SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION ET AL.
(SC 20325)

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

Syllabus

The plaintiff, the administratrix of the estate of the decedent, B, sought to recover damages from the defendants, the Department of Correction and the provider of health care for those in the department's custody, for B's allegedly wrongful death. In July, 2015, the Claims Commissioner authorized B to bring an action against the defendants for medical malpractice, but B died without having done so. In September, 2016, the plaintiff brought the present action against the defendants. The defendants filed a motion to dismiss, claiming that the action was time barred by the statute (§ 4-160 (d)) requiring a plaintiff who has been granted authorization to sue the state by the Claims Commissioner to bring an action within one year from the date that the authorization was granted. The plaintiff filed an objection, arguing that the one year time limitation contained in § 4-160 (d) was inoperative because the two year time limitation in the wrongful death statute (§ 52-555 (a)) controlled her wrongful death claim on behalf of B's estate. The trial court granted the motion to dismiss for lack of subject matter jurisdiction and rendered judgment for the defendants. The plaintiff appealed from the trial court's judgment to the Appellate Court, which affirmed. The Appellate Court concluded that the plaintiff was required to comply with both the one year time limitation contained in § 4-160 (d) and the two year time limitation contained in § 52-555 (a). More specifically, the Appellate Court held that, because § 4-160 created a right of action against the state that did not exist at common law, that statute's one year time limitation constituted a strict limitation on the waiver of sovereign immunity. The Appellate Court also rejected the plaintiff's claim that the two year statute of limitations in § 52-555 (a) superseded or rendered inoperative the one year limitation on the waiver of sovereign immunity, reasoning that nothing in the text of § 4-160 (d) excepts wrongful death actions from the strict, one year time limitation on the waiver of sovereign immunity. The Appellate Court further held that, because the Claims Commissioner's authorization to sue had expired when the plaintiff brought the present action, sovereign immunity barred her action, and the trial court properly granted the defendants' motion

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

to dismiss. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court's reasoning and analysis were sound, and, accordingly, that court properly upheld the trial court's granting of the defendants' motion to dismiss for lack of subject matter jurisdiction; moreover, this court's decision in *Soto* v. *Bushmaster Firearms International, LLC* (331 Conn. 53), which recognized that the two year statute of limitations for wrongful death actions contained in § 52-555 (a) does not supersede a time limitation in a statute that creates a right of action that did not exist at common law, provided additional support for the Appellate Court's holding because § 4-160 created the right to sue the state for medical negligence, subject to authorization by the Claims Commissioner, and the plaintiff was thus required to comply with both the two year statute of limitations of § 52-555 (a) and the one year limitation period set forth in § 4-160 (d).

(*One justice concurring separately*)

Argued May 4—officially released October 9, 2020**

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Prescott*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Mario Cerame, with whom, on the brief, were *Timothy Brignole* and *David Bush*, for the appellant (plaintiff).

James M. Belforti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellees (defendants).

** October 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

McDONALD, J. The nub of the question before us is whether the limitations period for a claim against the state brought by the representative of a decedent is controlled by General Statutes § 52-555 (a)[1] regarding wrongful death claims, General Statutes § 4-160[2] regarding actions authorized by the Claims Commissioner, or both. The plaintiff, Sandra Harvey, administratrix of the estate of Isaiah Boucher, appeals from the judgment of the Appellate Court, which affirmed the trial court's judgment dismissing the action against the defendants, the Department of Correction and the University of Connecticut Health Center Correctional Managed Health Care,[3] for lack of subject matter jurisdiction. The plaintiff argues that the Appellate Court incorrectly concluded that her action was time barred by § 4-160 (d).

[1] General Statutes § 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[2] General Statutes § 4-160 provides in relevant part: "(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . .

* * *

"(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of limitation applicable to such action shall be tolled until the date such authorization to sue is granted. . . ."

Although § 4-160 was the subject of amendments in 2016 and 2019; see Public Acts 2019, No. 19-182, § 4; Public Acts 2016, No. 16-127, § 19; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] For convenience, we hereinafter refer to the defendants, collectively, as the state.

She argues that, instead, § 52-555 (a) provides the controlling statute of limitations. We conclude that a plaintiff in the unusual posture of the one here, who brings a wrongful death action against the state after having previously obtained permission to sue for medical negligence from the Claims Commissioner, must comply with both the two year time limitation for a wrongful death action articulated in § 52-555 (a) and the one year time limitation on the Claims Commissioner's authorization to sue articulated in § 4-160 (d). Because the plaintiff only complied with the statute of limitations contained in § 52-555 (a) and not with the limitation period articulated in § 4-160 (d), we affirm the judgment of the Appellate Court.

The record reveals the following undisputed facts, including the dates that are relevant for the limitations periods at issue, and procedural history. In 2011, while incarcerated, Boucher became ill and requested medical treatment from the state. In 2013, he was diagnosed with cancer. He filed a notice of claim with the Claims Commissioner, seeking permission to file a medical malpractice action against the state on the basis of allegations relating to the delay in providing diagnostic testing and treatment. On July 16, 2015, the Claims Commissioner authorized Boucher to sue the state for medical malpractice. On September 26, 2015, Boucher died as a result of his cancer.

On September 29, 2016—approximately fourteen months after authorization was obtained from the Claims Commissioner and 369 days after Boucher's death—the plaintiff, as administratrix of Boucher's estate, brought the present action for wrongful death against the state. The state filed a motion to dismiss, asserting that the action was time barred. The state argued that a plaintiff who has obtained authorization to sue the state from the Claims Commissioner has only one year to do so under § 4-160 (d), and the plaintiff brought the

present action more than one year and two months after the Claims Commissioner authorized Boucher's action. The plaintiff filed an objection and memorandum of law in opposition to the motion to dismiss, arguing that the one year time limitation contained in § 4-160 (d) was inoperative because the two year time limitation contained in § 52-555 (a) controlled her wrongful death claim on behalf of Boucher's estate.

