue.
2. The plaintiff having sought, in its operative complaint, to foreclose on the mortgage that J and M voluntarily had granted to it, which was a consensual lien, rather than to foreclose on the nonconsensual judgment liens that previously had been filed, the Appellate Court correctly concluded that the homestead exemption did not apply, and, contrary to the claim of J and M, the mortgage was enforceable and was not contrary to the text of § 52-352b (t) or public policy: this court's plain reading of the text of § 52-352b (t) led it to reject the claim of J and M that a mortgage securing preexisting judgment debt could not be a consensual lien under that statute, and nothing in the statute (§ 52-350f) limiting a

judgment creditor's collection efforts to nonexempt assets prohibits parties from restructuring a judgment debt into a consensual lien, to which the homestead exemption would not apply, as the parties did in the present case; moreover, waiver of the homestead exemption through a mortgage is routinely permitted, and practical considerations supported the allowance of such a waiver inasmuch as disallowing it would severely restrict the availability of much needed credit to debtors, and as J and M appeared to deliberately choose to mortgage their home and receive forbearance from foreclosure on the judgment liens in exchange for the mortgage.

Argued January 15—officially released July 16, 2019

Procedural History

Action to foreclose judgment liens on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Richard P. Gilardi*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment in part for the plaintiff, from which the plaintiff appealed and the named defendant et al. cross appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Beach* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings; thereafter, the named defendant et al., on the granting of certification, appealed to this court. *Affirmed in part*; *appeal dismissed in part.*

Matthew K. Beatman, with whom, on the brief, was *John L. Cesaroni*, for the appellants (named defendant et al.).

Houston Putnam Lowry, with whom, on the brief, was *Dale M. Clayton*, for the appellee (plaintiff).

David Lavery and *Loraine Martinez* filed a brief for the Connecticut Fair Housing Center as amicus curiae.

Opinion

D'AURIA, J. If a creditor forecloses on a debtor's home, the debtor might be entitled to keep a portion of

the home's value, whatever the amount of the debt. This debtor protection, known as the homestead exemption, is available when the creditor forecloses on a judgment lien, but not on a consensual lien. See General Statutes § 52-352b (t).[1] In this case, the plaintiff, Rockstone Capital, LLC (Rockstone), held judgment liens against the defendants John Sanzo and Maria Sanzo.[2] The parties later agreed to a consensual lien in the form of a mortgage to secure the debt. Now, the Sanzos have defaulted on the mortgage payments, and Rockstone seeks to foreclose on the mortgage. The primary issue on appeal is whether the Sanzos are entitled to the homestead exemption. We conclude they are not.

The trial court found the following facts, as stipulated by the parties and contained in exhibits submitted to the court. The Sanzos' primary residence is in Monroe and most recently was valued at $500,000. In 2000, Fleet National Bank (Fleet) secured a judgment against them for about $100,000. To secure the debt, it recorded judgment liens on the Monroe property. Fleet later assigned its interests in the judgment and judgment liens to Rockstone.

In 2008, Rockstone initiated this action to foreclose on the judgment liens because the Sanzos had defaulted. The parties, however, entered into a forbearance agreement that halted the action. Under the agreement, the Sanzos were to make regular payments on the amount outstanding on the judgment liens and additional interest, costs, and fees, and to grant Rockstone a mortgage

[1] Connecticut's homestead exemption is embodied in General Statutes § 52-352b, which provides in relevant part: "The following property of any natural person shall be exempt . . . (t) The homestead of the exemptioner to the value of seventy-five thousand dollars . . . provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . ."

[2] The Housatonic Lumber Company also was named as a defendant but was defaulted for failure to plead and is not involved in this appeal.

on the Monroe property securing these obligations. In exchange, Rockstone agreed to refrain from pursuing this foreclosure action for as long as the Sanzos made their payments. The parties stipulated that they were represented by counsel and that their agreement was a commercial agreement.

The record also reflects the following procedural history. In 2014, Rockstone resumed this action, filing a motion to foreclose on the judgment liens because the Sanzos had defaulted on their obligations under the forbearance agreement. The Sanzos objected to the motion and invoked the homestead exemption. In response, Rockstone amended its complaint to seek foreclosure on the mortgage, instead of on the judgment liens. The Sanzos filed an answer, including a special defense that claimed the mortgage was a de facto waiver of the homestead exemption, which was contrary to public policy.

The action was submitted to the trial court on stipulations and exhibits submitted by the parties. Following an initial decision that the parties agreed was improper,[3] the court issued a corrected memorandum of decision. In it, the court acknowledged that the Sanzos had "vol-

[3] In its original memorandum of decision, the trial court relied on an express waiver of the homestead exemption contained within the mortgage itself. It concluded that the express waiver was void as against public policy, but that it was severable from the rest of the mortgage. It therefore granted foreclosure of the mortgage, subject to the homestead exemption.

Neither party had relied on the express waiver, however, because they agreed that it was unnecessary. In its motion to reargue, Rockstone stated that it "was not relying upon the express waiver language contained in the [m]ortgage since the [m]ortgage, being a consensual lien, is not within the purview of the homestead exemption statute and thus no waiver argument is necessary." In their own motion to reargue, the Sanzos agreed that "the [c]ourt ruled in a manner not addressed by either party . . . ." Conceding that the express waiver in the mortgage was "actually an extraneous term," they reiterated their argument that "the [m]ortgage itself is a de facto waiver of the [h]omestead [e]xemption under the unique facts of this case."

The parties do not rely on the express waiver on appeal. See *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 782, 171 A.3d 77 (2017).

untarily enabled [Rockstone] to seek recovery without the homestead exemption's applicability" and that "the homestead exemption would ordinarily not be applicable to a mortgage created by a voluntary agreement such as the one at hand." But based on the "unique procedural history" of the case, in which "the progression of this action has been to get around the homestead exemption," the court decided that the exemption should apply nonetheless. It held that the forbearance agreement was void as against public policy and therefore denied Rockstone's claim to foreclose on the mortgage. It also rendered judgment for Rockstone on the judgment liens, subject to the homestead exemption, even though Rockstone had amended its complaint to withdraw its claim regarding the judgment liens. The court did not determine the amount of debt, manner of foreclosure or law days for the judgment lien foreclosure.

Rockstone appealed and the Sanzos cross appealed to the Appellate Court. Rockstone appealed from the denial of its request to foreclose on the mortgage, and the Sanzos cross appealed from the judgment on the judgment liens. Because the trial court had not determined the amount of debt, manner of foreclosure or law days for the judgment lien foreclosure, the Appellate Court ordered a hearing to determine whether it should dismiss the appeals for lack of a final judgment. Following that hearing, the Appellate Court ordered the trial court to articulate its ruling and, after receiving the articulation, ordered the parties to address the final judgment question in their merits briefs to that court.

The Appellate Court concluded that it had jurisdiction over Rockstone's appeal because the trial court's denial of Rockstone's claim to foreclose on the mortgage constituted a final judgment. *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 778, 171 A.3d 77 (2017). It reversed the judgment of the trial court on the merits

of Rockstone's appeal, holding that the homestead exemption did not apply to a consensual lien such as a mortgage. Id., 784. The Appellate Court also concluded that it had jurisdiction over the Sanzos' cross appeal because, although it was not based on a final judgment, it was inextricably intertwined with Rockstone's appeal, which was based on a final judgment. Id., 786. Finally, it reversed the judgment of the trial court on the merits of the cross appeal because Rockstone's operative complaint had not sought foreclosure on the judgment liens. Id., 788–89.

The Sanzos petitioned this court for certification to appeal, which we granted, limited to the following issues: "1. Did the Appellate Court properly conclude that the appeal and cross appeal were taken from a final judgment of the trial court? 2. If the answer to the first question is yes, did the Appellate Court properly conclude that the plaintiff's postjudgment mortgage encumbering the same property and the same debt as the plaintiff's judgment liens was a consensual lien, and not a de facto waiver of the homestead exemption; see General Statutes § 52-352b (t); that would be void as a matter of public policy?" *Rockstone Capital, LLC* v. *Sanzo*, 327 Conn. 968, 173 A.3d 391 (2017). We affirm the judgment of the Appellate Court with respect to its conclusions that the appeal was taken from a final judgment and that the mortgage was a consensual lien. We conclude that certification was improvidently granted with respect to whether the cross appeal was taken from a final judgment and dismiss that portion of the appeal.

I

As threshold issues, we must address whether the Appellate Court had jurisdiction over the appeal and cross appeal. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject

matter jurisdiction is a question of law [and, therefore] our review [as to whether the Appellate Court had jurisdiction] is plenary." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 84, 191 A.3d 983 (2018). Subject to certain exceptions, an appellate court's subject matter jurisdiction "is limited to final judgments of the trial court." (Internal quotation marks omitted.) Id. A final judgment exists "[w]hen judgment has been rendered on an entire complaint . . . ." Practice Book § 61-2. In this case, Rockstone's operative complaint exclusively sought foreclosure of the mortgage, and the trial court denied the relief requested. We conclude that this constitutes a final judgment and, thus, that the Appellate Court had jurisdiction over the appeal.

Once the trial court denied Rockstone's request to foreclose on the mortgage, it then sua sponte ruled in favor of Rockstone on the judgment liens, but did not set the amount of debt, manner of foreclosure or law days. Therefore, the Sanzos argue, the trial court did not render a final judgment. See *Morici* v. *Jarvie*, 137 Conn. 97, 103, 75 A.2d 47 (1950) ("[a final] judgment [in a foreclosure action] must either find the issues for the defendant or [find the issues for the plaintiff and] determine the amount of the debt, direct a foreclosure and fix the law days"). We disagree. This argument ignores the undisputed predicate fact that Rockstone did not seek foreclosure on the judgment liens in its operative complaint. As stated previously, the complaint sets the parameters for determining a final judgment. See Practice Book § 61-2. Particularly "under the unusual circumstances of this case"; *Rockstone Capital, LLC* v. *Sanzo*, supra, 175 Conn. App. 786; in which the parties agree that there was no basis to rule on the judgment liens; id., 788; the trial court's ruling on the judgment liens, which fundamentally exceeded the scope of the complaint, does not defeat the final judgment it rendered on the mortgage.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we also conclude that certification was improvidently granted on the question of whether the Appellate Court had jurisdiction over the Sanzos' cross appeal from the trial court's ruling on the judgment liens. The parties agree that the ruling on the judgment liens was improper. Id. Moreover, the trial court stated in its articulation: "Once the court voided the forbearance agreement and underlying mortgage, the remaining matter to be resolved involved judgment on the original judgment liens. . . . It was the court's intention to preserve the [Sanzos'] right to the homestead exemption while preserving [Rockstone's] right to sue on the original judgment liens." (Citations omitted.) In other words, if the trial court had concluded, as we do, that the mortgage was enforceable, it never would have reached the judgment liens. Therefore, the appeal is dismissed as to that issue.

II

The primary issue in this case is whether the mortgage that the Sanzos granted to Rockstone is enforceable. The Sanzos argue it is not because it deprives them of the homestead exemption, which is contrary to both the text of § 52-352b (t) and public policy. We disagree. Under the plain language of the statute, a homestead exemption is not available to a mortgagor. Nor, on the facts of this case, is the granting of a mortgage a violation of public policy. Therefore, we conclude that the mortgage is enforceable.

"We exercise plenary review over questions of statutory interpretation, 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)." *State* v. *Daniel B.*, 331 Conn. 1, 12–13, 201 A.3d

989 (2019). Exemptions are construed liberally in the debtor's favor. See *In re Caraglior*, 251 B.R. 778, 782–83 (Bankr. D. Conn. 2000).

Under our statutes governing postjudgment collection, a creditor may enforce a money judgment "against any property of the judgment debtor unless the property is exempt . . . ." General Statutes § 52-350f. It may do so via "foreclosure of a real property lien . . . ." General Statutes § 52-350f. " 'Exempt' " means "unless otherwise specified, not subject to any form of process or court order for the purpose of debt collection . . . ." General Statutes § 52-352a (c). Under the homestead exemption, a judgment debtor's "homestead" is exempt "to the value of seventy-five thousand dollars . . . ." General Statutes § 52-352b (t). A " '[h]omestead' " is "owner-occupied real property . . . used as a primary residence." General Statutes § 52-352a (e). "Value" is "determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . ." General Statutes § 52-352b (t). "[T]hese statutory provisions . . . mean that a judgment lien can attach on a homestead, but that such a lien cannot be enforced up to the amount of the exemption." *KLC, Inc.* v. *Trayner*, 426 F.3d 172, 175 (2d Cir. 2005).

Plainly, though, the homestead exemption does not apply to a consensual lien. See General Statutes § 52-352b (t) ("fair market value of the real property less the amount of any . . . consensual lien which encumbers it"). A mortgage is a consensual lien. E.g., *In re Wolmer*, 494 B.R. 783, 784 (Bankr. D. Conn. 2013) ("consensual liens [here, the mortgages]"); *L. Suzio Asphalt Co.* v. *Ferreira Construction Corp.*, Superior Court, judicial district of New Haven, Docket No. 351912 (October 19, 1993) (10 Conn. L. Rptr. 264, 265) ("consensual liens, such as . . . a mortgage"); see also 4 Collier on Bankruptcy (R. Levin & H. Sommer eds., 16th Ed. 2019) ¶ 506.03 [1] [a], p. 506-11 ("[c]ommon examples of volun-

tary [or consensual] liens include real property mortgage liens").

In this case, Rockstone does not seek to foreclose on the nonconsensual judgment liens initially filed against the Sanzos. Rather, it seeks to foreclose on the consensual mortgage later voluntarily granted to it by the Sanzos. Therefore, we agree with the Appellate Court that the homestead exemption does not apply.

Although the Sanzos concede the general point that the homestead exemption does not apply to mortgages, they make two arguments as to why the particular mortgage they granted to Rockstone should not be enforced. We find neither argument persuasive.

First, the Sanzos argue that their mortgage—a mortgage securing preexisting judgment debt—is not the type of mortgage contemplated by § 52-352b (t). This argument is not supported by a plain reading of the statute's text. The statute does not define "consensual lien," but could hardly refer to the concept more broadly: "*any* . . . consensual lien" is subtracted from the property's value in calculating the homestead exemption. (Emphasis added.) General Statutes § 52-352b (t). We disagree with the Sanzos that § 52-350f,[4] which limits a judgment creditor's collection efforts to nonexempt assets, is inconsistent with this reading of the homestead exemption. Nothing in § 52-350f prohibits parties from restructuring a judgment debt into another form, such as a consensual lien, to which the

[4] General Statutes § 52-350f provides: "A money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section 52-352a, 52-352b, 52-352d or 52-361a or any other provision of the general statutes or federal law. The money judgment may be enforced, by execution or by foreclosure of a real property lien, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) interest as provided by chapter 673 on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c."

exemption would not apply. In fact, the Sanzos appear to concede that they could have properly restructured their judgment debt if they had only done so through third-party financing, rather than directly through their creditor, Rockstone. Thus, we find no textual basis for holding that a mortgage securing judgment debt is excluded from the meaning of "consensual lien."[5]

Second, the Sanzos argue that a debtor may not waive the homestead exemption and that, on the facts of this case, the mortgage agreement they entered into with Rockstone, their judgment creditor, should properly be viewed as a de facto waiver of the exemption. We are not persuaded by either point.

"Waiver is the intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *Dinan* v. *Patten*, 317 Conn. 185, 195, 116 A.3d 275 (2015). A statutory right generally may be waived. Id. However, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." (Internal quotation marks omitted.) *Pereira* v. *State Board of Education*, 304 Conn. 1, 49–50, 37 A.3d 625 (2012).

Although there is considerable variation among the states as to the contours of and legal purposes underlying homestead exemptions; see, e.g., *Chames* v. *DeMayo*, 972 So. 2d 850, 856–57 (Fla. 2007); homestead

[5] Legislative history is also, at best, unhelpful to the Sanzos, as debate did not distinguish between prejudgment and postjudgment mortgages. The homestead exemption for residential real property was enacted in No. 93-301, § 2, of the 1993 Public Acts. During debate in the House of Representatives, Representative Lee A. Samowitz did emphasize, however, that the homestead exemption was not intended to impair mortgages: "I want to clarify this. [The homestead exemption] does not affect mortgages. Mortgages are secured. They are not impaired. They won't be impaired to bankruptcy, they won't be impaired to foreclosure." 36 H.R. Proc., Pt. 30, 1993 Sess., p. 10,852; see also id., p. 10,826 ("consensual liens are not impaired by this amendment"); id., p. 10,832 ("[t]his is intended not to impair the statutory and the [consensual] lien").

exemptions are typically driven by interrelated policies that consider the welfare of both individual private citizens and the public at large. "The principal objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of stability and independence." G. Haskins, "Homestead Exemptions," 63 Harv. L. Rev. 1289, 1289 (1950). More specifically, these laws seek to achieve security for debtors and their families by protecting their ability to remain in their homes, providing a financial cushion for those who would otherwise be unable to support themselves, or both. See R. Rivera, "State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws," 39 Real Prop. Prob. & Tr. J. 71, 101–102 (2004) (noting homestead exemptions that are intended "to protect debtors' homes in bankruptcy because when debtors retain their homes, they are more likely to spend money in the local economy, which is in the state's best interest," and homestead exemptions that are intended to provide monetary relief "to prevent a debtor from becoming completely dependent on the state for financial support").

In addressing whether an individual may waive a homestead exemption, a court usually considers the form of the waiver. Waivers via mortgage are routinely permitted.[6] See 1 The Law of Debtors and Creditors (2019) § 6:70 ("perhaps the most common form of

[6] Several legislatures also have considered the form of the waiver. E.g., Alaska Stat. § 09.38.105 (2006) ("[a] waiver of exemption executed in favor of an unsecured creditor before levy on an individual's property is unenforceable, but a valid security interest may be given in exempt property"); Tenn. Code Ann. § 26-2-301 (c) (2017) ("[t]he homestead exemption shall not operate against . . . any debt secured by the homestead when the exemption has been waived by written contract"); W. Va. Code Ann. § 38-9-6 (a) (LexisNexis 2011) ("[a]ny waiver of the rights conferred by this article shall be void and unenforceable except to the extent that [1] such waiver is accompanied by a consensual security interest in the property in which the homestead exemption is asserted").

waiver involves the homestead exemption, which may typically be waived by the debtor granting a creditor a mortgage"); 40 C.J.S., Homesteads § 102 (2019) ("[a]s a general rule, homestead rights may be waived by the parties entitled thereto by an act which evidences an unequivocal intention to do so" [footnote omitted]).

Some courts permit a waiver via mortgage because granting a mortgage on specific property allows the mortgagor to consider the specific consequences of default. For example, the Sanzos repeatedly cite a Florida Supreme Court decision barring a prospective waiver of the homestead exemption in an executory contract. See *Chames* v. *DeMayo*, supra, 972 So. 2d 857 (citing constitutional provisions, statutes and case law prohibiting "a general waiver of homestead or personal property exemptions in an executory contract"). But they omit from their discussion that court's express acknowledgment that a waiver via mortgage is enforceable: "[Our cases] do not prohibit a waiver of the homestead exemption; they simply require that such waivers be accomplished . . . by mortgage, sale, or gift . . . . Those who truly wish to waive their homestead exemption . . . can do so." (Citations omitted.) Id., 861–62. A waiver via mortgage is permitted because it "is made knowingly, intelligently, and voluntarily . . . with eyes wide open . . . ." (Citation omitted.) Id., 861. "In obtaining a mortgage, a homeowner is well aware that if the payments are not made, the home may be foreclosed upon. . . . [T]he very nature of the transaction implies the exercise of discretion and the contemplation of inevitable consequences." (Internal quotation marks omitted.) Id.; cf. *Beneficial Finance Co. of Colorado* v. *Schmuhl*, 713 P.2d 1294, 1297 (Colo. 1986) ("Our holding

Connecticut's homestead exemption statute is silent on whether, or under what circumstances, a homeowner may waive the exemption. See General Statutes § 52-352b (t); see also 36 H.R. Proc., Pt. 30, 1993 Sess., p. 10,853, remarks of Representative Lee A. Samowitz ("[t]he proposed bill does not deal with the statutory right of waiver").

[that a judgment debtor may waive an exemption by granting a security interest] is supported by the expectations of the parties in secured transactions. A debtor who grants a security interest in specific property to a creditor expects foreclosure of that interest upon default."); *Lingle State Bank of Lingle* v. *Podolak*, 740 P.2d 392, 396 (Wyo. 1987) ("[t]he debtor cannot waive the privilege of claiming the exemption *in advance*" [emphasis added; internal quotation marks omitted]).

Other courts permit a debtor to waive an exemption on the theory that prohibiting such a waiver would go too far in restricting an individual's right to encumber property. For instance, the New York Court of Appeals has held that a debtor's exemptions are not meant to serve the "paternalistic function" of prohibiting a debtor from disposing of exempt property, or "the less drastic step" of encumbering it in exchange for consideration. *Matter of New York* v. *Avco Financial Service of New York, Inc.*, 50 N.Y.2d 383, 388, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (1980). It recognized that "the law has not forbidden a debtor to execute a mortgage upon the property so protected and thus create a lien which may be foreclosed despite the property's exempt status . . . ." (Citations omitted.) Id.; see also, e.g., *United Bank of Bismarck* v. *Selland*, 425 N.W.2d 921, 925 (N.D. 1988) ("although the exemption statutes are designed to protect debtors from becoming destitute as a consequence of unforeseeable indebtedness, the statutes should not be construed to deprive an individual of his rights of ownership in exempt property . . . among which is the power to encumber, to sell, or otherwise dispose of it" [internal quotation marks omitted]); cf. *Moyer* v. *International State Bank*, 404 N.W.2d 274, 277 (Minn. 1987) ("[t]he statute does not forbid a debtor to mortgage protected property and to create a lien against identified property which can be foreclosed despite the property's exempt status").

Practical considerations support the reasoning in these cases. "[A] determination that a statutory exemp-

tion cannot be waived by a security agreement would severely restrict the availability of [much needed] credit to debtors who, in many cases, have few assets to use as collateral." *Beneficial Finance Co. of Colorado* v. *Schmuhl*, supra, 713 P.2d 1297; see also *Hernandez* v. *S.I.C. Finance Co.*, 79 N.M. 673, 675, 448 P.2d 474 (1968) ("[o]ften, such property is the poor man's only source of cash in an emergency and, if the law permits him to sell his exempt property, surely it permits the less drastic step of encumbering it").

This concept applies particularly to homestead exemptions because a homestead is often a debtor's best potential source of credit. "A debtor's equity in residential real property subject to a homestead exemption is often substantial. Thus, permitting the debtor to encumber the homestead through execution of a second mortgage or similar instrument is economically justified." J. Haines, "Security Interests in Exempt Personalty: Toward Safeguarding Basic Exempt Necessities," 57 Notre Dame Law. 215, 220 n.35 (1981); see W. Vukowich, "Debtors' Exemption Rights," 62 Geo. L.J. 779, 852 (1974) ("[p]ermitting waivers of exemptions and security interests in the more substantial exempt assets . . . is sound, since it permits persons to use the more substantial assets as collateral; in fact, these are the types of assets which represent the best collateral and which are most commonly used as such"); see also *Benchmark Bank* v. *Crowder*, 919 S.W.2d 657, 661 (Tex. 1996) ("[h]omestead owners must have the ability to renew, rearrange, and readjust the encumbering obligation to prevent a loss of the homestead through foreclosure"). In some scenarios, therefore, waiver of the homestead exemption actually serves the public policies underlying it by allowing a debtor to remain in his home and providing him with a source of funds to support himself.

In support of their argument that a debtor may not waive the homestead exemption, the Sanzos ignore the form of their waiver: a mortgage. Although the Sanzos'

mortgage in this case involved an executory contract (the forbearance agreement), and therefore presents a scenario not addressed by the cases previously discussed, we are persuaded that the same principles still apply. We are not convinced that a waiver of the homestead exemption always contravenes the public policy behind it, such that it may never be waived.

The Sanzos find little support for their argument in Connecticut law. They rely primarily on *TuxisOhr's Fuel, Inc.* v. *Trio Marketers, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-04-4002067-S (October 26, 2005) (40 Conn. L. Rptr. 203), and *Haggerty* v. *Williams*, 84 Conn. App. 675, 855 A.2d 264 (2004), as examples of statutory rights that an individual may not waive in every circumstance. *Tuxis-Ohr's Fuel, Inc.*, concerned a provision in a personal guarantee contract that waived the homestead exemption. *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 204. *Haggerty* involved a provision in a mortgage that waived the relevant statute of limitations. *Haggerty* v. *Williams*, supra, 676–77. In each case, the court was concerned that allowing a debtor to waive a statutory protection "at the inception" of an agreement; id., 681; would mean a waiver was the result of "ignorance, improvidence, an unequal bargaining position or was simply unintended." (Internal quotation marks omitted.) Id., 682. These courts also feared that the public policy advanced by the granting of these statutory rights would erode by encouraging similar waivers " 'as a matter of routine.' " Id., 681; accord *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 205.

The present case does not involve a scenario, as in *Tuxis-Ohr's Fuel, Inc.*, and *Haggerty*, in which a debtor waived statutory protection "at the inception' " of an agreement; *Haggerty* v. *Williams*, supra, 84 Conn. App. 681; without a realistic chance to consider the consequences. When the Sanzos decided to grant a mortgage,

they had already defaulted on the judgment debt and were actually (not just theoretically) facing foreclosure. They had the aid of counsel. They entered into a negotiated commercial agreement. They are not relying on a provision buried within the mortgage but, rather, on the mortgage itself. It was "obvious," they concede, that the purpose of this mortgage was to contract around the homestead exemption.

Nor, unlike *Tuxis-Ohr's Fuel, Inc.*, and *Haggerty*, is this a situation in which mortgages would be granted, and thus public policy would be undercut, merely " 'as a matter of routine.' " *Haggerty* v. *Williams*, supra, 84 Conn. App. 681. Before entering into the agreement, the Sanzos could choose between invoking the homestead exemption in the face of the foreclosure action and granting a mortgage. For the reasons just stated, they appear to have made this choice deliberately. It is not self-evident that judgment debtors in similar situations would routinely make the same choice to mortgage their homes, particularly if they had few other exempt assets and a homestead exemption represented their best financial outcome. Moreover, as described previously, restructuring judgment debt might often work in a debtor's favor. Indeed, in 2009, the Sanzos received forbearance from foreclosure in exchange for the mortgage. Until 2014, they apparently complied with the terms of the forbearance agreement and remained in their home because of it.

Finally, the Sanzos and the amicus curiae, the Connecticut Fair Housing Center, urge us to look beyond the form of the mortgage to its substance, which they argue was merely a de facto general waiver. They contend that the mortgage did not secure any debt beyond the original judgment liens. They also note that it was not a novation or release of the judgment liens. Therefore, they argue, the only real effect of the mortgage was to waive the homestead exemption in the same

manner as one would through a general contractual waiver. We disagree for two reasons.

First, Rockstone's interest secured by the mortgage was not identical to the interest secured by the judgment liens. The mortgage secured the judgment lien debt, as well as additional fees and costs stemming from the forbearance. The mortgage also had the effect of subordinating Rockstone's security interest, as two superior liens had been filed and recorded after Rockstone's judgment liens, but before the mortgage.

Second, although the forbearance agreement could have more clearly distinguished between the old debt (secured by the judgment liens) and the new (secured by the mortgage) by, for instance, granting a novation, the Sanzos were well informed about the consequences of default, and the purpose of the mortgage was clear.[7]

The judgment of the Appellate Court is affirmed insofar as that court determined that Rockstone's appeal was taken from a final judgment and that the mortgage was a consensual lien to which the homestead exemption does not apply, and insofar as that court reversed the trial court's judgment with respect to the denial of Rockstone's claim to foreclose on the mortgage and remanded the case for further proceedings; that portion of the appeal concerning whether the Appellate Court correctly concluded that the Sanzos' cross appeal was taken from a final judgment of the trial court is dismissed.

In this opinion the other justices concurred.

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[7] We do not consider the other arguments advanced by the amicus because they were not raised by the parties. See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 595, 833 A.2d 908 (2003).

JANE DOE *v.* CHARLES COCHRAN
(SC 19879)

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

Syllabus

The plaintiff sought to recover damages from the defendant physician, claiming that he was negligent in failing to accurately report the positive results of a laboratory test for genital herpes to his patient, S, the plaintiff's boyfriend. The plaintiff and S had been involved in an exclusive romantic relationship. Before the relationship became sexual, the plaintiff and S agreed to seek testing for sexually transmitted diseases (STDs). Prior to this agreement, the plaintiff had tested negative for STDs. S then visited the defendant and informed him that he wanted to be tested for STDs for the protection of his new, exclusive girlfriend. The defendant arranged for S to undergo a blood test, and the results were positive for genital herpes. The defendant delegated to a member of his practice staff the task of informing S of the test results. The staff member incorrectly told S over the phone that his STD test results were negative. After the plaintiff's relationship with S became sexual, the plaintiff began to experience outbreaks consistent with and was subsequently diagnosed with genital herpes. S thereafter contacted the defendant to inquire further, and the defendant informed S that he actually had tested positive for genital herpes and apologized for the error. The defendant moved to strike the plaintiff's complaint, claiming that the plaintiff's claim sounded in medical malpractice and, therefore, must fail for lack of a physician-patient relationship between the plaintiff and the defendant. The defendant claimed alternatively that, even if the plaintiff's claim sounded in ordinary negligence, the plaintiff and the defendant were not involved in any special relationship that would justify extending a duty of care to her. The trial court granted the defendant's motion to strike, concluding that the defendant did not owe a duty to the plaintiff. On appeal from the judgment in favor of the defendant, *held*:

1. The defendant could not prevail on his claim, as an alternative ground for affirming the trial court's judgment, that, because the plaintiff's complaint sounded in medical malpractice, the lack of a physician-patient relationship rendered her claim legally insufficient and, therefore, that the trial court properly struck the plaintiff's complaint;

* This appeal originally was argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins, and Kahn. Thereafter, Justice Vertefeuille was added to the panel. Justice Vertefeuille read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

although this court assumed, for the sake of argument, that the plaintiff's complaint reasonably could be read to allege that the defendant committed medical malpractice, it concluded that the plaintiff's allegations also reasonably could be understood to sound in ordinary negligence because, even though the alleged error occurred in a medical setting and arose as a result of a medical diagnosis in the context of an ongoing physician-patient relationship, that error was not one involving professional medical judgment or skill, as the reading of the test results and the communication of those results to S were ministerial tasks that required no advanced medical training, and proof that the alleged error constituted negligence would not require expert medical testimony or the establishment of a professional standard of care.

2. A health care provider who negligently misinforms a patient, either directly or through a designated staff member, that the patient tested negative for an STD such as genital herpes owes a duty of care to an identifiable third party who is engaged in an exclusive romantic relationship with the patient at the time of the STD testing and who foreseeably contracts the STD as a result of his or her reliance on the provider's erroneous communication to the patient, and, accordingly, the trial court incorrectly concluded that, as a matter of law, the defendant owed no duty of care to the plaintiff with respect to the inaccurate reporting to S of his test results: although this court previously has demonstrated a general aversion to extending a physician's duty of care to nonpatients, it has allowed, under limited circumstances, for the imposition of liability in cases, such as the present one, involving an identifiable potential victim who will be foreseeably harmed by a physician's negligence, and construing the plaintiff's complaint in the light most favorable to sustaining its sufficiency, this court concluded that the plaintiff was an identifiable potential victim of the defendant's alleged negligence, as only one person could have fit the description of S's exclusive girlfriend, and S presumably could have identified her by name if he had been asked by the defendant to do so; moreover, a number of other jurisdictions have recognized that a duty of a medical professional to correctly advise a patient who suffers from a communicable disease, including STDs, extends not only to the patient but also to third parties who may foreseeably contract the disease from the patient, and § 311 of the Restatement (Second) of Torts, which provides that one who negligently gives false information may be held liable to a third party who predictably is injured by the recipient's reasonable reliance on that information, appeared to support the imposition of liability in this case; furthermore, public policy considerations supported the imposition of a third-party duty of care under the circumstances of the present case, as imposing a duty in this case, in which broader public health concerns are involved, would not necessarily intrude on the sanctity of the physician-patient relationship, when the duty at issue simply requires a physician to accurately relay test results to the patient himself, if the defendant could not be held liable, then the plaintiff in all likelihood would be without

remedy or compensation for her injuries and errors such as the defendant's miscommunication would go unadmonished, the defendant, rather than the plaintiff or S, was most effectively and economically situated to avoid the harm that befell the plaintiff, and such errors are not so prevalent or ineluctable that imposing third-party liability, solely with respect to identifiable victims, would meaningfully impact medical malpractice insurance rates or overall health care costs.

(*Three justices dissenting in one opinion*)

Argued November 16, 2017—officially released July 16, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the defendant's motion to strike; thereafter, the court granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Thomas B. Noonan, for the appellant (plaintiff).

James S. Newfield, with whom, on the brief, was *Diana M. Carlino*, for the appellee (defendant).

Gregory J. Pepe filed a brief for the American Medical Association et al. as amici curiae.