The trial court granted the state's motion to dismiss. The court noted that the time limitation period contained in § 4-160 (d) must be narrowly construed and strictly applied because the statute both derogates sovereign immunity and creates a right of action that did not exist at common law. The court concluded that a plaintiff seeking to bring a statutory cause of action against the state must comply with *both* the one year time limitation under § 4-160 (d) *and* the applicable statute of limitations that governs the underlying cause of action. It determined that the "[f]ailure to comply with either [time limitation] deprives the court of subject matter jurisdiction and is grounds for dismissal." Thereafter, the trial court denied the plaintiff's motion for reconsideration and reargument.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. On appeal, she claimed that the trial court improperly granted the state's motion to dismiss because the two year time limitation for a wrongful death action articulated in § 52-555 (a) cannot be limited by § 4-160 (d). The Appellate Court affirmed the judgment of the trial court, concluding that the plaintiff was required to comply with both the one year time limitation contained in § 4-160 (d) and the two year time limitation contained in § 52-555 (a). *Harvey* v. *Dept. of Correction*, 189 Conn. App. 93, 103, 108, 206 A.3d 220 (2019).

The Appellate Court focused on the well established rule that a statute in derogation of sovereign immunity,

such as § 4-160 (d), must be strictly and narrowly construed. See id., 100–101. Additionally, the court articulated the principles concerning statutory time limitations. See id., 101–102. Specifically, the Appellate Court explained that a time limitation contained in a statute that creates a right of action that did not exist at common law constitutes a substantive prerequisite to the trial court's subject matter jurisdiction, limiting the defendant's liability. See id., 102. This type of time limitation, the Appellate Court reasoned, is distinguishable from a statute of limitations applicable to a right of action that existed at common law, which is a procedural limitation on the availability of the remedy. See id.

The Appellate Court concluded that, because § 4-160 creates a right of action against the state that did not exist at common law, the one year time limitation contained within it constitutes a strict limitation on the waiver of sovereign immunity. Id., 101–102. The Appellate Court explained that the waiver expired approximately two months before the plaintiff commenced the present action, so the principles of sovereign immunity deprived the trial court of subject matter jurisdiction. See id., 102, 106.

The plaintiff nonetheless argued that the two year statute of limitations contained in § 52-555 (a) "superseded or rendered inoperative" the one year limitation on the waiver of sovereign immunity. Id., 103. The Appellate Court rejected this argument, reasoning that nothing in the text of § 4-160 (d) excepts wrongful death actions from the strict, one year time limitation on the waiver of sovereign immunity. See id.

The Appellate Court also rejected the plaintiff's reliance on *Lagassey* v. *State*, 281 Conn. 1, 5, 914 A.2d 509 (2007), and *Ecker* v. *West Hartford*, 205 Conn. 219, 226, 530 A.2d 1056 (1987). *Harvey* v. *Dept. of Correction*, supra, 189 Conn. App. 103–105. The court distinguished

Lagassey on the ground that the plaintiff in that case commenced her action within one year of the Claims Commissioner's grant of authorization to sue the state, in compliance with § 4-160 (d). See id., 104. Nothing in the court's holding in *Lagassey*—that the plaintiff's action was time barred because she commenced it outside the two year statute of limitations for wrongful death under § 52-555 (a)—suggested that compliance with § 4-160 (d) was unnecessary. See id., 104–105. The court reasoned that *Ecker* was inapposite because it considered only whether the two year statute of limitations could be waived; it did not consider how § 52-555 (a) impacted the court's jurisdiction over an action that was untimely under other applicable statutes. See id., 105.

The Appellate Court noted that "statutes of limitations generally are wielded by defendants as shields; their purpose is not to provide additional substantive rights to plaintiffs." Id., 106. It concluded that the plaintiff was required to "comply with both § 4-160 (d) and the underlying, applicable statute of limitations in order to timely bring an action against the state." Id. Because the Claims Commissioner's authorization to sue had expired when the plaintiff brought the present action, the Appellate Court held that sovereign immunity barred her action and that the trial court properly granted the state's motion to dismiss. See id.

Thereafter, the plaintiff filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that the plaintiff's action had to be dismissed pursuant to the sovereign immunity provisions of . . . § 4-160 (d), notwithstanding the time limitations set forth in . . . § 52-555 for bringing a wrongful death action?" *Harvey* v. *Dept. of Correction*, 332 Conn. 905, 208 A.3d 1239 (2019).

After reviewing the parties' briefs, the record, and the oral argument, we conclude that the Appellate Court's reasoning and analysis were sound, and its conclusion was correct. Nevertheless, we address two additional points not considered by the Appellate Court that support its conclusion that the plaintiff was required to comply with both §§ 52-555 (a) and 4-160 (d).

First, the state claims that this court recently recognized that the two year statute of limitations for wrongful death actions contained in § 52-555 (a) does not supersede a time limitation in a statute that creates a right of action that did not exist at common law. See *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 102–105, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019). We agree that this aspect of *Soto* provides additional support for the Appellate Court's holding in the present case.

In *Soto*, the administrators of the estates of certain children and school employees killed at Sandy Hook Elementary School brought an action against the manufacturers, distributors, and retailers of the semiautomatic rifle that the assailant used to kill the decedents. Id., 64–67. Among other causes of action, the plaintiffs brought claims under § 52-555 (a) for wrongful death. Id., 67. These claims alleged, inter alia, that the defendants' violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., provided the underlying theory of liability.[4] See id. The defendants moved to strike these claims as time barred

[4] CUTPA provided two underlying legal theories of liability. First, the plaintiffs in *Soto* claimed that the defendants' sale of the military grade weapon into the civilian market was a negligent and unfair trade practice. *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 73. Second, the plaintiffs claimed that the defendants marketed and advertised the weapon in an unethical manner. Id. Only the first theory of liability is relevant to the present case.

by CUTPA's three year statute of limitations, reasoning that the latest alleged CUTPA violation occurred when the defendant retailers sold the rifle to the assailant's mother in March, 2010, and the plaintiffs commenced their action on December 13, 2014, within two years of the decedents' deaths but more than four years after the retailers sold the rifle. Id., 100–101. The trial court *denied* the defendants' motions to strike in this respect, reasoning that, "when a wrongful death claim is predicated on an underlying theory of liability that is subject to its own statute of limitations, it is the wrongful death statute of limitations that controls." Id., 102.

We reversed this aspect of the judgment, holding that the trial court should have struck as time barred those wrongful death claims that were predicated on unfair trade practice allegations because the plaintiffs failed to comply with both the two year, wrongful death statute of limitations and the three year limitation period contained in CUTPA. See id., 105. We recognized that, "*in the ordinary case*, § 52-555 (a) supplies the controlling statute of limitations regardless of the underlying theory of liability." (Emphasis added.) Id., 102. But we reasoned that, when a statute creates a right of action that did not exist at common law, the time limitation provision contained in that statute limits not only the availability of the remedy, but the existence of the right itself. See id., 103. "For such statutes, we have said that the limitations provision 'embodies an essential element of the cause of action created—a condition attached to the right to sue at all. . . . Failure to [strictly observe the time limitation] results in a failure to show the existence of a good cause of action.' " Id., quoting *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 748–49, 150 A.3d 1109 (2016). We concluded that the time limitation is thus a substantive element of the right of action and must be strictly observed—including when that right of action provides the underlying theory of liability

for a wrongful death claim. See *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 104–105. Accordingly, we held in *Soto* that, because CUTPA created a right of action that did not exist at common law, the plaintiffs were required to comply with both the two year limitation period under the wrongful death statute *and* the three year limitation period under CUTPA. Id., 103, 105.

Here, the state argues that our holding in *Soto* requires the plaintiff to comply with both the two year limitation period for wrongful death under § 52-555 (a) and the one year limitation period for the waiver of sovereign immunity under § 4-160 (d). The plaintiff concedes that her appeal likely fails if we conclude that *Soto* controls. Application of the rule from *Soto* turns on whether the theory of liability underlying the plaintiff's wrongful death claim is a right of action that existed at common law.

The theory of liability underlying the plaintiff's wrongful death claim is medical negligence, which is a cause of action that did exist at common law. See id., 102–103 ("This court applied [the rule in the ordinary case] in *Giambozi* v. *Peters*, 127 Conn. 380, 16 A.2d 833 (1940), overruled in part on other grounds by *Foran* v. *Carangelo*, 153 Conn. 356, 216 A.2d 638 (1996), in which the court held that the statute of limitations of the predecessor wrongful death statute, rather than the limitations provision applicable to medical malpractice claims, governed in a wrongful death action based on malpractice. Id., 385 . . . ." (Citation omitted.)). Common law created the right of action for medical negligence, and statutes, such as General Statutes § 52-584, define the availability of the remedy by imposing a limitation period. When medical negligence provides the theory of liability for a wrongful death claim, the negligence statute of limitations is supplanted by § 52-555 (a), which provides the only applicable limitation

period. See, e.g., *Giambozi* v. *Peters*, supra, 385; see also, e.g., *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 723, 725, 557 A.2d 116 (1989) ("[i]t is undisputed" that limitation period articulated in § 52-555 governs wrongful death action alleging medical malpractice against hospitals, doctor, and anesthesiology practice).

Significant to the present case, however, is the fact that the state has always enjoyed immunity from any action seeking damages for negligence, medical or otherwise. "The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 258, 932 A.2d 1053 (2007). Section 4-160 created the right to sue the state for medical negligence, subject to authorization by the Claims Commissioner, so the one year time limitation in § 4-160 (d) is not supplanted by § 52-555 (a). As such, a plaintiff's right to sue the state exists only during the one year period authorized by the Claims Commissioner.

Because the right of action providing the theory of liability that underlies the plaintiff's wrongful death claim could not be maintained against the state at common law, *Soto* further establishes that the plaintiff was required to comply with *both* the two year statute of limitations for wrongful death under § 52-555 (a) *and* the one year limitation period for the Claims Commissioner's authorization to sue the state under § 4-160 (d).

The second point not directly considered by the Appellate Court involves our decision in *Leahy* v. *Cheney*, 90 Conn. 611, 98 A. 132 (1916). On appeal to this court, the plaintiff contends that the reasoning in *Leahy* supports her argument that the two year time limitation for a wrongful death action should control. In that case, the plaintiff, the executrix of an employee,

sued the defendants, the executors of the employer, for breach of contract. See id., 612–13. The plaintiff filed her action within the six year limitation period for breach of contract but more than one year after the employee died. See id., 613–14. The defendants argued that the plaintiff's action was time barred because General Statutes (1902 Rev.) § 1128[5] required the plaintiff to bring it within one year of the decedent employee's death. See id., 613.

This court rejected the defendants' argument, reasoning instead that § 1128 "was not intended to shorten the statutory time" for the action to be brought; id.; but, rather, was meant to give the decedent's executor or administrator, at minimum, one "full year in which to take out administration, learn of the existence of the claim, and bring [an action]." Id., 614. We concluded that § 1128 provided the executor or administrator of an estate as much time as remained of the unexpired limitation period at the time of the decedent's death, except that, if the limitation period were to expire within one year of the decedent's death, then it would extend to one year from the date of the decedent's death. See id.

In the present case, the plaintiff characterizes § 1128 as "the then applicable wrongful death statute" and argues that this court's reasoning in *Leahy* supports her argument that the two year limitation period from § 52-555 (a) should supersede the one year limitation period from § 4-160 (d). This argument is unpersuasive for two reasons.