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

Emily B. Rock, *Cynthia C. Bott* and *Julie V. Pinette* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

PALMER, J. The principal issue in this appeal is whether a physician who mistakenly informs a patient that he does not have a sexually transmitted disease (STD) may be held liable in ordinary negligence to the patient's exclusive sexual partner for her resulting injuries when the physician knows that the patient sought

testing and treatment for the express benefit of that partner. Under the circumstances alleged, we conclude that the defendant, Charles Cochran, a physician, owed a duty of care to the plaintiff, identified by the pseudonym Jane Doe, even though she was not his patient. Accordingly, we conclude that the trial court improperly granted the defendant's motion to strike the plaintiff's one count complaint and reverse the judgment of the trial court.

The following facts, as set forth in the plaintiff's complaint and construed in the manner most favorable to sustaining its legal sufficiency; see, e.g., *Lestorti* v. *DeLeo*, 298 Conn. 466, 472, 4 A.3d 269 (2010); and procedural history are relevant to our disposition of this appeal. In early 2013, the plaintiff began dating her boyfriend, identified in this action by the pseudonym John Smith. At all relevant times, the plaintiff and Smith were involved in an exclusive romantic relationship. At some point, the couple agreed that, before their relationship became sexual, they would individually seek testing for STDs. As of July, 2013, the plaintiff had tested negative for and did not have any STDs.

At that time, pursuant to his agreement with the plaintiff, Smith visited his physician, the defendant, who is a licensed medical doctor practicing in Norwalk. During Smith's visit, the defendant asked Smith why he wanted to be tested again for STDs, as the defendant had tested him just five months earlier. Smith explained that he wanted to be tested again for the protection and benefit of his new, exclusive girlfriend, the plaintiff. The defendant then took a sample of Smith's blood, arranged for it to be tested for STDs, and subsequently reviewed the laboratory (lab) test results.

The lab report that the defendant reviewed included a guide for reading the test's results. The guide indicated that an HSV 2 IgG (herpes simplex virus type 2 specific antibody) result of less than 0.9 is negative for the

herpes simplex virus type 2 (herpes), a result between 0.9 and 1.1 is equivocal, and a result greater than 1.1 means that the sample tested positive for herpes. Smith's HSV 2 IgG test result was 4.43, significantly above the threshold for a positive herpes diagnosis.

The defendant delegated to a member of his staff the task of informing Smith of the results of his test. Even though the lab report clearly demonstrated a positive herpes diagnosis, the staff member incorrectly told Smith over the phone that his STD test results had come back negative.

The plaintiff's relationship with Smith subsequently became sexual. Thereafter, the plaintiff began to experience herpes outbreaks and was diagnosed with herpes. Upon learning of this, Smith contacted the defendant to inquire further about his test results. The defendant then informed Smith that he actually had tested positive for herpes and apologized for the error.

The plaintiff brought a one count action against the defendant, alleging that the defendant had been negligent in various respects. The defendant moved to strike the complaint on the basis that the plaintiff's claim sounded in medical malpractice and, therefore, must fail for lack of any physician-patient relationship between the plaintiff and the defendant. The defendant argued in the alternative that, even if the court construed the plaintiff's claim as sounding in ordinary negligence, the plaintiff and the defendant were not involved in any special relationship that would justify extending a duty of care to her.

The trial court granted the defendant's motion to strike. The court did not expressly resolve the issue of whether the plaintiff's claim sounds in ordinary negligence or medical malpractice, at once describing the plaintiff as "seeking to extend medical malpractice liability of a physician to the sexual partner of a patient" and referring to the defendant's "claimed negligence

. . . in reporting the test results." The analysis undertaken by the trial court, however, implies that it viewed the claim as sounding in ordinary negligence. Specifically, the court concluded that the claim was governed by our decision in *Jarmie* v. *Troncale*, 306 Conn. 578, 50 A.3d 802 (2012), and applied the framework that we set out in that case for determining whether a nonpatient may assert an ordinary negligence claim against a health care provider. See id., 591–99. Ultimately, the trial court concluded the defendant did not owe a duty of care to the plaintiff and, for that reason, granted the defendant's motion to strike. This appeal followed.[1]

I

As an initial matter, we must resolve a dispute between the parties as to the gravamen of the plaintiff's complaint. As an alternative ground for affirmance, the defendant contends on appeal, as he did before the trial court, that the plaintiff's one count complaint sounds in medical malpractice. In support of this conclusion, the defendant points to, among other things, the facts that (1) the plaintiff alleged that "[the defendant] had an obligation to perform the STD tests and [to] report the results accurately to . . . Smith according to accepted medical practice and standards," (2) the plaintiff further alleged that the defendant's "breach of accepted medical practice and standards" by failing to properly treat, test, monitor, and advise Smith, was the cause of her injuries, and (3) the plaintiff's counsel attached to the complaint a certificate, pursuant to General Statutes § 52-190a (a), averring that there were grounds for a good faith belief that the defendant had committed "medical negligence" in the "care or treatment" of Smith. Because a medical malpractice claim that fails to allege a physician-patient relationship

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

between a plaintiff and a defendant is legally insufficient; *Jarmie* v. *Troncale*, supra, 306 Conn. 588–89; and because it is undisputed that the plaintiff never was a patient of the defendant, the defendant contends that the trial court properly struck the complaint.

The plaintiff responds that, although she attached a certificate of good faith pursuant to § 52-190a (a) out of an abundance of caution, her complaint alleges ordinary, common-law negligence rather than medical malpractice. She notes that the single count complaint is titled simply "negligence," and it alleges that the plaintiff's "injuries were the result of the negligence and carelessness of the [defendant] . . . in [that he failed] to properly advise . . . Smith of his STD test results . . . ." At no point, moreover, does the complaint use the term "medical malpractice."

A

We begin our analysis by reiterating that, although the better practice may be to include a separate count of the complaint for each distinct theory of liability, there is no such requirement. Practice Book § 10-26 provides that, "[w]here separate and distinct causes of action, as distinguished from separate and distinct claims for relief founded on the same cause of action or transaction, are joined, the statement of the second shall be prefaced by the words Second Count, and so on for the others . . . ." (Emphasis omitted.) In construing an earlier version of this rule of practice, this court explained that it has "uniformly approved the use of a single count to set forth the basis of a plaintiff's claims for relief [when] they grow out of a single occurrence or transaction or closely related occurrences or transactions, and it does not matter that the claims for relief do not have the same legal basis. It is only when the causes of action, that is, the groups of facts [on] which the plaintiff bases his claims for relief, are sepa-

rate and distinct that separate counts are necessary or indeed ordinarily desirable." (Footnote omitted.) *Veits* v. *Hartford*, 134 Conn. 428, 438–39, 58 A.2d 389 (1948). That remains the rule in this state, and it has been applied with respect to a single count complaint alleging different theories of negligence. See *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 160, 129 A.3d 677 (2016) ("[e]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action" [internal quotation marks omitted]); *Beaudoin* v. *Town Oil Co.*, 207 Conn. 575, 588, 542 A.2d 1124 (1988) (restating rule as articulated in *Veits*); *Baldwin* v. *Jablecki*, 52 Conn. App. 379, 382, 726 A.2d 1164 (1999) (statutory and common-law negligence may be pleaded in single count). Indeed, in *Jarmie*, on which both parties rely, we treated the single count complaint as alleging both medical malpractice and common-law negligence when the pleadings were substantially similar to those at issue here. See *Jarmie* v. *Troncale*, supra, 306 Conn. 583–86; cf. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 463, 102 A.3d 32 (2014) (reference to violation of statutory duty did not transform count of complaint alleging common-law negligence into statutory claim).[2]

Accordingly, we may assume, for the sake of argument, that the defendant is correct that the complaint reasonably can be read to allege that he committed professional malpractice by failing to follow accepted medical standards in his advising, treatment, and ongoing testing and monitoring of Smith. The question that we must resolve is simply whether the complaint also alleges that the defendant committed ordinary com-

[2] We note that the defendant could have filed a request to revise; see Practice Book § 10-35; in order to separate out and separately address the plaintiff's medical malpractice and common-law negligence claims, but did not do so.

mon-law negligence by permitting or instructing his office staff to give Smith the wrong test results.[3]

B

The following well established principles guide our analysis. First, "[b]ecause a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016).

"In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our read-

[3] As we discuss in part II of this opinion, the plaintiff's allegations may fit most neatly under the rubric of negligent misrepresentation. Because neither party has addressed the issue, however, we need not determine whether the allegations in the complaint are legally sufficient to plead a cause of action in negligent misrepresentation under the law of this state.

ing of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Citation omitted; internal quotation marks omitted.) *ATC Partnership* v. *Windham*, 268 Conn. 463, 466 n.4, 845 A.2d 389 (2004).

Second, our courts have long recognized that a health care provider may commit ordinary negligence, as opposed to medical malpractice, in the course of treating a patient or providing medical services. See, e.g., *Multari* v. *Yale-New Haven Hospital, Inc.*, 145 Conn. App. 253, 260, 75 A.3d 733 (2013) ("The plaintiff has not alleged medical malpractice . . . but simply ordinary negligence against an entity that happens to be a medical provider. The fact that the defendant is a medical provider, does not, by itself, preclude a finding that the plaintiff's action sounds in ordinary negligence."); *Badrigian* v. *Elmcrest Psychiatric Institute, Inc.*, 6 Conn. App. 383, 385–86, 505 A.2d 741 (1986) (claim that defendant failed to supervise psychiatric patients in crossing highway sounded in ordinary negligence); see also *Jarmie* v. *Troncale*, supra, 306 Conn. 593 and n.5 (leaving open possibility of third-party negligence claims against health care providers).

To determine whether a claim against a health care provider sounds in ordinary negligence rather than (or in addition to) medical malpractice, we must "review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . .

[M]alpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 254, 811 A.2d 1266 (2002). ''[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard.'' (Internal quotation marks omitted.) Id., 254–55. Accordingly, a claim sounds in medical malpractice when ''(1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.'' (Internal quotation marks omitted.) Id., 254. In connection with an ordinary negligence claim, by contrast, the defendant's conduct is judged against the standard of ''what a reasonable person would have done under the circumstances . . . .'' *Considine* v. *Waterbury*, 279 Conn. 830, 859, 905 A.2d 70 (2006).

C

With these principles in mind, we consider the plaintiff's complaint. The relevant allegations of the complaint indicate that the defendant reviewed Smith's test results, notified a staff member of those results, and delegated to the staff member the task of informing Smith of the results. The complaint further alleges that the lab report contained a guide that made clear that Smith had tested positive for herpes. In addition, the complaint alleges that, although the test results were

positive, the staff member informed Smith that his results were negative. Finally, the plaintiff alleges that the defendant's negligence in failing to accurately advise Smith of his positive test results caused Smith to infect the plaintiff with herpes.

These allegations are consistent with two distinct theories of negligence. First, the defendant could have misread Smith's lab report and incorrectly concluded that the results were negative. Second, it is possible that the defendant interpreted the report correctly but that either the defendant misinformed his staff member that the results were negative or the staff member misinformed Smith. In other words, the alleged error could have occurred either in the initial interpretation of the report or in the inaccurate communication of the results, via the staff member, to Smith. See 2 Restatement (Second), Torts § 311 (2), p. 106 (1965) (negligence may consist of failure to exercise reasonable care in ascertaining accuracy of information or in manner in which information is communicated).

In either case, we agree with the plaintiff that her allegations reasonably can be understood to sound in ordinary negligence. It is true that the alleged error transpired in a medical setting and that it arose as a result of a medical diagnosis in the context of an ongoing physician-patient relationship. There are at least two reasons, however, why we nevertheless conclude that this aspect of the complaint need not be read to sound in medical malpractice.

First, the alleged error is not one involving professional medical judgment or skill. If the defendant misread Smith's lab result, then he failed to perform what was, in essence, a simple, ministerial task. The index to the report states that a result greater than 1.1 indicates a positive test, and the report states that Smith's result was 4.43. No advanced medical training was necessary

to determine that Smith had tested positive for herpes; elementary reading and arithmetic skills should have been sufficient. Indeed, laypeople routinely perform comparable tasks, such as reading and interpreting meat thermometers, oil dipsticks, pool and spa test strips, and insulin tests.

Of course, the same conclusion holds to an even greater extent if the genesis of the error was that the defendant simply told his staff member the wrong test result or the staff member relayed the wrong result to Smith. That sort of careless miscommunication could occur in any setting and has nothing to do with the exercise of professional medical judgment or skill. Indeed, the very fact that the defendant delegated the task to a staff member, who presumably was not a medical doctor, points to the nontechnical nature of the communication.

Second, regardless of whether the alleged error arose from a misreading or a miscommunication, proving that it constituted negligence would not require expert medical testimony or the establishment of a professional standard of care. A jury will not need expert testimony to determine whether the defendant's staff was negligent in leading Smith to believe that he was free of STDs when the defendant knew, or should have known, that Smith had tested positive for herpes, a contagious STD, and intended to engage in sexual activity. Such a determination is well within the ken of a lay person.[4]

[4] It is true that there are rare circumstances in which expert testimony may not be necessary to establish that medical malpractice has occurred, such as when a surgeon leaves a surgical implement inside a patient after completing an operation. Such gross negligence may be assessed by a jury without reference to the prevailing standard of professional care. See, e.g., *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 580, 113 A.3d 932 (2015). This is not such a case because, among other reasons, the alleged error did not involve a failure on the part of the defendant to exercise that degree of professional skill or judgment that a reasonably prudent health care provider would have exercised under the circumstances.

Accordingly, we conclude that, as in *Jarmie*, the plaintiff in this case pleaded a cause of action sounding in ordinary negligence. We therefore turn our attention to the plaintiff's claim that the defendant, in informing Smith of his test results, owed a common-law duty of care not only to Smith but also to the plaintiff, a non-patient.

II

Having concluded that the plaintiff's claim sounds in ordinary negligence, we now must determine whether, under the circumstances presented in this case, a physician owes a duty of care to an identifiable third party[5] who is not a patient. We conclude that a physician does owe such a duty.

A

We begin by setting forth the elements of a cause of action in ordinary negligence. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the [alleged tortfeasor] violated that duty in the particular situation at hand." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 589.

[5] It is not clear from the complaint whether Smith allegedly told the defendant the plaintiff's actual name or simply indicated that he had an exclusive girlfriend for whose benefit he was seeking STD testing. Our analysis would be the same regardless of whether the plaintiff was actually identified to the defendant by name or merely remained identifiable on the basis of Smith's description of her as his exclusive girlfriend.

"Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable, but the test is, would the ordinary [person] in the [alleged tortfeasor's] position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . .

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) Id., 590.

The default assumption of the common law, then, is that one owes a duty to exercise due care in one's affirmative conduct with respect to all people, insofar as one's negligent actions may foreseeably harm them. 3 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2007) § 18.6, p. 862. Under specific circumstances, however, the law, for reasons of public policy, places additional restrictions on the class of people to whom a duty of care is owed. See, e.g., id., § 18.3, p. 781. In most instances, for example, a physician's liability for

the negligent care and treatment of a patient does not extend to nonpatient third parties who have been foreseeably injured by that negligence. Id., § 18.5A, p. 852; see also *Jarmie* v. *Troncale*, supra, 306 Conn. 592–93. But see *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 568, 113 A.3d 932 (2015) (recognizing limited cause of action for bystander emotional distress resulting from medical malpractice); *Jarmie* v. *Troncale*, supra, 593 n.5 (declining to endorse per se rule barring third-party claims against health care providers). The present case requires us to further clarify the scope of this exception to the general duty rule.

B

With these principles in mind, we now turn our attention to the central question posed by the present appeal, namely, whether a health care provider who negligently misinforms a patient that he does not have an STD owes a duty of care to an identifiable third party who foreseeably[6] contracts the STD as a result of the provider's negligence. The defendant contends that various public policy considerations counsel against recognition of such a duty. Most notably, because a patient such as Smith could have been or become intimate with an unlimited number of romantic partners, there is no meaningful way to identify or restrict the number of individuals whom he might infect and, therefore, to limit the class of persons who could have standing to bring an action of this sort.

The defendant further contends that a number of public policy considerations and common-law traditions that are unique to the health care environment or, specifically, to the physician-patient relationship,

[6] The trial court determined, and we agree, that a jury reasonably could find that "it is foreseeable that a sexual partner of a patient who erroneously had been told that he did not suffer from any STDs might contract the STD with all of the health related consequences of such an illness."

counsel against recognizing a physician's duty to a nonpatient third party under the circumstances alleged in the present case. He argues that (1) the law generally does not impose on physicians a duty of care to nonpatient third parties, (2) the considerations underlying the adoption of Connecticut's medical malpractice statutes, General Statutes §§ 52-190a through 52-190c, disfavor the imposition of additional liability on physicians, (3) imposing on physicians duties to third parties risks interfering with and undermining the physician-patient relationship, and (4) considerations of confidentiality create both legal and logistical hurdles to the recognition of such duties. Finally, the defendant contends that the plaintiff could have taken various measures both to protect herself from contracting herpes—presumably sexual abstention or the use of prophylactics—and to establish proper standing to bring an action of this sort—such as accompanying Smith when he sought treatment from the defendant.