[5] As this court explained, General Statutes (1902 Rev.) § 1128 provided that, "where the time limited for the commencement of any personal action, which by law survives to the representatives of a deceased person, shall not have elapsed at the time of his decease, the term of one year from the time of such decease shall be allowed to his executor or administrator to institute a suit therefor, and that in such cases such term shall be excluded from the computation." *Leahy* v. *Cheney*, supra, 90 Conn. 613, citing General Statutes (1902 Rev.) § 1128.

Hereinafter, all references to § 1128 are to the 1902 revision of the statute.

First, § 1128 was not the predecessor statute to § 52-555. The legislature renumbered § 1128 as General Statutes § 52-594 and amended § 52-594 in 1982. Both of these substantially similar statutes provide one year from the date of a decedent's death for an administrator or executor to commence an action for which the statute of limitations would expire during that year. See footnote 5 of this opinion. Neither statute creates a cause of action for wrongful death. As such, our analysis in *Leahy* of the purpose of § 1128 is not probative of the statutes at issue in this case.

Second, even if the plaintiff were correct that *Leahy* is applicable to her action, our holding in *Leahy* would fail to save her cause of action from dismissal. Before the Appellate Court, the plaintiff similarly argued that § 52-594 extended the Claims Commissioner's waiver of sovereign immunity. *Harvey* v. *Dept. of Correction*, supra, 189 Conn. App. 106–107. The Appellate Court reasoned that, even if that were true, the plain text of § 52-594 indicates that it would extend the Claims Commissioner's waiver of sovereign immunity by only one year from the date of Boucher's death. See id., 108. The limitation period would have then expired on September 26, 2016. Id. "[U]nder the law of our state, an action is commenced not when the writ is returned but when it is served [on] the defendant." (Footnote omitted; internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Here, the plaintiff served the state on September 29, 2016. *Harvey* v. *Dept. of Correction*, supra, 108. We conclude that, even if *Leahy* were applicable, § 52-594 would not save the plaintiff's cause of action.

In sum, having reviewed the briefs of the parties and the record on appeal, we conclude that the issue on which we granted certification was properly resolved in the well reasoned decision of the Appellate Court.

Consistent with that conclusion, we further conclude that our decision in *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 53, requires a plaintiff who brings an action for wrongful death to comply with both the two year statute of limitations contained in § 52-555 (a) and the limitation period contained in the statute providing the underlying theory of liability, when that theory did not exist as a right of action at common law. See id., 105. On the basis of the foregoing, we conclude that the Appellate Court properly upheld the trial court's granting of the state's motion to dismiss for lack of subject matter jurisdiction.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

D'AURIA, J., concurring. I agree with and join the majority's opinion resolving the certified issue presented, which asks whether the administratrix of the estate of a decedent who received permission to sue the state for medical malpractice under General Statutes § 4-160 (b), and who dies as a result of that malpractice before filing suit, must comply with the statutes of limitations contained in both § 4-160 (d) and General Statutes § 52-555 to bring suit against the state for wrongful death premised on medical malpractice. Applying our precedents and interpreting the legislature's intent, I agree with the majority that the answer is yes, the administratrix, Sandra Harvey, must comply with both statutes of limitations. Because she did not, sovereign immunity bars her action, and the trial court properly dismissed it for lack of subject matter jurisdiction.

I write separately to draw attention to arguably more fundamental sovereign immunity questions begged in this case, namely, whether, under these circumstances,

the administratrix of the decedent's estate even had authority to bring a wrongful death claim against the state under § 4-160 (b). That is, when, after receiving permission to sue the state for medical malpractice, a decedent dies as a result of that malpractice before filing suit, is his estate required to return to the Claims Commissioner to seek permission to sue for wrongful death? And, if the administratrix must return to the Claims Commissioner to seek permission to sue for wrongful death, does § 4-160 (b) even apply to a wrongful death claim premised on medical malpractice? Although the majority does not address these issues, the certified question, as framed, appears to presume that, if the administratrix did comply with both statutes of limitations, an action for wrongful death would lie under these circumstances.[1] In fact, it appears the answer to the certified question is relevant only if in fact the administratrix had authority to bring the wrongful death action. But whether she did is not clear.

The majority states that "[t]he theory of liability underlying the plaintiff's wrongful death claim is medical negligence . . . ." This statement plainly is based on the plaintiff's allegations that the failure of state agents, servants, or employees to properly evaluate, diagnose, and treat the decedent's oropharyngeal cancer caused

[1] The trial court did not decide the issue, either, but did note the possibility that the Claims Commissioner's grant to the decedent of permission to sue the state under § 4-160 (b) did not authorize a wrongful death action: "[The trial court] question[ed] whether the plaintiff's characterization of this lawsuit as a wrongful death action is a proper gloss and/or is properly brought before this court when the action approved by the [Claims] [C]ommissioner was a medical malpractice claim. . . . [A] distinctly different claim not presented to the Claims Commissioner but raised 'as an afterthought' [is] barred by sovereign immunity." The trial court suggested that, if a wrongful death claim is a distinctly different claim than a medical malpractice claim, the administratrix would be required to go back to the Claims Commissioner to get permission to sue. But, if the wrongful death claim was not distinctly different because the underlying malpractice was in fact before the Claims Commissioner, then the court's determination regarding the statute of limitations controlled the outcome of the case.

"the progression of [his] cancer condition [that] eventually led to his death." While he was still alive, the decedent provided a certificate of good faith, and the Claims Commissioner granted permission to sue, "limited to that portion of the claim alleging malpractice . . . ." The decedent died before putting the case into suit, thereby necessitating the appointment of the administratrix.

Whether a wrongful death claim that is based on an "underlying" medical malpractice theory of liability comes within § 4-160 (b), thereby requiring that the Claims Commissioner grant permission to sue, and whether such a claim is encompassed by permission to sue for medical malpractice are, in my view, issues at least as fundamental—and jurisdictional—as the statute of limitations issue that the majority decides. The majority properly does not address these issues because neither the parties nor the Appellate Court addressed them. The legislature, of course, could resolve them, and should, in my view, consider doing so, as neither § 4-160 (b) nor our case law provides significant guidance on how to decide these questions.

Section 4-160 (b) provides that, "[i]n any *claim alleging malpractice* against the state, a state hospital or against a physician, surgeon, dentist, podiatrist, chiropractor or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim." (Emphasis added.) Under § 4-160 (b), if a claimant provides a certificate of good faith, as the decedent did in this case, the Claims Commissioner has no discretion to decline to grant permission to sue. Rather, she must grant permission to sue. See *D'Eramo* v. *Smith*, 273 Conn. 610, 622, 872 A.2d 408 (2005) ("the effect of

the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the [C]laims [C]ommissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements"); *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 504, 167 A.3d 1112 ("a medical malpractice action . . . is subject to § 4-160 (b), which . . . strips the commissioner of [her] discretionary decision-making power to authorize suit for such claims against the state if a certificate of good faith in accordance with [General Statutes] § 52-190a has been submitted"), cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

The legislative history of this exception to the Claims Commissioner's discretionary authority, passed in 1998, explains that the purpose of § 4-160 (b) was to streamline and to expedite the litigation process, both for the benefit of the injured plaintiff and for reasons of judicial economy. See *D'Eramo* v. *Smith*, supra, 273 Conn. 624 (Testimony before the Judiciary Committee included the following statements: "I would think that I would file a [c]ertificate of [g]ood [f]aith promptly and the case would move on. . . . We only seek to get to the jury and get an opportunity to have our day in court in these medical negligence cases against the [s]tate and not have to wait . . . . [W]e have to make it as simple as possible to accomplish justice even when the sovereign is involved." (Citations omitted; internal quotation marks omitted.)). Section 4-160 (b) only addresses "any claim alleging malpractice," however. This court has not had the opportunity to interpret this phrase. It is not clear whether "any claim alleging malpractice" includes a wrongful death claim for which malpractice is the underlying theory of liability. Even if § 4-160 (b) encompasses wrongful death claims premised on medical malpractice, it also is not clear if permission to sue

for a common-law medical malpractice claim extends to a wrongful death claim premised on medical malpractice.[2]

Section 4-160 (b) does not provide any clear answers to these questions. I also have found no case law addressing them. In *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 493, however, the Appellate Court addressed whether a medical malpractice claim was encompassed by the Claims Commissioner's permission to sue. See id., 504. In *Arroyo*, the plaintiffs had requested and received permission to sue the state for medical malpractice. See id., 497. On appeal, the defendants argued that the trial court lacked subject matter jurisdiction because the "theory of liability" that the plaintiffs were pursuing in their lawsuit was "materially different" from the claim contained in the request for permission to sue that they had filed with the Claims Commissioner, which was granted pursuant to the mandatory provision of § 4-160 (b).[3] Id., 500. The Appellate

[2] Notably, the legislature in 2019 amended § 4-160 (b) to provide in addition: "In lieu of filing a notice of claim pursuant to section 4-147, a claimant may commence a medical malpractice action against the state prior to the expiration of the limitation period set forth in section 4-148 and authorization for such action against the state shall be deemed granted. Any such action shall be limited to medical malpractice claims only and any such action shall be deemed a suit otherwise authorized by law in accordance with subsection (a) of section 4-142." Public Acts 2019, No. 19-182, § 4. This amendment was not intended to—and did not—clarify the issues this concurring opinion identifies. In fact, the amendment sets up the possibly odd scenario in which a plaintiff bypasses the Claims Commissioner and brings an action in court by filing a good faith certificate in support of a medical malpractice action, and, upon the plaintiff's death as an alleged result of that malpractice, the administratrix would have to go the Claims Commissioner for permission to sue.

[3] "Specifically, the defendants argue[d] that in alleging that [the defendant urologist] 'dissected and ligated . . . vascular structures, thereby . . . severing blood flow to [the plaintiff patient's] left testicle,' the 'vascular structure' to which the plaintiffs must have been referring in their notice of claim was the testicular artery because the only 'vascular structure' that could have resulted in a lack of blood flow to the testicle was the testicular artery. The defendants then reasoned that, because the plaintiffs' theory of liability presented at trial was that [the defendant urologist] dissected and ligated a vein, not the testicular artery, and injured the nearby testicular artery in

Court disagreed with the defendants, explaining that, although the plaintiffs' theory of the case was more "particularized" at trial than it was in their request for permission to sue, the general theory remained the same. Id., 504–506. The court reasoned that it was only natural for the plaintiffs' theory to become more particularized at trial after the plaintiffs had received the benefit of the discovery process. Id., 506.

The holding in *Arroyo* at least suggests that the plaintiff's request for permission to sue may be more general than the actual claim brought against the state. *Arroyo* also suggests that materially different claims are not authorized under § 4-160 (b). It is not clear, however, whether a wrongful death claim is a more particularized claim of medical malpractice, as was the case in *Arroyo*, which did not involve wrongful death or a materially different claim. But see *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966) (wrongful death claim under § 52-555 is "a continuance of that which the decedent could have asserted had he lived" (internal quotation marks omitted)).