The trial court, in granting the defendant's motion to strike, was swayed by a number of these arguments. The court also discussed several additional concerns: whether physicians might become obligated to contact and warn or to educate patients' sexual partners; the fact that physicians have no control over whether and how patients share their STD test results with potential sexual partners; and whether the recognition of a duty to nonpatients should be predicated on the existence of a formal, mutual STD testing agreement between the patient and his or her prospective sexual partner. Although the defendant, certain of the amici,[7] and the trial court raise many valid concerns, for the reasons that follow, we are persuaded that they do not counsel

[7] We granted permission for the following groups to submit amicus briefs: the Connecticut Trial Lawyers Association, in support of the plaintiff; and the American Medical Association, the Connecticut Hospital Association, and the Connecticut State Medical Society, in support of the defendant.

against the recognition of a duty under the specific circumstances presented in this case.

1

Setting aside for the moment the question of what third-party duties apply within the distinct confines of the physician-patient relationship, we observe at the outset that many of the concerns that the defendant raises and that the trial court found persuasive have been addressed and resolved in other professional contexts. Although the plaintiff has not labeled it as such, her claim is, in essence, one for negligent misrepresentation. That tort specifically encompasses situations such as this, in which a tortfeasor negligently supplies misinformation knowing that the recipient of that information intends to supply it in turn for the benefit and guidance of a third party.

"This court has long recognized liability for negligent misrepresentation. We have held that even an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. . . . [When the information supplied is to be used in the furtherance of a business transaction and the alleged harm is solely pecuniary, the] governing principles are set forth in . . . § 552 of [Volume 3 of] the Restatement Second of Torts [1977]: One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance [on] the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (Citations omitted; internal quotation marks omitted.) *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 217–18, 520 A.2d 217 (1987). Recognizing the potentially limitless scope of the finan-

cial harms that may flow from the dissemination of false information, the Restatement (Second) restricts liability for negligent misrepresentation of this sort to the loss suffered "(a) by the person or one of a limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply it," and "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." 3 Restatement (Second), Torts § 552 (2) (a) and (b), p. 127 (1977); see also id., comment (a), pp. 127–28. In other words, the Restatement (Second) addresses the problem of potentially limitless third-party liability, first, by conferring standing on only those third parties to whom the defendant knew that the recipient intended to supply the information at issue and, second, by restricting liability to losses arising from transactions for the purpose of which the information was supplied.

Defined and cabined in this manner, liability for negligent misinformation has been upheld in various contexts in which a professional is hired to supply information to a client, knowing that the client is obtaining the information at least in part for the benefit and guidance of some third party or parties. Although we have not definitively resolved whether an accountant or an auditor may be liable for negligent misrepresentation to a nonclient third party; see *Stuart* v. *Freiberg*, 316 Conn. 809, 816–17, 831–32 n.17, 116 A.3d 1195 (2015) (deeming it unnecessary to determine whether liability could be imposed and leaving question open); a number of other courts have held that such professionals can be held liable under the approach set forth in § 552 of the Restatement (Second) of Torts. See, e.g., *Ellis* v. *Grant Thornton LLP*, 530 F.3d 280, 288–89 (4th Cir.) (applying West Virginia law), cert. denied, 555 U.S. 1049, 129 S. Ct. 652, 172 L. Ed. 2d 614 (2008); *North American*

Specialty Ins. Co. v. *Lapalme*, 258 F.3d 35, 38–40 (1st Cir. 2001) (applying Massachusetts law); see also *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 836 (7th Cir. 2007) (applying similar Illinois rule).

A growing number of courts also have dispensed with the traditional privity requirement and have imposed liability on attorneys with respect to transactions in which the attorney's opinion is solicited for the benefit of an identifiable third party. See generally B. Walker, Note, "Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity," 21 Washburn L.J. 48 (1981) (noting modern trend toward imposing liability and discussing cases). Although courts following the modern approach to professional negligent misinformation claims have not been oblivious to the concerns raised by the defendant and certain of the amici—the potential for limitless third-party liability, interference with the professional-client relationship, and the undue burdening of the professional practice—they have concluded that limiting liability to circumstances in which professional services are sought for the specific benefit of *identifiable* third parties adequately addresses any concerns centering around both foreseeability and professionalism. See id., 65–66; see also *North American Specialty Ins. Co.* v. *Lapalme*, supra, 258 F.3d 40; *Pelham* v. *Griesheimer*, 92 Ill. 2d 13, 20–21, 440 N.E.2d 96 (1982).[8]

Moreover, as we discuss more fully in part II B 4 of this opinion, the Restatement (Second) of Torts recog-

[8] We emphasize that the question of negligent misrepresentation is not before us, and we express no opinion as to whether Connecticut law recognizes a third-party cause of action in negligent misrepresentation against attorneys, accountants, auditors, or medical professionals. See footnote 3 of this opinion. Our point is simply that the concerns that the defendant and the dissent raise regarding potentially limitless liability are the same concerns that have been raised, and satisfactorily addressed, in various professional contexts across many jurisdictions.

nized that there is even less need to cabin potential third-party liability for negligent misrepresentation in cases such as this, in which the misinformation was not supplied for the recipient's financial benefit and the third-party plaintiff suffered physical as well as pecuniary injuries. Under those circumstances, the Restatement (Second) advises that "[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . (b) to such third persons as the actor should expect to be put in peril by the action taken." 2 Restatement (Second), supra, § 311 (1) (b), p. 106. Similar principles underlie § 324A, which provides that "[o]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or . . . (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Id., § 324A (a) and (c), p. 142.

2

Turning to the specific question of what duties, if any, a medical professional owes to a nonpatient third party, we begin by reviewing Connecticut precedent. The parties agree that *Jarmie* v. *Troncale*, supra, 306 Conn. 578, is the seminal Connecticut case on the subject, but they disagree as to how the present case should be resolved under *Jarmie*.[9] We conclude that, although *Jarmie* helps to guide our analysis, whether a physician owes a duty of care to a patient's intimate partner to

[9] Neither party advocates that we overrule or reconsider *Jarmie*.

accurately report that patient's STD test results remains a question of first impression in Connecticut.

In *Jarmie*, the defendant physician diagnosed and treated a patient for various liver and kidney ailments, including hepatic encephalopathy but failed to warn her of the latent driving impairment associated with her condition. Id., 581. After leaving the physician's office, the patient lost consciousness while operating her motor vehicle and struck the plaintiff. Id. The trial court granted the defendant's motion to strike the plaintiff's complaint in his subsequent negligence action against the physician, concluding that physicians owe no common-law duty to protect third parties from injuries caused by patients. Id., 582.

On appeal, we began by emphasizing that there is no common-law or statutory rule against nonpatients bringing ordinary negligence claims against physicians. Id., 586. We recognized, however, that our cases display a general aversion to extending a physician's duty of care to nonpatients. See id., 592. That aversion is rooted in the principles of tort reform underlying § 52-190a, as well as the common-law rule that, in the absence of a special relationship, there is no duty to protect a third person from the conduct of another. Id. We further explained that "[t]here is no well established common-law rule that a physician owes a duty to warn or advise a patient for the benefit of another person." Id. Nevertheless, we emphasized that we have not "employed or endorsed a per se rule that [third-party] claims [against health care providers] are categorically barred because of the absence of a physician-patient relationship but, rather . . . this court has exercised restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients." (Internal quotation marks omitted.) Id., 593–94 n.5. In addition, we distinguished cases from other jurisdictions that had imposed third-party liability on a physi-

cian by remarking that those cases, unlike *Jarmie*, involved a physician who had "failed to warn the patient that he or she either had a communicable disease or had been exposed to one." Id., 616. Accordingly, we left open the possibility that, under appropriate circumstances, and in particular with respect to the diagnosis of communicable diseases, a physician's common-law duty of care may extend to nonpatients.[10]

In the parts of this opinion that follow, we will discuss and apply the various factors and considerations that we deemed to be relevant to the duty analysis in *Jarmie*. For now, we emphasize two points. First, a principal reason that we affirmed the judgment of the trial court in *Jarmie* and declined to recognize that the defendant physician owed a duty to the plaintiff motorist was because the plaintiff was not an *identifiable* victim at the time that medical services were provided. Id., 590–91, 603. Rather, "potential victims of [the physician's] alleged negligence included any random pedestrian, driver, vehicular passenger or other person who hap-

[10] The dissent, while conceding that this remains an open question under *Jarmie*, fails to note that, in *Jarmie*, we specifically distinguished cases from other jurisdictions that imposed third-party liability on physicians in the context of failing to warn about communicable diseases. Indeed, aside from one brief footnote, the dissent, which quotes heavily from *Jarmie*, barely acknowledges that the present case raises a fundamentally different question—the third-party liability of a medical professional with respect to the misreporting of a sexually transmitted disease—than that at issue in *Jarmie* or any of our previous cases.

As we explain more fully hereinafter, it is beyond cavil that both the law and the medical profession impose broader and different duties on physicians, duties that extend beyond the confines of the physician-patient relationship, with respect to the diagnosis of STDs and other infectious diseases. Of course, it is not unreasonable to take the position, as the dissent has, that, for reasons of public policy, we never should impose on physicians any duties beyond those established by the legislature. We think it would be a mistake, however, for this court to simply conclude that *Jarmie* disposes of the issue presented in this case without carefully evaluating the fundamentally distinct considerations that characterize the context of communicable diseases.

pened to come in close proximity to a motor vehicle operated by [the patient] following her diagnosis." Id., 597.

We explained that, in previous cases, we had "limited foreseeable victims of a health care provider's negligence to identifiable persons . . . ." Id., 594; see id., 596 ("the foreseeability test as applied by this court in the context of health care providers has . . . required an identifiable victim because we have deemed the effect of a physician's conduct on third parties as too attenuated"); see also *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 96–97, 735 A.2d 347 (1999) (psychiatrist owed no duty to patient's ex-spouse, who was not identifiable victim); *Fraser* v. *United States*, 236 Conn. 625, 632, 674 A.2d 811 (1996) (psychotherapist owed no duty to victim because "our decisions defining negligence do not impose a duty to those who are not identifiable victims [and] . . . in related areas of our common law, we have concluded that there is no duty except to identifiable persons").

In the present case, by contrast, the plaintiff has alleged that "Smith told [the defendant] that he was seeking STD testing not only for his benefit, but for the protection and benefit of his new, exclusive girlfriend, [the] plaintiff." Construing this pleading in the light most favorable to sustaining the sufficiency of the complaint, we must conclude that the plaintiff was an identifiable, if not identified, potential victim of the defendant's alleged negligence at the time that treatment was rendered.[11] That is to say, only one woman could have

[11] We recognize that there could be cases in which a dispute arises over whether the plaintiff is in fact the individual who was identifiable as a potential victim prior to the occurrence of negligence—if, for example, the defendant had argued that the plaintiff was not in fact the exclusive girlfriend of whom he was made aware when Smith sought STD testing. Because the defendant has not made that argument in the present case, for present purposes, the identity of the plaintiff as the identifiable victim is not in question. If it were, the question of identity would, of course, be a question of fact for the fact finder.

fit the description of Smith's exclusive girlfriend, and Smith presumably could have identified her by name if he had been asked to do so. See *Jarmie* v. *Troncale*, supra, 306 Conn. 597–98 (identifiable victim is one whom it was possible to identify before negligent act occurred).

This identifiable victim requirement strikes an equitable balance between the interests at stake. Although a health care provider's liability may expand beyond his or her patients, its increased scope would encompass only those third-party victims of whose existence and potential exposure to harm the health care provider had been made aware—or could have become aware—prior to the negligent act.[12]

Second, since we decided *Jarmie*, we have held that, under limited circumstances, a health care provider is liable to third parties for professional negligence, albeit in the context of a bystander emotional distress claim. In *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 558, we concluded that "a bystander to medical malpractice may bring a claim for the resulting emotional distress . . . when the injuries result from gross negligence such that it would be readily apparent to a lay observer." Id., 560. In so holding, we relied on "our recent statement in *Jarmie* . . . eschewing any per se rule that [third-party tort] claims are categorically barred because of the absence of a physician-patient relationship . . . ."[13] (Citation omitted; internal quotation marks omitted.) Id., 574.

[12] In *Jarmie*, we also relied on the fact that the defendant physician had not undertaken any affirmative action that placed the plaintiff at risk. *Jarmie* v. *Troncale*, supra, 306 Conn. 624. In the present case, however, the plaintiff has alleged that the defendant affirmatively informed Smith that he was free of STDs, knowing that she might become intimate with Smith in reliance on that information.

[13] We are not persuaded by the efforts of the dissent to distinguish *Squeo*. The dissent contends that *Squeo* is different because the claim in that case sounded in medical malpractice rather than ordinary negligence. See footnote 2 of the dissenting opinion. This argument proves too much.

Accordingly, we find Connecticut precedent to be unsettled with respect to the particular question presented here. Although we never have been confronted with the question of a physician's duty to a third party with respect to the reporting of STD test results, and although we consistently have expressed a general aversion to extending the duty of health care providers to third parties, we have allowed, under limited circumstances, for the imposition of liability to an identifiable potential victim who will be foreseeably harmed by a physician's negligence.

3

In *Jarmie*, after we concluded that Connecticut precedent did not bar the imposition of the duty at issue, we proceeded to look to sister state authority and also to consider whether various policy factors favored the imposition of such a duty. *Jarmie* v. *Troncale*, supra, 306 Conn. 598–624. In this part of the opinion, we review how other jurisdictions have resolved similar cases. In part II B 4, we analyze the various policies at issue.

The entire dissent is predicated on the concern that any recognition that physicians have duties to third parties will compromise the sanctity of the physician-patient relationship, jeopardize the confidentiality of patient records, promote unnecessary defensive medicine, and bring about higher insurance rates and health care costs, driving doctors out of practice and adversely affecting patient care. As we have explained, however; see part I B of this opinion; medical malpractice claims are those that go to the core of the physician-patient relationship: physicians are sued in their capacities as medical professionals, on the basis of the specialized medical care of a patient, involving the exercise of medical judgment. If nonpatient third parties can have standing to prosecute claims of *that* sort, as *Squeo* says they can, then, a fortiori, allowing them to bring claims sounding in ordinary negligence need not intrude on the sanctity of the physician-patient relationship. And, if our decision in *Squeo* has not resulted in the parade of horribles that the dissent invokes (and which are, in essence, the very same horribles that the defendants and certain of the amici in *Squeo* invoked); see *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 575–77; then we can have some reassurance that the alarmist warnings in the present case will be no more prescient.

A number of other jurisdictions have held that, under certain circumstances, the duty of a medical professional to correctly diagnose and advise a patient who suffers from a communicable disease extends not only to the patient but also to third parties who may foreseeably contract that disease from the patient. See 61 Am. Jur. 2d 382, Physicians, Surgeons and Other Healers § 226 (2012) ("[a] physician is liable for his or her negligence in permitting persons to be exposed to infectious or communicable diseases to the injury of the persons so exposed"); see also L. Gostin & J. Hodge, "Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification," 5 Duke J. Gender L. & Policy 9, 37 (1998); T. Bateman, annot., "Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient, 3 A.L.R.5th 370, 377–79, § 2 [a] (1992); G. Sarno, "Physician's Failure To Protect Third Party from Harm by Nonpsychiatric Patient," 43 Am. Jur. Proof of Facts 2d 657, 670–72, § 3 (1985). Many such courts, for example, have long held that physicians and other health care providers charged with diagnosing, treating, and controlling the spread of contagious diseases owe a duty of care to members of the immediate family of an infected patient. See, e.g., *Bolieu* v. *Sisters of Providence in Washington*, 953 P.2d 1233, 1239 (Alaska 1998); *Hofmann* v. *Blackmon*, 241 So. 2d 752, 753 (Fla. App. 1970), cert. denied, 245 So. 2d 257 (Fla. 1971); *Shepard* v. *Redford Community Hospital*, 151 Mich. App. 242, 245–46, 390 N.W.2d 239 (1986), appeal denied, 431 Mich. 872, 430 N.W.2d 458 (1988); *Skillings* v. *Allen*, 143 Minn. 323, 326, 173 N.W. 663 (1919); *Wojcik* v. *Aluminum Co. of America*, 18 Misc. 2d 740, 746–47, 183 N.Y.S.2d 351 (1959).[14] In some of these cases, the court held that the

[14] One sister state court also has recognized a third-party duty to the spouse of a hospital employee who was not informed that he had been exposed to the human immunodeficiency virus (HIV), an STD, in the line of work. See *Vallery* v. *Southern Baptist Hospital*, 630 So. 2d 861, 862,

provider had an affirmative duty to notify or educate the third party, whereas, in other cases, the court simply held that a third party had standing to enforce the provider's duty to properly diagnose, treat, and educate the infected patient.