Even if a claim for wrongful death premised on medical malpractice is not a more particularized claim for medical malpractice, it is nonetheless arguable that permission to sue the state for medical malpractice might encompass a wrongful death claim premised on the same malpractice. Under General Statutes § 4-147, regarding claims against the state in general, the Appellate Court has determined that, "[w]hile the plaintiff [is] not required to set forth a formal declaration of the particular causes of action he [seeks] to bring against the state, he need[s] to include information that would

turn by unintentionally cauterizing it, the plaintiffs did not obtain a waiver of sovereign immunity for the claim presented to the court." (Emphasis omitted; footnote omitted.) *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 500.

clarify the nature of the waiver sought and ensure that the Claims Commissioner . . . [has] an understanding of the nature of that waiver." *Morneau* v. *State*, 150 Conn. App. 237, 252, 90 A.3d 1003, cert. denied, 312 Conn. 926, 95 A.3d 522 (2014). The Appellate Court has held that a plaintiff may not bring suit on a claim "not included in the proceedings before the Claims Commissioner" but is limited to raising the legal theories that were raised before the Claims Commissioner. Id., 251. A claim is sufficiently raised before the Claims Commissioner if the allegations before the Claims Commissioner "would support the elements of [the] distinct [cause] of action." Id. Under this rule, it is possible that notice of a medical malpractice claim may be sufficient to provide notice to the Claims Commissioner of a possible wrongful death claim, should the plaintiff die, if that claim is premised on the same allegations of medical malpractice. It is not clear, however, if this rule applies to subsection (b) of § 4-160.

If the permission to sue granted in this case did not encompass the administratrix' wrongful death claim, she would be required to seek permission to sue anew. This brings us full circle to the question of whether the wrongful death claim is a claim "alleging malpractice against the state, a state hospital or against a . . . licensed health care provider employed by the state"; General Statutes § 4-160 (b); thereby requiring that the Claims Commissioner grant permission to sue if the administratrix provides a certificate of good faith, or whether wrongful death is something different that instead invokes the Claims Commissioner's discretionary authority. It is perhaps surprising that these issues previously have not arisen, but they are bound to arise at some point—either because, as in this case, the injured party receives permission to sue for medical malpractice but dies before bringing the suit, or because the

injured party receives permission to sue and does bring suit for medical malpractice but dies before the case resolves.

At oral argument before this court, the defendants' counsel declined to commit to a position on whether an administratrix would have to return to the Claims Commissioner to seek authorization to sue the state for wrongful death, the original claimant having died after receiving permission to sue for medical malpractice but before putting the case into suit. It is understandable that counsel might want to hold their fire and argue in a future case that, narrowly construed, neither the legislature nor the Claims Commissioner authorized a wrongful death suit under those circumstances.

Because the legislature specifically decided as a matter of policy to permit prompt action on medical malpractice claims by curtailing the Claims Commissioner's discretion when a plaintiff provides a certificate of good faith, I believe the legislature is best suited to clarify whether permission to sue the state for medical malpractice encompasses a claim for wrongful death premised on that medical malpractice. See *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002) ("[b]ut just as the primary responsibility for formulating public policy resides in the legislature . . . so, too, does the responsibility for determining, within constitutional limits, the methods to be employed in achieving those policy goals" (citations omitted)). In light of the limited legal guidance available on these issues, legislative guidance would avoid the consumption of judicial and other state resources required to resolve a question that is plainly one of legislative policy. A legislative solution would also avoid uncertainty and delay for litigants awaiting resolution of the estates of those who have passed.

STATE OF CONNECTICUT *v.* DURANTE D. BEST (SC 20278)

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

Syllabus

Convicted of murder, attempt to commit murder, and assault in the first degree in connection with the shooting of his girlfriend's daughter, O, and O's roommate, J, the defendant appealed to this court, claiming that the trial court had abused its discretion in admitting into evidence four photographs depicting the bloody interior of the car in which O and J drove to the hospital after the shooting. On the day of the shooting, O and J arrived at the house where the defendant and his girlfriend lived and found them arguing inside a locked bedroom. O and J demanded that the defendant open the bedroom door. When he did, he shot O and J each once in the chest. O and J fled to O's car and drove to the hospital, where J died as a result of her injuries. At trial, the state introduced into evidence, over defense counsel's objection, the four photographs as full exhibits. On appeal to this court, the defendant claimed that the trial court had improperly admitted the photographs because they were not relevant to the crimes with which he was charged and, alternatively, because they were unduly prejudicial insofar as their graphic nature had a tendency to arouse the jurors' passions. *Held* that the trial court did not abuse its discretion in admitting into evidence the photographs depicting the bloody interior of the car that O and J used to flee the shooting: the photographs were relevant because the amount of blood loss that O and J suffered immediately after the shooting and the corresponding severity of their wounds were probative of certain elements of the charged offenses, namely, whether the wounds the defendant inflicted were grievous enough to cause J's death and serious physical injury to O, and the defendant's intent as to those offenses; moreover, the photographs were relevant because they corroborated O's testimony at trial about the events that transpired immediately following the shooting; furthermore, the trial court did not abuse its discretion in concluding that the probative value of the photographs outweighed their prejudicial effect.

Argued February 21—officially released October 14, 2020**

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

** October 14, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with two counts each of the crimes of attempt to commit murder and assault in the first degree, and with one count each of the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Rodriguez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Lavine*, *Mullins* and *Harper*, *Js.*, which reversed in part the judgment of the trial court and remanded the case for a new trial on the murder charge and one count each of the attempt to commit murder and assault in the first degree charges; thereafter, the case was tried to the jury before *Richards*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Joseph Corradino*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The sole issue in this appeal is whether the trial court abused its discretion in admitting into evidence four photographs that depicted the bloody interior of a motor vehicle used to transport to the hospital two victims who were shot by the defendant, Durante D. Best. The defendant claims that the photographs were irrelevant to the criminal charges against him and that, even if relevant, their probative value was outweighed by their prejudicial effect on the jury. We conclude that the trial court did not abuse its discretion in admitting the photographs and affirm the judgment of conviction.