Although appellate cases addressing a physician's duties to a patient's premarital sexual partners are few and far between, the plaintiff and certain of the amici have identified several cases that permit an action to be brought either by a victim who was identifiable at the time of treatment or by any member of the class of persons who foreseeably could contract an STD from the patient as a result of the physician's negligence. See, e.g., *Reisner* v. *Regents of the University of California*, 31 Cal. App. 4th 1195, 1200–1201, 37 Cal. Rptr. 2d 518 (1995) (physician had duty to advise patient that he tested positive for human immunodeficiency virus (HIV) for benefit of unknown and unidentifiable but foreseeable sexual partners), review denied, California Supreme Court, Docket No. S045274 (May 18, 1995); *C.W.* v. *Cooper Health System*, 388 N.J. Super. 42, 60–62, 906 A.2d 440 (App. Div. 2006) (health care provider owed duty to inform patient of positive HIV test results and that duty extended to persons "within the class of reasonably foreseeable individuals whose health [was] likely to be threatened by the patient's ignorance of his own health status," including patient's future sexual partner); *DiMarco* v. *Lynch Homes-Chester County, Inc.*, 525 Pa. 558, 563–64, 583 A.2d 422 (1990) (when boyfriend of blood technician who acquired hepatitis B from accidental exposure was member of class of persons whose health was likely to be threatened by

868–69 (La. App. 1993), cert. denied, 634 So. 2d 860 (La. 1994). But see *Doe* v. *Pharmacia & Upjohn Co.*, 388 Md. 407, 409–10, 879 A.2d 1088 (2005) (company that cultivated and harvested HIV cultures for incorporation into test for HIV antibodies owed no duty of care to spouse of employee who tested positive for HIV following workplace exposure).

exposure to such communicable disease, and her physicians gave erroneous advice to her regarding potential spread of that disease, boyfriend had cause of action against physicians); *Estate of Amos* v. *Vanderbilt University*, 62 S.W.3d 133, 138 (Tenn. 2001) (future husband and daughter of patient who was not informed that she was at risk of contracting HIV deemed members of identifiable class for purposes of hospital's third-party liability).

The defendant attempts to distinguish these cases on the ground that the plaintiff, unlike the sexual partners at issue in the cited cases, could have accompanied Smith when he sought STD testing and thus established a quasipatient relationship with the defendant sufficient to support a legal duty of care. We are not persuaded by this contention. First, the defendant provides no authority to support his theory that either the law or the medical profession confers a special status on a nonspouse sexual partner who accompanies a patient to his or her appointment with a physician and that that status is sufficient to support a legal duty of care. Second, it may well be that the defendant's suggested approach would interfere more directly with the physician-patient relationship and raise more substantial confidentiality concerns than would the imposition of the third-party duty of care for which the plaintiff advocates.

The defendant also notes that many of these cases involve potentially deadly diseases such as HIV that are more serious than herpes. We agree with the Alaska Supreme Court, however, that "the duty issue cannot turn on possible distinctions among diseases based on their severity and ubiquity. . . . Rather, the severity and ubiquity of the disease bear on what the [provider] must do to discharge the duty." *Bolieu* v. *Sisters of Providence in Washington*, supra, 953 P.2d 1240.

A Florida case, *Hawkins* v. *Pizarro*, 713 So. 2d 1036 (Fla. App.) review denied, 728 So. 2d 202 (Fla. 1998),

provides an instructive contrast. In that case, a patient tested positive for hepatitis C, but her physician's office improperly advised her that she had tested negative. Id., 1037. Several months later, the patient met the plaintiff, whom she eventually married. Id. The plaintiff contracted hepatitis C from the patient and filed an action against the physician for medical negligence. Id. In upholding the trial court's granting of summary judgment in favor of the defendant, the District Court of Appeal of Florida recognized that hepatitis C is a highly contagious sexually transmitted disease and that a physician's duty of care in treating such diseases is intended in part for the benefit of third parties. Id., 1037–38. The court held that the physician owed no duty to the plaintiff, however, because he was neither identified nor known to the physician at the time of the incorrect diagnosis. Id., 1038. By contrast, our research has not revealed any cases in which a court held that there was no third-party liability under circumstances such as those in the present case, in which STD testing was obtained expressly for the benefit of an identifiable, exclusive romantic partner. But cf. *D'Amico* v. *Delliquadri*, 114 Ohio App. 3d 579, 583, 683 N.E.2d 814 (1996) (plaintiff conceded that, under Ohio law, defendant physician owed her no direct duty to properly warn and advise his patient, plaintiff's boyfriend, as to communicability of genital warts).[15]

[15] Most of the cases on which the dissent relies address unrelated questions, such as whether a physician has a duty to third parties to properly advise a patient as to his or her fertility status or potential to infect caregivers. See, e.g., *Dehn* v. *Edgecombe*, 384 Md. 606, 616, 865 A.2d 603 (2005); *Candelario* v. *Teperman*, 15 App. Div. 3d 204, 204–205, 789 N.Y.S.2d 133 (2005). The dissent also relies on *Hawkins*, which, as we have explained, is wholly consistent with the rule that we announce today. Indeed, the court in *Hawkins* concluded that a physician's duty to accurately report the results of an STD test does run to identified third parties whose existence is known to the physician and who will foreseeably be infected as a result of the inaccurate report, precisely because the duty is intended in part for the benefit of those parties. See *Hawkins* v. *Pizarro*, supra, 713 So. 2d 1037–38.

Beyond sister state authority, we further note that the Restatement (Second) of Torts appears to support the imposition of liability in a case such as this. As we previously discussed, § 311 of the Restatement (Second) provides that one who negligently gives false information may be held liable to a third party who predictably is injured by the recipient's reasonable reliance on that information. Notably, comment (b) to that section holds up the physician-patient relationship as the primary illustration of the rule: "The rule stated in this [s]ection finds particular application where it is part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient *or others*, as it is to make a correct diagnosis or to prescribe the appropriate medicine." (Emphasis added.) 2 Restatement (Second), supra, § 311, comment (b), p. 106. Accordingly, we conclude that sister state and secondary authorities, although limited, generally support the imposition of a third-party duty under the circumstances alleged in the present case. As we discuss in part II B 5 of this opinion, sister state courts generally have not been swayed by the various practical concerns that the defendant and certain of the amici have raised and that the trial court found to be compelling.

4

Next, because the question presented is one of first impression in Connecticut, we consider various public policy factors that both this court and other authorities have deemed to be relevant to whether and under what circumstances a physician owes a duty of care to a nonpatient third party. On balance, we conclude that those factors support the imposition of a third-party

duty of care under the circumstances of the present case.

In *Jarmie*, we identified the following factors, among others, as being relevant to the question of what duty of care a physician owes to nonpatient third parties: the purposes of the tort compensation system, including efficiency, harm avoidance, and the appropriate distribution of loss; *Jarmie* v. *Troncale*, supra, 306 Conn. 599–602; the normal expectations of the participants in the activity under review and the public policy of encouraging participation in the activity, including the sanctity of the physician-patient relationship; id., 603–14; and the purposes that underlie Connecticut's medical malpractice statute, § 52-190a, including the avoid-ance of increased litigation and higher health care costs. Id., 592–93, 603, 614–15. When addressing third-party liability in the context of infectious diseases in particular, courts also have taken into account such considerations as "the foreseeability of third-party injury as shown by the patient's [infectious disease] carrier status, the degree of communicability of the patient's infectious disease, and the physician's actual or constructive knowledge of the ease of transmission of the patient's infectious disease; a public health statute [the] legislative intent [of which] is partly to protect third parties, such as a statute requiring physicians to report diagnosed instances of communicable or infectious diseases; breach of the physician's duty to exercise due care to protect third parties from foreseeable harm as shown by failure to report diagnosed instances of communicable or infectious diseases to public health authorities, failure to warn the patient with the infectious disease not to have contact with third parties, failure to warn the family of the patient with the infectious disease about the ease of, and precautions against, its transmission, failure to quarantine the patient with the infectious disease, failure to vaccinate the patient's

family [members] against the infectious disease, conveyance of an affirmative indication that contact with the infected patient is not risky, and failure to take other reasonable measures to prevent exposure to the patient with the communicable disease; additional indicia of negligence, including failure to use standard available tests for diagnosing a patient's infectious disease, failure to interpret diagnostic test results correctly, and failure to diagnose the patient's infectious disease; and harm to a third-party plaintiff as shown by the third party's illness from exposure to the physician's infectious patient." T. Bateman, supra, 3 A.L.R.5th 379, § 2 [b].

a

For purposes of the present appeal, two of these factors, or sets of factors, are especially pertinent to our analysis. First, although we continue to recognize the sanctity of the physician-patient relationship and the need to exercise "restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients"; *Jarmie* v. *Troncale*, supra, 306 Conn. 592; we also recognize that such concerns are at their nadir, and a physician's broader public health obligations are at their zenith, with respect to the diagnosis and treatment of infectious diseases.

Throughout history, both medical organizations and government entities have recognized not only the critical role that physicians play in combatting the spread of contagious diseases such as STDs, but also the concomitant fact that, in diagnosing and treating such diseases, a physician's duties and loyalties necessarily must be divided between the patient and other people whom the patient may infect. See generally L. Gostin & J. Hodge, supra, 5 Duke J. Gender L. & Policy 9. For example, "one of the earliest recorded public health strategies for STD prevention was to pierce the veil of

secrecy surrounding these hidden diseases by notifying sexual partners . . . of infected patients . . . .'' Id., 11. ''Often known collectively as the 'duty to warn,' these [judicially imposed, common-law] obligations subsequently have been codified by many state legislatures.'' Id., 12. For example, partner notification measures were broadly implemented during the 1930s in an effort to control and eradicate the syphilis epidemic. Id., 21. Many states continue to operate provider based partner referral programs under which health care providers are responsible for contacting, on a confidential basis, the sexual partners of patients diagnosed with various STDs. See id., 27–32.

Indeed, even the American Medical Association (AMA), one of the amici supporting the defendant's position, which argues against the imposition of a third-party duty under these circumstances, has recognized that, ''[a]lthough physicians' primary ethical obligation is to their individual patients''; American Medical Association, Code of Medical Ethics (2017) opinion 8.4, p. 128; they also have a responsibility ''to protect and promote the health of the public.'' Id., opinion 8.1, p. 125. ''[P]hysicians must balance dual responsibilities to promote the welfare and confidentiality of the individual patient and to protect public safety.'' Id., opinion 8.2, p. 126. The AMA has further observed that a physician's ''long-recognized'' professional responsibilities to nonpatients are especially pronounced in the context of infectious disease, for which professional standards of care demand that a physician not only treat his or her own patients competently, but also go so far as to ''[p]articipate in implementing scientifically and ethically sound quarantine and isolation measures in keeping with the duty to provide care in epidemics.'' Id., opinion 8.4, p. 128.

As we noted, the principle that a physician's duty to protect the broader public health and to help to deter

the spread of contagious diseases at times transcends the physician's duty to his or her individual patient has long been codified in federal and state law. See, e.g., L. Gostin & J. Hodge, supra, 5 Duke J. Gender L. & Policy 58. Connecticut is no exception in this respect. Our legislature has, for example, enacted laws that require physicians to test pregnant patients for syphilis and HIV; General Statutes § 19a-90; require health care providers to report certain communicable diseases to local and state public health officials; General Statutes § 19a-215; and permit physicians to warn, or to disclose confidential patient information for the purpose of warning, a known partner of a patient who has been diagnosed with an HIV infection or related disease. General Statutes § 19a-584 (b).

Perhaps most notably, since 2006, both the United States Centers for Disease Control and Prevention (CDC) and the AMA have approved the use of so-called expedited partner therapy programs to combat the spread of STDs.[16] Expedited partner therapy "is the delivery of medications or prescriptions by persons infected with an STD to their sex partners without clinical assessment of the partners"; in accordance with this protocol, "[c]linicians . . . provide patients with sufficient medications directly or via prescription for the patients and their partners."[17] The AMA has authorized the use of expedited partner therapy even though that approach to treating STDs "potentially abrogates the standard informed consent process, compromises continuity of care for patients' partners, encroaches [on] the privacy of patients and their partners, increases the possibility of harm by a medical or allergic reaction, leaves other diseases or complications undiagnosed,

[16] American Bar Association, Recommendation (August 11–12, 2008) p. 2, available at https://www.cdc.gov/std/ept/onehundredsixteena.authcheckdam.pdf (last visited July 5, 2019).

[17] American Bar Association, Recommendation (August 11–12, 2008) p. 2, available at https://www.cdc.gov/std/ept/onehundredsixteena.authcheckdam.pdf (last visited July 5, 2019).

and may violate state practice laws.'' American Medical Association, supra, opinion 8.9, p. 132. In other words, the medical profession has formed the judgment that the need to stem the spread of STDs is so great, and the traditional physician-patient model so inadequate therefor, that an exception to the prevailing standard of care should be drawn so that physicians can provide treatment to third parties who are not their patients. Our legislature has embraced this novel approach, allowing practitioners to dispense oral antibiotic drugs to the sexual partners of patients who have been diagnosed with chlamydia or gonorrhea, two kinds of STDs, without first physically examining the partners. See General Statutes § 20-14e (e).

We recognize that none of these laws directly applies to herpes. This presumably reflects in part the fact that that disease is not curable at present, and, thus, the sexual partners of patients infected with herpes would not be candidates for programs such as expedited partner therapy. At the same time, the fact that herpes is incurable highlights the extent to which a physician's duties in a case such as this run to third parties as well as to the patient, as it will be the patient's potential sexual partners who are the most direct beneficiaries of the diagnosis.[18]

Perhaps more than in any other field of medicine, then, the duty of care that a physician owes to his or her patient in the diagnosis and treatment of infectious and sexually transmitted diseases also, necessarily,

[18] We emphasize that our recognition of a third-party duty in the present case is grounded in the unique characteristics of STDs in general and herpes in particular. Specifically, one—if not the primary—reason that patients seek to be tested for diseases such as herpes is to be able to represent to a potential sexual partner that they are disease free. Accordingly, the dissent's fear that physicians will be liable to third parties for the improper diagnosis of conditions such as chicken pox, influenza, or the measles is unfounded. See footnote 9 of the dissenting opinion.

entails some duty to third parties who are likely to contract the disease from the patient. As the Supreme Court of Pennsylvania explained, "[c]ommunicable diseases are so named because they are readily spread from person to person. Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be taken to prevent the infection of others. The patient must be advised to take certain sanitary measures, or to remain quarantined for a period of time, or to practice sexual abstinence or what is commonly referred to as safe sex." (Internal quotation marks omitted.) *DiMarco* v. *Lynch Homes-Chester County, Inc.*, supra, 525 Pa. 562. The court continued: "Such precautions are taken not to protect the health of the patient, whose well-being has already been compromised, [but] rather such precautions are taken to safeguard the health of others." (Emphasis omitted.) Id.; cf. *Davis* v. *Rodman*, 147 Ark. 385, 391–92, 227 S.W. 612 (1921) ("[o]n account of his scientific knowledge and his peculiar relation, an attending physician is, in a certain sense, in custody of a patient afflicted with [an] infectious or contagious disease"); V. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials (11th Ed. 2005) p. 432 (custody of persons with contagious diseases may give rise to singular duty to control conduct of other person).

At the same time, we perceive little risk that imposing a third-party duty under these circumstances would interfere with the physician-patient relationship, breach patient confidentiality, or require the practice of costly defensive medicine. See, e.g., *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1203. Although the plaintiff contends that the defendant owed her a duty of care as an identifiable potential victim who foreseeably would rely on the accuracy of his diagnosis, her argument is that that duty would have been

fully satisfied if the defendant simply had provided the accurate test results to Smith, his patient. In other words, the defendant was under no obligation to contact the plaintiff, to otherwise ensure that she was made aware of Smith's test results, or to do anything other than fulfill his undisputed professional obligation to accurately convey his patient's test results to the patient himself.[19] The concerns of the dissent that our decision in this case will somehow result in the disclosure of confidential medical information are, therefore, wholly unfounded.

In conclusion, we think that it is beyond cavil that physicians such as the defendant owe some duty of care to third parties when diagnosing and treating a patient who suffers from an STD. We do not believe that imposing the duty for which the plaintiff advocates would intrude on the sanctity of the physician-patient relationship. Indeed, the duty at issue here—simply to accurately relay the patient's test results to the patient—is far more limited and less intrusive than the public health reporting and partner notification requirements that have been imposed on physicians in the context of diagnosing and treating infectious diseases.

b

The second set of factors that governs our analysis relates to the purposes of the tort compensation system.

[19] The dissent's position appears to be that, if the defendant's duty to the plaintiff is no more than the duty he owes to Smith to accurately report the test results, then holding the defendant liable to the plaintiff as well as Smith "would not reduce the potential for harm because health care providers would be required to do no more than they already must do to fulfill their duty to patients." (Internal quotation marks omitted.) Setting aside the fact that increasing a physician's potential liability will presumably increase his or her incentive to avoid negligent errors of the type alleged, the present case is readily distinguishable from *Jarmie*, from which the dissent draws the quoted language. In the present case, unlike in *Jarmie*, which involved an automobile accident caused by the defendant physician's patient, Smith himself is unlikely to have any cause of action against the defendant, insofar as there is no indication that he suffered legally cognizable damages. Accord-

"[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . . It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. . . . [Of course] [i]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent [on] us to consider those risks." (Citations omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 599–600. In the present case, these factors also weigh strongly in favor of imposing a duty on health care providers to identifiable and foreseeable third-party victims such as the plaintiff.

First, we observe that, if the defendant is not held liable to the plaintiff under these circumstances, then, in all likelihood, she will be without remedy or compensation for her injuries. It is doubtful, for example, that the plaintiff could recover in negligence from Smith, who acted responsibly in seeking regular STD testing and did not have sexual contact with her until he was possessed of a reasonable, good faith belief that he was free of STDs.

The trial court, while recognizing "the absence of any other source of compensation for the [plaintiff's] harm," apparently concluded that this factor was mitigated by (1) the fact that "the cost of medical treatment likely

ingly, the defendant will face potential liability only to an identifiable third-party victim such as the plaintiff.

would be covered by health insurance," and (2) the plaintiff's ability to engage in "self-protective measures . . . ." The dissent also is of the view that the plaintiff is not without recourse because she "may well be covered by public or private health insurance policies . . . ."

There is nothing in the record to support the pure speculation that the plaintiff had, or will continue to have, adequate health insurance.[20] Nor do we think it is appropriate to expect ordinary health insurance policies, or taxpayers, to bear the costs of a physician's negligence. Medical malpractice policies exist to spread such costs.

In any event, the availability of insurance will be of little consolation to the plaintiff, insofar as genital herpes is presently an incurable disease. E.g., E. Moore, Encyclopedia of Sexually Transmitted Diseases (2005) p. 135; Mosby's Medical Dictionary (8th Ed. 2009) p. 872. We must assume that, for the remainder of her life, the plaintiff will suffer periodic outbreaks of painful blisters or ulcers associated with the virus. See, e.g., E. Moore, supra, pp. 132–33. Her desirability as a potential romantic partner may be diminished. And, if she should become pregnant, she will have to contend with the risk that she may transmit the virus to her newborn child. See, e.g., id., p. 135. Some of these injuries will not be covered—or may not be adequately covered—by medical insurance, and we ought not pretend otherwise. Only the defendant can compensate the plaintiff for these losses.

With respect to "self-protective measures," we presume that the trial court was referring to the fact that,

[20] We note that "[m]any people in Connecticut are currently without health insurance, usually because they think they [cannot] afford it, are unemployed or are at higher risk due to [preexisting] conditions." Insurance for the Uninsured, available at http://www.cthealthchannel.org/individuals/group-health-insurance/insurance-for-the-uninsured/ (last visited July 5, 2019).

notwithstanding Smith's apparently negative STD test results, the plaintiff could have further reduced the risk that she would contract an STD either by using prophylactics or abstaining from intercourse with Smith altogether. Even if we were to assume, for the sake of argument, that it would be reasonable and right to expect couples, such as the plaintiff and Smith, to abstain from sexual intimacy, or to consistently practice safe sex while dating, that would only push back the problem. At some point, their relationship could have progressed to a point at which they would have married and consummated their union. At that point, a wedding band would not have been proof against the defendant's negligence. See *Hawkins* v. *Pizarro*, supra, 713 So. 2d 1037 (STD was misdiagnosed prior to courtship, and sexual partner was diagnosed after marriage).

Second, the flip side of the coin is that, if the plaintiff cannot hold the defendant responsible for his alleged negligence, then errors of this sort will go unadmonished. Patients such as Smith are unlikely to have incurred any legally cognizable damages as a result of an incorrect test report and, therefore, may be unable to recover from a defendant physician. We recognize that not every wrong is compensable in tort and that losses, even unjust losses, sometimes must be allowed to lie where fate has cast them. See *Jarmie* v. *Troncale*, supra, 306 Conn. 599. Under these circumstances, however, imposing third-party liability would play an important role in spurring physicians such as the defendant to take greater care in reporting STD lab results. As the California Court of Appeal recognized in *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1195, the law should "encourage the highest standard of care concerning communicable and infectious diseases . . . ." Id., 1201; see also id., 1204 ("we believe that a doctor who knows he is dealing with the [twentieth] [c]entury version of Typhoid Mary ought to

have a very strong incentive to tell his patient what she ought to do and not do and how she ought to comport herself in order to prevent the spread of her disease" [footnote omitted]). Holding the defendant liable to the plaintiff would create such an incentive and deter the careless misreporting of STD test results.

The trial court, while recognizing that imposing third-party liability under these circumstances could play an important deterrent function and help control the insidious spread of STDs, expressed concern over what it saw as potentially unforeseen consequences. The court speculated, for instance, that physicians themselves might feel compelled to discuss lab results with their patients, which could be more costly and less efficient than relying on nurses or office staff to relay results. We do not find this concern compelling.

A patient who seeks medical attention to be tested for a disease, any disease, has a reasonable expectation that the test results will be reported accurately, by whatever means. See, e.g., L. Casalino et al., "Frequency of Failure To Inform Patients of Clinically Significant Outpatient Test Results," 169 Archives Internal Med. 1123, 1123 (2009) ("[f]ailures to inform patients of abnormal test results . . . are common and legally indefensible factors in malpractice claims"). The risks and costs associated with misinforming a patient that he does not have a particular disease can be dramatic. Those include the direct costs to the patient and the health care system, as when, for example, treatment of a serious illness such as cancer is irremediably delayed, or, as in the present case, through the inadvertent infection of third parties by a patient who falsely believes that he is free of STDs. Holding health care providers responsible for errors of the sort alleged will help to maintain public trust in the reliability of the STD

reporting system and, therefore, encourage continued participation in this important public health regimen.[21]

Of course, it ultimately will be for the jury to determine whether a reasonable health care provider would have reported Smith's test results differently, whether through direct physician-to-patient communications or through the use of additional fail-safes and quality assurance measures. But we certainly are not prepared to say, as a matter of law, that, whatever added costs might be entailed by a quick telephone call or a letter from one's physician, or a policy requiring office staff

[21] In order to prevent the spread of genital herpes, the CDC recommends that individuals take exactly the precautions taken by the plaintiff in the present case: "The surest way to avoid transmission of STDs, including genital herpes, is to abstain from sexual contact, *or to be in a long-term mutually monogamous relationship with a partner who has been tested for STDs and is known to be uninfected.*" (Emphasis added.) Centers for Disease Control and Prevention, Genital Herpes—CDC Fact Sheet (Detailed Version), available at https://www.cdc.gov/std/herpes/stdfact-herpes-detailed.htm (last visited July 5, 2019). The Department of Public Health also has recognized that encouraging sexually active individuals to seek regular STD testing is a high public health priority. See Connecticut Department of Public Health, Press Release, Department of Public Health Urges Residents To Be Tested for Sexually Transmitted Diseases (April 28, 2010), available at https://portal.ct.gov/DPH/Press-Room/Press-Releases---2010/April-2010/Department-of-Public-Health-Urges-Residents-To-Be-Tested-for-Sexually-Transmitted-Diseases (last visited July 5, 2019).

We disagree with the dissent that the legally relevant question is whether "a person harmed in the manner that this plaintiff was harmed would expect to be compensated by the physician . . . ." Clearly, the plaintiff expected there was some reasonable possibility that the defendant would be held accountable, or she would not have brought the present action. Equally clearly, she could not have had a high degree of confidence in a favorable result, as no Connecticut court had previously recognized such a duty. When the issue is, as a question of first impression, whether a previously unrecognized common-law duty should be recognized, it makes little sense (and is circular) for the result to hinge on whether a layperson accurately would predict that an appellate court would rule in her favor. The salient question in this case, rather, is whether a person in the plaintiff's position reasonably would expect that a physician would adopt an STD test result reporting protocol with an eye toward the potentially serious harm that could befall a patient's exclusive sexual partner if a negative result should be erroneously reported.

to double check that they are reporting test results accurately, they are too onerous relative to the human, financial, and public health costs associated with a false negative report.[22] Cf. *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1200 (it is not unreasonable to expect physicians to give additional warning or warnings).

Along these same lines, we note that it would not be unreasonable for a jury to conclude that the defendant, and not the plaintiff or Smith, was most effectively and economically situated to avoid the harm that befell the plaintiff. In this era of technologized medicine, the conveyance of lab results is a regular and central component of a physician's professional duties. The physician has exclusive access to the original lab results, until such time as they are shared with or conveyed to the

[22] It may well be that the steady march of technology already has rendered purely academic the trial court's concerns, as many patients now are able to view their test results directly through online electronic portals. See Office of the National Coordinator for Health Information Technology, ONC Data Brief No. 40 (April, 2018) pp. 1, 6, available at https://www.healthit.gov/sites/default/files/page/2018-04/HINTS-2017-Consumer-Data-Brief-april-2018.pdf (last visited July 5, 2019) (stating that, as of 2017, 52 percent of individuals were offered online access to their medical records, and that lab results were most frequently accessed information).

The dissent speculates that recognizing a third-party duty under these circumstances will lead physicians such as the defendant to engage in costly defensive medicine, which could raise the cost of health care. The dissent does not contend, however, that recognizing such a duty will lead to the unnecessary use of expensive medical tests or other modalities typically associated with defensive medicine. Rather, the defensive medicine that a physician may embrace under these circumstances is the avoidance of asking a patient to identify his or her sexual partner or asking whether he or she is seeking STD testing for the purpose of informing future sexual partners of the results.

We think that there is little realistic risk that physicians will alter their standards of care when errors of the sort alleged can be so easily and economically avoided by adopting simple quality control measures and exercising reasonable diligence. In any event, we fail to understand the harm that would result if a physician did not go out of his or her way to specifically identify a patient's sexual partner.

patient. As between the defendant, on the one hand, who can avoid errors of this sort simply by double checking the results before or after speaking with the patient; see L. Casalino et al., supra, 169 Archives Internal Med. 1123 (discussing "relatively simple" best practices); and Smith and the plaintiff, on the other, who could ensure that the plaintiff remained free of STDs only by permanently abstaining from intimate contact,[23] a jury reasonably could conclude that the defendant was the party who was in the best position to avoid the harm at the lowest cost and, therefore, should bear the costs of the loss. See, e.g., *Rodi Yachts, Inc.* v. *National Marine, Inc.*, 984 F.2d 880, 883–84, 888 (7th Cir. 1993).

At the same time, physicians such as the defendant can most readily bear and spread through malpractice insurance the costs associated with errors of the sort alleged. We are not convinced that such errors are both so prevalent and so ineluctable that imposing third-party liability, solely with respect to identifiable victims, will meaningfully impact insurance rates or overall health care costs.[24] For these reasons, we conclude that

[23] We note that herpes may be transmitted by forms of intimate contact other than intercourse. See, e.g., 1 Harrison's Principles of Internal Medicine (A. Fauci et al. eds., 14th Ed. 1998) p. 1085.

[24] The dissent posits that our decision could have a significant impact on the health care system because more than 15,000 new STDs are diagnosed in Connecticut each year and, *if* we assume that each newly infected individual was involved in an exclusive sexual relationship, then their more than 15,000 partners all represent potential plaintiffs. This argument falters on many levels.

Not surprisingly, having multiple and/or anonymous sexual partners is among the primary risk factors for contracting STDs. Centers for Disease Control and Prevention, STDs and HIV—CDC Fact Sheet (Detailed Version), available at https://www.cdc.gov/std/hiv/stdfact-std-hiv-detailed.htm (last visited July 5, 2019); see also L. Finer et al., "Sexual Partnership Patterns as a Behavioral Risk Factor for Sexually Transmitted Diseases," 31 Fam. Plan. Persp. 228, 228–30 (1999). By contrast, if an individual is engaged in a truly and mutually monogamous relationship, then he or she is unlikely to contract an STD other than from his or her partner (who would not, in that scenario, be a potential plaintiff in a case such as this). Accordingly,

the relevant policy considerations weigh heavily in favor of allowing liability under these circumstances.

5

Finally, we address two concerns that the defendant and certain of the amici have raised and that the trial court found compelling. First is the slippery slope issue. The trial court observed, and we agree, that, "[i]n a sense, [the] plaintiff's complaint identifies a best case scenario . . . ." That is to say, the plaintiff and Smith were involved in an exclusive romantic relationship at the time Smith sought STD testing, Smith informed the defendant that he was seeking testing for the benefit and protection of the plaintiff, and the plaintiff subsequently agreed to engage in sexual relations with Smith in reliance on the test results as reported to Smith. This means that the defendant's potential liability for negligently misreporting Smith's test results extended to at most one nonpatient third party, a party of whose existence

the dissent's assumption that each of the more than 15,000 individuals who contracted an STD in Connecticut in 2015 was involved in an exclusive sexual relationship seems highly implausible. Nor is there any reason to believe that a significant percentage of STD test results are inaccurately reported to the patient.

Moreover, we note that, of the more than 15,000 new cases of selected STDs to which the dissent refers, the vast majority of them consist of chlamydia and, to a lesser extent, gonorrhea; see Connecticut Department of Public Health, STD Statistics in Connecticut, available at http://www.ct.gov/dph/cwp/view.asp?a=3136&q=388500 (last visited July 5, 2019); diseases that, unlike herpes, are readily treatable with antibiotics. See, e.g., E. Moore, supra, pp. 77, 107–109. Accordingly, even for the fraction of new STD cases that might involve an identifiable victim, in a newly exclusive relationship, who would become infected as a result of an erroneous test report, the vast majority would suffer minimal damages and would be unlikely to go to the trouble of bringing a legal action.

In sum, there is no reasonable basis for concluding that the present case is anything other than a singularity, let alone a harbinger of thousands of future legal actions. For example, there is no indication that other jurisdictions that have allowed such actions to proceed have experienced a spike in medical malpractice rates, and we are aware of no evidence to support the dissent's warning that such an increase is "very likely" in this state.

the defendant was aware at the time of treatment, who could foreseeably contract a contagious STD if an erroneous negative test result were reported, and to whom he owed no independent duty beyond the duty already owed to Smith to accurately report his test results.

Nevertheless, the trial court expressed concerns that imposing a duty under these limited circumstances could open the floodgates. For example, the court questioned whether, if Smith had been dating multiple women at the time, or later began to date other women, with whom Smith had not discussed STDs, the defendant would owe a duty to a large and ill-defined class of potential plaintiffs. The trial court also questioned whether, under different circumstances, a physician such as the defendant might feel compelled to question a patient regarding his sexual partners, or to contact those partners to discuss the patient's STD status, or at least to ensure that the patient accurately relayed the test results to all of his sexual partners. Finally, the court questioned whether it makes sense to make liability hinge on the sort of mutual STD testing arrangement to which the plaintiff and Smith agreed.

Beginning with the last point, we emphasize that the defendant's liability does not hinge on the fact that Smith and the plaintiff entered into a mutual testing agreement. The alleged fact that Smith sought and obtained STD testing at the time could become relevant at trial only insofar as it would support the plaintiff's theory of causation, that is, that she was free of STDs until she became intimate with Smith during or after July, 2013.

Beyond that, we emphasize that the duty that we recognize today is quite limited. It extends only to identifiable third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any

STD that a physician fails to diagnose or properly report. And the physician fully satisfies that third-party duty simply by treating *the patient* according to the prevailing standard of care and accurately informing *the patient* of the relevant test results. See, e.g., *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1203; *Pate* v. *Threlkel*, 661 So. 2d 278, 281–82 (Fla. 1995); *Estate of Amos* v. *Vanderbilt University*, supra, 62 S.W.3d 138. Whether there are other, broader circumstances under which a physician may be held to owe a duty of care to a nonpatient third party who foreseeably contracts an infectious disease as a result of the physician's negligence is a question that we need not resolve today.

Nor, as we have discussed, are we overly concerned that our recognition of a duty under the specific circumstances of this case will create a flood of litigation, increase insurance costs, or discourage physicians from offering STD testing. See, e.g., *Bolieu* v. *Sisters of Providence in Washington*, supra, 953 P.2d 1239. The amici supporting the defendant's position have given us no reason to believe that errors of the sort alleged are commonplace or that they cannot readily be avoided by cost-effective quality assurance measures. As the California Court of Appeal explained in rejecting such arguments, "[a]rguments premised on opened floodgates and broken dams are not persuasive [when] . . . we suspect that only a few drops of water may spill onto a barren desert." *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1204. And, of course, if the legislature perceives differently the risk that conferring standing on individuals such as the plaintiff will result in a health care funding crisis, then nothing bars that body from imposing whatever restrictions it deems prudent on common-law actions of this sort.