The jury reasonably could have found the following facts. At the time of the shooting, the defendant lived in a house on Jefferson Street in Bridgeport with his girlfriend, Erika Anderson (Erika), his stepbrother, Joseph Myers, and two other individuals—Jackie Figueroa and Nelson Stroud. Around mid-afternoon on May 4, 2006, Erika's daughter, Octavia Anderson (Octavia), arrived at the house with her three year old son and Octavia's roommate, Rogerlyna Jones, to pick up her mother for an outing to a carnival. Jones went up to the house and knocked on the door to retrieve Erika, while Octavia stayed in the car with her son. Jones soon returned to the car, however, and informed Octavia that no one was answering the door. Octavia exited the car and encountered Stroud, who told her that the defendant and Erika were inside the house having an argument. Both Octavia and Jones then approached the house, where they found the door unlocked. They entered the kitchen and heard the defendant and Erika arguing in the bedroom.

Octavia called out to her mother and heard her respond, but the door to the bedroom remained closed. Octavia found a large roll of plastic wrap in the kitchen, which she used to bang on the bedroom door while telling the defendant and Erika to "open up the door." Octavia continued to bang on the bedroom door and yelled out to the defendant, "[if] [y]ou don't open this door, I'm gonna fuck you up." Jones added "we've got backup . . . ." The defendant opened the door and shot Octavia and Jones each once in the chest. Both women then ran outside toward Octavia's car, and Erika fled after them. Erika watched as the women drove away. When Erika turned around, she faced the defendant, who then shot her once in the chest.

Octavia drove herself and Jones to Bridgeport Hospital, stopping at one point to ask a friend for help. Both

Octavia and Jones were bleeding copiously during the ride to the hospital due to the severity of their wounds. All three victims suffered substantial and life threatening injuries as a result of the gunshot wounds inflicted by the defendant. Although Octavia and Erika ultimately survived, Jones was not so fortunate—she died of her injuries shortly after arriving at Bridgeport Hospital.

Following a jury trial, the defendant was convicted of murder in violation of General Statutes § 53a-54a (a), two counts of attempted murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). On appeal to the Appellate Court, the defendant claimed that the trial court improperly denied his request for a jury instruction on self-defense. See *State* v. *Best*, 168 Conn. App. 675, 676–77, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). The Appellate Court concluded that the defendant was entitled to a self-defense instruction as to Octavia and Jones but was not entitled to the instruction as to Erika because "[n]one of the evidence adduced at trial indicate[d] that Erika posed a threat to the defendant." Id., 688. Accordingly, the Appellate Court reversed the defendant's conviction as to the murder of Jones, the attempted murder of Octavia, and the assault in the first degree of Octavia, and remanded the case for a new trial on those charges. Id., 689. The Appellate Court affirmed the defendant's judgment of conviction in all other respects. Id.

At the defendant's second jury trial on the murder, attempted murder, and first degree assault charges, the state admitted into evidence various photographs of the crime scene, many of which depicted the victims' blood. The state also moved to admit into evidence four photographs of the bloody interior of the car that

Octavia used to drive herself and Jones to the hospital following the shooting. These photographs depict the front compartment of Octavia's Dodge Stratus, where blood can be seen on the seats, console, cup holder, and footwell. Defense counsel objected to the admission of the photographs of the automobile's interior, arguing that they were "inflammatory and not of any probative value, and ask[ing] that they . . . not be entered into [evidence]." The state responded that the photographs were "not particularly graphic by the standards of this courtroom, and they are probative of the nature of the injuries sustained by the two ladies who arrived in the vehicle." The trial court overruled the defendant's objection and admitted the photographs into evidence as full exhibits. At the conclusion of the trial, the jury found the defendant guilty of the crimes charged. The trial court sentenced the defendant to a total effective sentence of forty years imprisonment, to be served consecutive to the sentence imposed on the counts pertaining to Erika that remained intact following his first jury trial. This appeal followed.

On appeal, the defendant claims that the four photographs of the bloody interior of Octavia's car were not relevant to the crimes with which he was charged and, therefore, improperly were admitted into evidence. Alternatively, the defendant claims that the photographs were unduly prejudicial because their graphic nature had a tendency "to inflame the jury's passions or tug on [the jurors'] sympathies." The defendant claims that the alleged evidentiary error was harmful because, in the absence of the admission of the photographs, "the jury may have found reasonable doubt in the varying accounts of the shooting, believed [the defendant's] testimony that he believed he was acting in self-defense, or believed that he fired the revolver recklessly or negligently . . . ."

I

We first address whether the challenged photographs were relevant.[1] "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429, 64 A.3d 91 (2013); see also Conn. Code Evid. § 4-1 (" '[r]elevant evidence' means evi-

[1] The state contends that the defendant did not raise a "straight relevance objection" in the trial court and, therefore, failed to preserve this claim for appellate review. This argument is without merit. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly" by "articulat[ing] the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose . . . . [T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Taylor G.*, 315 Conn. 734, 769–70, 110 A.3d 338 (2015). At trial, the defendant objected to the admission of the photographic evidence in part on the ground that it was "not of any probative value . . . ." Evidence that has "no probative value whatsoever" is "entirely irrelevant" because it does "nothing toward establishing the likelihood" of a fact in issue. (Internal quotation marks omitted.) *State* v. *Moody*, 214 Conn. 616, 628, 573 A.2d 716 (1990). By arguing that the photographic evidence was devoid of any probative value in the present case, the defendant plainly raised a relevance objection. Indeed, the state addressed the relevance of the evidence in its response to the defendant's objection, arguing, in pertinent part, that the photographs were "probative of the nature of the injuries sustained by the two ladies who arrived in the vehicle." We therefore conclude that the defendant functionally preserved his relevance claim. See *State* v. *Santana*, 313 Conn. 461, 468, 97 A.3d 963 (2014) ("although a party need not use the term of art applicable to the claim, or cite to a particular statutory provision or rule of practice to functionally preserve a claim, he or she must have argued the underlying principles or rules at the trial court level in order to obtain appellate review"); *State* v. *Paulino*, 223 Conn. 461, 476–77, 613 A.2d 720 (1992) (holding that defendant's objection that evidence was "unnecessary and harmful" sufficiently preserved claim that evidence was more prejudicial than probative, even though defendant "failed to incorporate the specific language that he . . . use[d] on appeal").