Second, we do not share the trial court's concern that recognizing a third-party cause of action for negligent misreporting of STD test results would be impracticable. The court reasoned that, in many such instances, a patient such as Smith and an alleged victim such as the plaintiff will no longer be romantically involved by the time an action reaches the trial stage and, therefore, that key evidence—the patient's medical records—may not be available. The court noted that federal and state privacy laws could bar a plaintiff from obtaining and presenting such records without the patient's consent and that the patient might have little incentive to disclose such records to a former partner and have his or her medical and sexual history become part of the public record. The court also appeared to suggest that, in cases in which the patient does cooperate with the plaintiff, the patient might agree to selectively provide only those records that supported the plaintiff's case, leaving the physician unable to defend himself or herself.

Although we do not discount the possibility that the concerns that the trial court raises could present logistical hurdles in some other case, those hypothetical challenges do not counsel against allowing the plaintiff to hold the defendant accountable in a case such as this, in which the plaintiff apparently will have full access to the medical records necessary to put on her case.[25] As we noted in *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 86, "evidentiary constraints at trial do not, themselves, affect the sufficiency of a stated cause of action . . . ."[26] For all of the foregoing reasons, we hold that the trial court incorrectly concluded that, as a matter of law, the defendant owed no duty of care to the plain-

[25] Both parties have represented that Smith executed authorizations allowing the plaintiff to obtain and use his medical records for purposes of this action.

[26] Moreover, as in all cases, trial courts are free to take reasonable measures in mitigation of any such problems.

tiff with respect to the reporting of Smith's STD test results.[27]

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion D'AURIA, MULLINS and VERTEFEUILLE, Js., concurred.

ROBINSON, C. J., with whom McDONALD and KAHN, Js., join, dissenting. I respectfully disagree with the majority's conclusion that Connecticut physicians, with respect to the diagnosis and reporting of their patients' sexually transmitted disease (STD) test results, owe a direct duty of care to "identifiable third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any STD that a physician fails to diagnose or properly report." In my view, the majority's conclusion is inconsistent with our recent decision in *Jarmie* v. *Troncale*, 306 Conn. 578, 590–91, 50 A.3d 802 (2012), in which we deemed three principal considerations to be especially pertinent in determining what, if any, duty of care is owed by a medical professional to a nonpatient third party, specifically (1) Connecticut precedent, (2) the foreseeability of the alleged harm, and (3) public policy considerations. Following *Jarmie*, I conclude instead that the defendant physician, Charles Cochran, owed no duty to the plaintiff, Jane Doe, and that the trial court properly granted the defendant's motion to strike the plaintiff's single count complaint. Because I would affirm the judg-

[27] Lest there be any confusion, we emphasize that the existence of a third-party duty with respect to the accurate reporting of STD test results does not hinge on whether a patient and a victim remain romantically involved or whether the patient agrees to cooperate in the victim's legal action. Our point is simply that, as in any legal action, the fact that a particular claim may be difficult to prove from an evidentiary standpoint does not imply that the claim itself is not legally cognizable.

ment subsequently rendered by the trial court in favor of the defendant, I respectfully dissent.

I begin by noting my agreement with the majority's recitation of the factual and procedural history of the case. I also note my substantial agreement with the majority's analysis in part I of its opinion, including the standard of review and the treatment of the plaintiff's single count complaint as having alleged both medical malpractice and common-law negligence, similar to our treatment of the action in *Jarmie*.[1] Id., 583–86. I part ways with the majority at part II of its opinion.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . .

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative

[1] I agree with the majority's observation in footnote 3 of its opinion that "the plaintiff's allegations may fit most neatly under the rubric of negligent misrepresentation. Because neither party has addressed the issue, however, we need not determine whether the allegations in the complaint are legally sufficient to plead a cause of action in negligent misrepresentation under the law of this state." I nevertheless respectfully disagree with part II B 1 of its opinion, in which the majority discusses principles of negligent misrepresentation at length in combining them with other tort law principles, in order to create a duty of care that we have not previously recognized in this state. Because I do not agree that principles of negligent misrepresentation support recognizing a direct duty of care owed by physicians to nonpatients, I respectfully disagree with this portion of part II B 1 of the majority's opinion.

to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . .

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) Id., 589–90.

In *Jarmie*, we considered whether to recognize a duty of care owed by a physician to a third party nonpatient. In that case, a patient crashed her vehicle into the plaintiff after blacking out while driving. Id., 580. The plaintiff in *Jarmie* claimed that the defendant, a physician, had breached a duty to warn the patient of

the risks of a latent driving impairment associated with a particular medical condition. Id. In concluding that the physician did not owe a duty of care to a third party nonpatient, this court considered three principal factors: (1) Connecticut precedent, (2) foreseeability, and (3) public policy considerations, including the decisions of courts in other jurisdictions. Id., 589–91.

We began in *Jarmie* by analyzing Connecticut precedent, and observed that it "is useful to view Connecticut common-law rules defining the duty of health care providers in conjunction with [General Statutes] § 52-190a, the medical malpractice statute, because all of the relevant case law followed enactment of that provision. The statute had several purposes, including: (1) to put some measure of control on what was perceived as a crisis in medical malpractice insurance rates; (2) to discourage frivolous or baseless medical malpractice actions; (3) to reduce the incentive to health care providers to practice unnecessary and costly defensive medicine because of the fear of such actions; (4) to reduce the emotional, reputational and professional toll imposed on health care providers who are made the targets of baseless medical malpractice actions; and (5) the replacement of proportional liability for the preexisting system of joint and several liability as a central part of [tort reform], so as to remove the health care provider as an unduly attractive deep pocket for the collection of all of the plaintiff's damages. . . . Thus, a principal goal of § 52-190a, and of tort reform generally, was to limit the potential liability of health care providers. . . .

"The common law, reflecting the goals of the tort reform movement and the legislature's purpose in enacting § 52-190a, likewise disfavors the imposition of liability on health care providers. The established rule is that, absent a special relationship of custody or control, there is no duty to protect a third person from the

conduct of another. . . . Thus, physicians owe an ordinary duty to their patients not to harm them through negligent conduct and an affirmative duty to help them by providing appropriate care. . . . There is no well established common-law rule that a physician owes a duty to warn or advise a patient for the benefit of another person." (Citations omitted; internal quotation marks omitted.) Id., 591–92.

"Consistent with the purpose of the medical malpractice statute and the limited duty of health care providers under the common law, this court has exercised restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients. As a consequence, we have held that a nurse and an emergency medical technician owed no duty of care to a patient's sister, who fainted while observing a medical procedure performed on the patient; *Murillo* v. *Seymour Ambulance Assn., Inc.*, [264 Conn. 474, 477–78, 823 A.2d 1202 (2003)]; a psychiatrist owed no duty to a patient's former spouse for any direct injury to the marriage caused by the allegedly negligent treatment of the patient for marital difficulties; see *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 88, 95–98, 735 A.2d 347 (1999); a psychiatrist who evaluated children for possible sexual abuse owed no duty of reasonable care to protect the children's father, the suspected abuser, from false accusations of abuse arising out of the performance of the evaluations; *Zamstein* v. *Marvasti*, 240 Conn. 549, 550–51, 559–61, 692 A.2d 781 (1997); and a physician owed no duty of care to his patient's daughter, who suffered emotional distress as a result of observing the patient's health deteriorate because of the physician's malpractice. *Maloney* v. *Conroy*, 208 Conn. 392, 393, 403, 545 A.2d 1059 (1988). The only time that we have even contemplated enlarging the duty of a health care provider to include a person who is not a patient was when we considered whether

a psychotherapist owed a duty to a third party to control an outpatient who was not known to have been dangerous. See *Fraser* v. *United States*, [236 Conn. 625, 627–30, 674 A.2d 811 (1996)]. In that case, we determined that no duty existed in the absence of a showing that the victim was either individually identifiable or, possibly, was either a member of a class of identifiable victims or within the zone of risk to an identifiable victim. Id., 634. Accordingly, although there is no directly comparable Connecticut case law on which to rely, our precedent, in general, does not support extending the duty of care . . . because, with one limited exception that does not apply . . . we repeatedly have declined, in a variety of situations, to extend the duty of health care providers to persons who are not their patients." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 592–93.

Although the precise factual circumstances of this case present an issue of first impression, I conclude that Connecticut precedent, as explained in *Jarmie*, demonstrates this court's consistent reluctance to extend the legal duties of medical professionals to nonpatient third parties. Indeed, no Connecticut case decided after *Jarmie* has disturbed the soundness of that assessment.[2] Therefore, Connecticut precedent militates against recognizing a legal duty in the present case.

[2] The majority relies on *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 113 A.3d 932 (2015), to bolster its argument that Connecticut precedent is "unsettled with respect to the particular question presented here." That case is, however, distinguishable. In *Squeo*, a case involving a bystander emotional distress claim and medical malpractice, and not ordinary negligence, we only cited to *Jarmie* to note that our rejection of a bar on a cause of action for bystander emotional distress in the context of medical malpractice was consistent with our rejection of a per se rule barring third-party tort claims in the absence of a physician-patient relationship. *Squeo* v. *Norwalk Hospital Assn.*, supra, 573–74. *Squeo* does not disturb our assessment of Connecticut precedent in *Jarmie* that this court is reluctant to extend the duties of medical professionals to nonpatient third parties. See id., 580–81 (concluding that "bystander to medical malpractice may recover for the severe emotional distress that he or she suffers as a direct result of contemporaneously

Consistent with *Jarmie*, I next consider a classic duty analysis focused on the foreseeability of the alleged harm. Id., 594–98. I agree with the majority's observation that *Jarmie* left open the possibility that a duty may exist in a case where the victim is identifiable, and I also agree with the majority that, construing the complaint in the present case in a light most favorable to sustaining its sufficiency, the plaintiff was identifiable.[3] Whereas the plaintiff in *Jarmie* was neither an identifiable victim nor a member of an identifiable class of victims as a general motorist who might come in close proximity to a vehicle operated by the patient following her diagnosis; id., 597–98; the patient in the present case explained to the defendant that he had sought STD testing for the benefit of his new, exclusive girlfriend, the plaintiff, thus making her identifiable to the defen-

observing gross professional negligence such that the bystander is aware, at the time, not only that the defendant's conduct is improper but also that it will likely result in the death of or serious injury to the primary victim").

Further, the majority's reliance on *Squeo* illustrates a problem with the majority's efforts to limit this case to the precise circumstances presented. The majority effectively uses *Squeo* as evidence that we have already stepped through the door left open in *Jarmie*, and, "if our decision in *Squeo* has not resulted in the parade of horribles that the dissent invokes . . . then we can have some reassurance that the alarmist warnings in the present case will be no more prescient." As I argue subsequently in this dissenting opinion, the public policy concerns implicated in the context of STDs apply with equal or greater force to any number of different infectious diseases, a contention the majority disputes. Just as the majority relies on *Squeo* to support an expansion of liability under the circumstances of the present case, this court may subsequently rely on today's decision as a precedent to support further expansions of liability in other contexts. Because I find the majority's efforts to distinguish STDs from other infectious diseases in the context of the present case unavailing, I see it as unlikely that, in the future, the Connecticut Bar or even the courts of this state will view the precedential value of today's decision as limited to STDs.

[3] I disagree with the majority's observation that, despite quoting "heavily" from *Jarmie*, I "barely [acknowledge]" that the present case raises a different question than the one at issue in *Jarmie*. I believe my agreement with the majority's observation that *Jarmie* left open the possibility that a duty may exist in a case where the victim is identifiable is acknowledgment enough that this case cannot be simply disposed of under *Jarmie*.

The majority further states that "it would be a mistake . . . to simply conclude that *Jarmie* disposes of the issue presented in this case without carefully evaluating the fundamentally distinct considerations that charac-

dant. Our analysis in *Jarmie* did not, however, hinge

terize the context of communicable diseases." I take no issue with that statement. In fact, the standard articulated by *Jarmie* requires evaluation of policy considerations. The majority and I have each evaluated the policy considerations, and conclude differently as to whether they militate in favor of or in opposition to recognition of a duty in this case. In essence, the majority believes certain policy concerns are so strong that this court should walk through the door left open in *Jarmie*. I, however, would stop at the threshold of that doorway.

I further emphasize that the majority misunderstands this dissent as standing for my belief "that, for reasons of public policy, we *never* should impose on physicians any duties beyond those established by the legislature." (Emphasis added.) Instead, I take the position that, when, as in the present case, our court is so deeply divided as to whether public policy concerns support recognition of a legal duty, and when the implications of such recognition of a duty may be so vast, the legislature is in a far better position to make such a determination given its institutional advantages with respect to considering and receiving evidence as to matters of public policy. See, e.g., *Cefaratti* v. *Aranow*, 321 Conn. 593, 632–33, 141 A.3d 752 (2016) (*Zarella*, *J.*, dissenting) (observing that, in deciding whether doctrine of apparent authority or apparent agency should be available to tort plaintiffs, "[i]t is not the role of this court to strike precise balances among the fluctuating interests of competing private groups . . . such as, on the one hand, people who are similarly situated to the plaintiff . . . and, on the other hand, hospitals and other health-care institutions," and noting that this "function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications [that] may arise from the assignment of liability" [citation omitted; internal quotation marks omitted]); *Campos* v. *Coleman*, 319 Conn. 36, 65–66, 123 A.3d 854 (2015) (*Zarella*, *J.*, dissenting) ("[T]his court has the authority to change the common law to conform to the times. In a society of ever increasing interdependence and complexity, however, it is an authority this court should exercise only sparingly. . . . [T]he legislature, unlike this court, is institutionally equipped to gather *all* of the necessary facts to determine whether a claim for loss of parental consortium should be permitted and, if it should, how far it should extend. The legislature can hold public hearings, collect data unconstrained by concerns of relevancy and probative value, listen to evidence from a variety of experts, and elicit input from industry and society in general. Further, elected legislators, unlike the members of this court, can be held directly accountable for their policy decisions." [Citation omitted; emphasis in original; footnote omitted.]); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 439, 119 A.3d 462 (2015) ("balancing of interests that are accommodated by statutes of limitations" is "factual [matter] within the legislative purview"); *State* v. *Lockhart*, 298 Conn. 537, 574, 4 A.3d 1176 (2010) (observing that "determining . . . parameters" of state constitutional rule requiring recording of custodial interroga-

solely on the issue of foreseeability. We noted that "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists." (Internal quotation marks omitted.) Id., 590. Considerations of foreseeability must be tempered by the reluctance in Connecticut precedent to extend the duties of health care providers to nonpatient third parties and the weight of public policy considerations, which militate against recognizing a duty in the present case.

Our final consideration in *Jarmie* was whether public policy considerations favored or disfavored recognition of a duty. In addressing public policy concerns, we considered the purposes of tort compensation and "four specific factors to be considered in determining the extent of a legal duty as a matter of public policy. . . . (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions."[4] (Internal quotation marks omitted.) Id., 603.

tions "requires weighing competing public policies and evaluating a wide variety of possible rules" and noting that "such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play").

[4] Before addressing the precedents of other jurisdictions and public policy considerations, the majority states that, "[i]n *Jarmie*, after we concluded that Connecticut precedent did not bar the imposition of the duty at issue, we proceeded to look to sister state authority and also to consider whether various policy factors favored the imposition of such a duty." Although I agree that Connecticut precedent did not per se bar the imposition of such a duty, I emphasize that this court left little doubt in *Jarmie* as to how Connecticut precedent viewed the imposition of similar duties on health care providers. As noted previously, this court explicitly concluded that, "although there is no directly comparable Connecticut case law on which to rely, our precedent, in general, does not support extending the duty of care . . . because, with one limited exception that does not apply . . . we repeatedly have declined, in a variety of situations, to extend the duty of health care providers to persons who are not their patients." *Jarmie* v. *Troncale*, supra, 306 Conn. 593.

"[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . . It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. . . . [I]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent upon us to consider those risks." (Citations omitted; internal quotation marks omitted.) Id., 599–600.

With regard to the compensation of innocent parties, individuals like the plaintiff in the present case may well be covered by public or private health insurance policies, so it is not necessarily the case that the plaintiff, or others in her position, will be left without compensation. Additionally, as we observed in *Jarmie*, "to the extent an injured party may not be covered by a . . . health insurance policy, the financial cost to victims . . . does not necessarily outweigh the impact of the proposed duty on thousands of physician-patient relationships across the state and the potentially high costs associated with increased litigation . . . ." Id., 601. As for the deterrence of wrongful conduct, if, as the majority concludes, the duty owed to the plaintiff is the same duty owed to the patient—namely, the accurate reporting of STD testing results—then "expanding the liability of health care providers would not reduce the potential for harm because health care providers

would be required to do no more than they already must do to fulfill their duty to patients." Id., 601–602. Finally, the same concerns we voiced in *Jarmie* concerning interference with the physician-patient relationship and an increase in litigation are present in this case, and are discussed more fully subsequently in this dissenting opinion.

I now move to the four specific factors discussed in *Jarmie*. "Starting with the expectations of the parties, long established common-law principles hold that physicians owe a duty to their patients because of their special relationship, not to third persons with whom they have no relationship. Furthermore, there is no state statute or regulation that imposes a duty on health care providers to warn a patient for the benefit of the public." Id., 603–604. It is unlikely that a person harmed in the manner that this plaintiff was harmed would expect to be compensated by the physician, with whom he or she has no special relationship, in light of the privileged status of the physician-patient relationship and the common-law protections granted to physicians. Consequently, the normal expectations of the parties weigh against recognition of a duty in the present case, as they did in *Jarmie*.

Turning to the public policy of encouraging participation in the activity under review, recognizing a duty of care under the circumstances of this case "would be inconsistent with the physician's duty of loyalty to the patient, would threaten the inherent confidentiality of the physician-patient relationship and would impermissibly intrude on the physician's professional judgment regarding treatment and care of the patient." Id., 606. Indeed, "[u]nlike most duties, the physician's duty to the patient is explicitly relational: physicians owe a duty of care to *patients*. . . . Mindful of this principle, we have recognized on more than one occasion the physician's duty of undivided loyalty to the patient . . . and

the patient's corresponding loyalty, trust and dependence on the professional opinions and advice of the physician. . . . Undivided loyalty means that the patient's well-being must be of paramount importance in the mind of the physician. Indeed, this is the foundation for the patient's reciprocal loyalty, trust and dependence on the physician's medical treatment and advice. Consistent with this view, we have stated that, [a]s a matter of public policy . . . the law should encourage medical care providers . . . to devote their efforts to their patients . . . and not be obligated to divert their attention to the possible consequences to [third parties] of medical treatment of the patient. . . . It is . . . the consequences to the patient, and not to other persons, of deviations from the appropriate standard of medical care that should be the central concern of medical practitioners. . . .

"Extending a health care provider's duty also would threaten the confidentiality inherent in the physician-patient relationship because lawsuits alleging a breach of the duty would compel the use of confidential patient records by defending physicians. The principle of confidentiality lies at the heart of the physician-patient relationship and has been recognized by our legislature. General Statutes § 52-146o was enacted in 1990; see Public Acts 1990, No. 90-177; to address the need to protect the confidentiality of communications in order to foster the free exchange of information from patient to physician . . . . The statute provides that a health care provider shall not disclose patient information in their files without the patient's explicit consent. See General Statutes § 52-146o (a). Thus, when a patient decides to bring a claim against a health care provider, the patient makes a purposeful decision to waive confidentiality. . . . Subsection (b) (2) of § 52-146o, however, contains an exception whereby patient consent is not required for the disclosure of communications

or records by a health care provider against whom a claim has been made. Consequently, if [an injured third party] files an action against the health care provider of [a patient], records containing the patient's medical history will very likely be disclosed in court and subjected to public scrutiny. The effect of expanding the duty of a health care provider in this fashion cannot be underestimated. Physician-patient confidentiality is described as a privilege . . . . When that confidentiality is diminished to any degree, it necessarily affects the ability of the parties to communicate, which in turn affects the ability of the physician to render proper medical care and advice. Accordingly, it is not in the public interest to extend the duty of health care providers to third persons in the present context because doing so would jeopardize the confidentiality of the physician-patient relationship."[5] (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 606–609.

Connecticut state law reflects additional patient confidentiality concerns that militate against the recognition of a duty in the present case. State law demonstrates the overarching primacy of patient confidentiality, even

[5] The majority contends, however, that such confidentiality concerns may be present in other cases, but do not exist in a case like this, in which a plaintiff will ostensibly have full access to the pertinent medical records via the patient, her exclusive romantic partner. But this reasoning would further limit the majority's holding to the alleged facts of this case, meaning that in a nearly identical future scenario, in which all that is different from the present case is that the patient is uncooperative with the plaintiff's action with regard to the disclosure of medical records—such as might happen if the relationship dissolved—there might be no recognition of a duty. I am aware of no Connecticut case law suggesting that our recognition of a duty of care should turn on the alleged willingness of a nonparty patient to have his or her medical records made available in a nonpatient's action sounding in ordinary negligence. Consequently, I respectfully find the majority's response to confidentiality concerns—that such concerns may be present in other cases, but do not exist in the present case—unconvincing.

in this context of infectious disease.[6] Connecticut has a communicable disease reporting system and a list of specific diseases and conditions that physicians are required to report to public health officials. See Regs., Conn. State Agencies § 19a-36-A2 (requiring Commissioner of Public Health to issue list of reportable diseases); see also Connecticut Department of Public Health, "Reportable Diseases, Emergency Illnesses and Health Conditions, and Reportable Laboratory Findings Changes for 2019," 39 Conn. Epidemiologist 1 (2019) (list of reportable diseases). The reporting is made by physicians to the public health authority, but it is government officials who may act on the information and intervene with any third parties, not the reporting physician. See General Statutes. § 19a-215 (d). Put differently, the physician has no statutory duty vis-à-vis any third party beyond merely reporting the disease or condition to the appropriate authority.

Another instructive example of the legislature's concern for confidentiality can be seen in Connecticut's HIV laws, upon which the majority relies for the proposition that physicians' public health obligations may transcend their duties to individual patients, observing that the state "permit[s] physicians to warn, or to disclose confidential patient information for the purpose of warning, a known partner of a patient who has been diagnosed with an HIV infection or related disease." The HIV statute is protective of confidentiality insofar as it does not permit a physician to directly inform a sexual partner

[6] I note that in its discussion of public policy concerns, the majority focuses a great deal of attention on public health concerns, namely, the diagnosis and treatment of infectious diseases. The majority suggests that in the context of such diseases, "a physician's duties and loyalties necessarily must be divided between the patient and other people whom the patient may infect," and "the principle that a physician's duty to protect the broader public health and to help to deter the spread of contagious diseases at times transcends the physician's duty to his or her individual patient has long been codified in federal and state law."

about a patient's HIV test results under circumstances similar to this case. See General Statutes § 19a-584 (b) (physician may only directly inform known partner if both partner and patient are under physician's care or if patient has requested it). Although the majority's opinion does not impose a duty to warn on physicians under the circumstances of this case, the overarching emphasis placed on confidentiality by the legislature, including the legislature's decision not to impose further statutory duties on physicians to warn under similar circumstances, coupled with the threat that confidential records may be disclosed in litigation without the patient's consent, suggest that imposition of a duty under the circumstances of this case is incongruous with the legislature's repeated emphasis on patient confidentiality. Put plainly, recognizing a duty under the circumstances of this case endangers participation in the activity under review because it interferes with physicians' duty of loyalty to their patients and threatens the sanctity of physician-patient confidentiality.

Moving to the avoidance of the increased risk of litigation, the Department of Public Health has published STD reporting statistics for 2015 that indicate approximately 13,269 reported cases of Chlamydia, 2,092 reported cases of Gonorrhea, and 99 reported cases of Syphilis that year. Connecticut Department of Public Health, "Chlamydia, Gonorrhea, and Primary and Secondary Syphilis Cases Reported by Town," (2015), available at https://portal.ct.gov/-/media/Departments-and-Agencies/DPH/dph/infectious_diseases/std/Table12015pdf (last visited July 11, 2019). Assuming that each of those individuals was in an exclusive sexual relationship, there would have been 15,460 additional individuals to whom physicians may have owed a duty under the majority's opinion in the present case. This increase in the risk of litigation threatens more than just the pocketbooks of physicians and their insurers;

it threatens patient care. A likely consequence of this expansion of liability is that physicians will be reticent to discuss their patients' romantic relationships or sexual behavior in an attempt to avoid identifying third parties to whom the physician could be liable, despite such an approach not necessarily being in the patient's best interests. This reaction, referred to as "defensive medicine" in medical literature, involves physicians altering treatment and advice as part of an effort to avoid liability, and it is considered to have very negative and costly effects on the provision of health care. See J. Greenberg & J. Green, "Over-testing: Why More Is Not Better," 127 Am. J. Med. 362, 362–63 (2014); M. Mello et al., "National Costs of the Medical Liability System," 29 Health Aff. 1569, 1572 (2010); see also B. Nahed et al., "Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons," (2012), p. 4, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3382203/pdf/pone.0039237.pdf (last visited July 11, 2019).

An additional concern is the effect that an expansion of the potential liability of physicians is likely to have on malpractice insurance rates. Connecticut health care professionals cannot obtain a license to practice medicine without showing that they have adequate malpractice insurance. See General Statutes § 20-11b (a). If insurance premiums for physicians increase to an unaffordable level, physicians may leave the practice of medicine or, at the least, stop offering the services that instigate such high premiums. An instructive example of this concern is the early 2000s crisis in the field of obstetrics. "Soaring malpractice insurance costs led to the closings of trauma and maternity wards across the country [and] forced many obstetricians to give up obstetrics, restrict services, deny certain high-risk patients, become consultants, relocate, retire early, or abandon their practices all together." (Footnote omit-

ted.) S. Domin, "Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis," 53 Cath. U. L. Rev. 499, 499–500 (2004). The threat of something similar happening in Connecticut requires that we exercise caution, particularly in an area where the potential consequences are such that the legislature is in a better position to address these concerns than our courts are.

Indeed, this is an issue on which the legislature has previously acted. As we observed in *Jarmie*, part of the impetus behind the enactment of our medical malpractice statute, § 52-190a, was "to put some measure of control on what was perceived as a crisis in medical malpractice insurance rates." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 591. One such measure of control, the requirement that an opinion letter issued by a similar health care provider be attached to a medical negligence complaint, was suggested by the General Assembly's Legislative Program Review and Investigations Committee after it conducted hearings following a significant increase in medical malpractice insurance rates in the early 2000s. See Legislative Program Review and Investigations Committee, Connecticut General Assembly, Medical Malpractice Insurance Rates (December 2003). Because the majority's opinion recognizes a duty to potentially thousands of new plaintiffs, which is very likely to have an impact on medical malpractice rates, this court should not throw caution to the wind and take such action when the legislature is in a much better position to investigate the issue, and make findings and recommendations on the subject, as it has done in similar circumstances.

Given that the legislature has acted extensively in the areas of both STD reporting and to provide physicians relief from professional liability, I am hesitant to

usurp its "primary responsibility for formulating public policy" by recognizing a new duty to third party nonpatients. (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 780, 160 A.3d 333 (2017). Indeed, in *Sic* v. *Nunan*, 307 Conn. 399, 410, 54 A.3d 553 (2012), this court recognized that primary responsibility for public policy in declining to impose a duty on motorists stopped at an intersection to keep their wheels pointed straight, emphasizing that the legislature had "not seen fit to enact any statutes" in that respect. Thus, I disagree with the majority's decision to adopt a duty in the present case that will expand the pool of potential litigants, increase the risk of litigation, and threaten access to and the quality of patient care in this state—in contravention of legislative action on point.

Finally, turning to decisions of other jurisdictions, I note that there is no clear trend in our sister courts that supports usurping the legislature's responsibility for public policy and creating the duty that the majority recognizes in the present case. To be sure, there is case law that supports the decision of the majority. See *Reisner* v. *Regents of the University of California*, 31 Cal. App. 4th 1195, 1197–201, 37 Cal. Rptr. 2d 518 (1995) (physician owed duty to unknown and unidentifiable sexual partner of patient to warn patient or her parents of patient's HIV positive status), review denied, California Supreme Court, Docket No. S045274 (May 18, 1995); *C.W.* v. *Cooper Health System*, 388 N.J. Super. 42, 58–62, 906 A.2d 440 (App. Div. 2006) (hospital and its physicians owed direct duty to unknown and unidentifiable sexual partner of patient to warn patient of patient's HIV positive status); *DiMarco* v. *Lynch Homes-Chester County, Inc.*, 525 Pa. 558, 563–64, 583 A.2d 422 (1990) (physicians owed duty to sexual partner of patient with hepatitis not to give erroneous advice to patient because class of foreseeable victims included anyone who was

intimate with patient);[7] *Estate of Amos* v. *Vanderbilt University*, 62 S.W.3d 133, 138 (Tenn. 2001) (university medical center owed duty to future husband and future daughter of HIV positive patient to warn patient so she might take precautionary measures preventing transmission of HIV because future husband and future daughter were within class of identifiable persons within zone of danger). I find, however, that sister state cases declining to recognize a third party duty for physicians are more consistent with our state's public policy and precedent. See, e.g., *Hawkins* v. *Pizarro*, 713 So. 2d 1036, 1037–38 (Fla. App.) (physician owed no duty to future spouse of patient when physician improperly advised patient she tested negative for hepatitis C), review denied, 728 So. 2d 202 (Fla. 1998); *Dehn* v. *Edgecombe*, 384 Md. 606, 622, 865 A.2d 603 (2005) (physician owed no duty to wife of patient when physician negligently failed to provide patient with minimally acceptable medical care in connection with a vasectomy); *Herrgesell* v. *Genesee Hospital*, 45 App. Div. 3d 1488, 1490, 846 N.Y.S.2d 523 (2007) (physician owed no duty to daughter of patient when daughter contracted hepatitis B from patient because physician does not owe duty to nonpatient who contracts illness from patient, even if physician knows nonpatient cares for patient or is family member of patient); *Candelario* v. *Teperman*, 15 App. Div. 3d 204, 204–205, 789 N.Y.S.2d 133 (2005) (physician owed no duty to daughter of patient when daughter contracted hepatitis C, even though physician was aware daughter was caring for patient); *D'Amico* v. *Delliquadri*, 114 Ohio App. 3d 579, 581–83, 683 N.E.2d

[7] The dissenting justice in *DiMarco* observed that "the dangers of adopting a negligence concept of duty analyzed in terms of scope of the risk or foreseeability are considerable and are to be avoided. These dangers include . . . the prospect of inducing professionals to narrow their inquiries into the client or patient situation, to the detriment of the client or patient, so as to avoid possible liability toward third parties which might come from knowing 'too much.' " (Footnote omitted.) *DiMarco* v. *Lynch Homes-Chester County, Inc.*, supra, 525 Pa. 565–66 (Flaherty, J., dissenting).

814 (1996) (physician owed no duty to girlfriend of patient when girlfriend contracted genital warts from patient after defendant cared for and treated patient). Consequently, the decisions of our sister courts demonstrate no clear trend on the broader recognition and extent of physicians' third party duties, let alone the specific duty that the majority recognizes in the present case.[8]

Accordingly, I conclude, consistent with *Jarmie* v. *Troncale*, supra, 306 Conn. 578, that the defendant did not owe the plaintiff, who was not his patient, a duty of care in the present case. Given the potential ramifications of recognizing such an expanded duty of care, I would leave that potential expansion of liability to the legislature—which is better equipped than this court to make the public policy findings attendant to that expansion of liability.[9] See, e.g., *State* v. *Lockhart*, 298

[8] The majority attempts to distinguish these cases as not analogous enough to the precise circumstances of the present case, leaving the majority with a handful of cases it deems worthy of consideration. Even if I were to agree with the majority's winnowing of the list of cases we should consider to be relevant, I would hardly call a four to one majority in favor of the majority's position a convincing consensus among our sister courts, especially when so few courts have weighed in on the precise question presented.

[9] Finally, even if I were to agree with the majority's recognition of a direct duty of care on the facts of the present case, which I respectfully do not, the future ramifications of the majority's opinion would nevertheless give me pause. Although the majority repeatedly cautions that its holding is limited and narrow, I nevertheless find this contention troubling because its implications portend just the opposite result. First, although the majority states that its decision is limited strictly to cases involving the diagnosis of STDs, the public policy concerns discussed therein apply with equal or even greater force to any number of different infectious diseases, such as chickenpox, influenza, and measles. It is likely that in cases with identifiable nonpatient third parties, the majority's opinion in this case will be held up as a logically convincing precedent to further extend the potential liability of health care providers. Second, the majority's foreseeability analysis is inherently subjective. What if the physician has awareness of a romantic partner's existence independent of knowledge obtained from the patient, such as through a social relationship? There is little reason why this court's logic would not counsel in favor of recognizing a duty in such a case, concerns of which would be exacerbated should the majority's decision be extended beyond STDs to other infectious diseases, such as influenza. Put differently, the majority's opinion sets a precedent that will easily open the floodgates to a great expansion of potential third party liability for health care providers.

Conn. 537, 574–75, 4 A.3d 1176 (2010) (declining to require recording of custodial interrogations and deferring to legislature because "it is in a better position to evaluate the competing policy interests at play in developing a recording requirement in that it can invite comment from law enforcement agencies, prosecutors and defense attorneys regarding the relevant policy considerations and the practical challenges of implementing a recording mandate"). Accordingly, I conclude that the trial court properly granted the defendant's motion to strike.

Because I would affirm the judgment of the trial court, I respectfully dissent.