dence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence''). Thus, ''photographic evidence is admissible where the photograph has a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry.'' (Internal quotation marks omitted.) *State* v. *Kelly*, 256 Conn. 23, 64, 770 A.2d 908 (2001). The evidence need not be ''essential to the case in order for it to be admissible. . . . In determining whether photographic evidence is admissible, the appropriate test is relevancy, not necessity.'' (Citations omitted.) Id., 65. ''The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion.'' (Internal quotation marks omitted.) *State* v. *Pena*, 301 Conn. 669, 674, 22 A.3d 611 (2011).

At trial, the state bore the burden of proving beyond a reasonable doubt, among other things, that the defendant caused the death of Jones in violation of § 53a-54a (a) and inflicted ''serious physical injury'' on Octavia in violation of § 53a-59 (a) (1). ''Serious physical injury'' is defined as ''physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4). The amount of blood loss suffered by Octavia and Jones during their brief journey to the hospital immediately after the shooting was indicative of the severity of their gunshot wounds and had a tendency to prove that these wounds were grievous enough to cause the death of Jones and serious physical injury to Octavia.[2] See *State* v. *DeJesus*, 194 Conn. 376,

[2] We find no merit in the defendant's contention that the photographs at issue are irrelevant because they are not ''crime scene photographs and/or autopsy or wound photographs taken elsewhere.'' Although crime scene or

384, 481 A.2d 1277 (1984) (holding that photographs of wounds suffered by victims were relevant "to the cause and manner of the death of the two victims"); *State* v. *Rivera*, 169 Conn. App. 343, 378, 150 A.3d 244 (2016) ("[a]utopsy photographs depicting the wounds of victims are independently relevant because they may show the character, location and course of the [weapon]" (internal quotation marks omitted)), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017); *State* v. *Osbourne*, 162 Conn. App. 364, 371–72, 131 A.3d 277 (2016) (photographs depicting victim's blood loss and bloody clothing were relevant, among other reasons, to establish that victim suffered physical injury).

Although the connection is more tenuous, the trial court may also have considered the photographs relevant to the defendant's criminal intent. With respect to the crimes of murder and attempted murder, the state bore the burden of proving beyond a reasonable doubt that the defendant acted with the specific intent to cause the deaths of Jones and Octavia. See, e.g., *State* v. *Bennett*, 307 Conn. 758, 765–66, 59 A.3d 221 (2013) ("[i]n order to be convicted under our murder statute, the defendant must possess the specific intent to cause the death of the victim" (internal quotation marks omitted)); *State* v. *Murray*, 254 Conn. 472, 479, 757 A.2d 578 (2000) ("[a] verdict of guilty of attempted murder requires a finding of the specific intent to cause death"). With respect to the crime of assault in the first degree, the state bore the burden of proving beyond a reasonable doubt that

wound photographs might provide the most direct and salient evidence of the nature and extent of a victim's injuries, they are not the *only* type of photographic evidence that may be used for that purpose. It is well established that "[e]vidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis added; internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 497, 964 A.2d 73 (2009). We address the claimed prejudicial effect of the challenged evidence in part II of this opinion.

the defendant shot Octavia with the specific intent to cause her serious physical injury. See, e.g., *State* v. *Nash*, 316 Conn. 651, 668, 114 A.3d 128 (2015) ("[i]ntentional assault in the first degree in violation of § 53a-59 (a) (1) requires proof that the defendant (i) had the intent to cause serious physical injury to a person, (ii) caused serious physical injury to such person or to a third person, and (iii) caused such injury with a deadly weapon or dangerous instrument").

"As we have observed on multiple occasions, [t]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). Intent to cause death or serious physical injury "may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the [crime]. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Gary*, 273 Conn. 393, 407, 869 A.2d 1236 (2005). The extent and severity of injuries often are used as indirect proof of intent. See *State* v. *Reynolds*, 264 Conn. 1, 101, 836 A.2d 224 (2003) (holding that autopsy photographs were admissible in penalty phase of capital case because they "were relevant to the state's claim that the defendant had intentionally inflicted extreme psychological pain or torture on [the victim] beyond that necessary to accomplish the killing" (emphasis omitted)), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Doehrer*,

200 Conn. 642, 650, 513 A.2d 58 (1986) (photograph of victim's injuries was "independently relevant to the issue of intent," which "was a material element of both the murder and assault charges and it was the state's burden to prove such intent beyond a reasonable doubt"); *State* v. *Epps*, 105 Conn. App. 84, 96, 936 A.2d 701 (2007) (trial court properly admitted photographs of victim's injuries because "[t]he seriousness of the injuries would be relevant in proving the defendant's intent to disfigure or even his intent to kill, which was an element of the charge of attempt to commit murder"), cert. denied, 286 Conn. 903, 943 A.2d 1102 (2008); *State* v. *Osbourne*, supra, 162 Conn. App. 372 (photographs depicting victim's blood loss and bloody clothing were relevant to issue of "whether the defendant possessed the requisite intent of the crime charged").

Lastly, the photographs of the interior of Octavia's vehicle were relevant because they corroborated Octavia's testimony about the events that transpired immediately following the shooting. See, e.g., *State* v. *Doehrer*, supra, 200 Conn. 649 (photograph of victim's injuries was admissible because it "tended to corroborate" testimony of victim and her mother); *State* v. *LaBreck*, 159 Conn. 346, 350–51, 269 A.2d 74 (1970) (various photographs, including one of victim's blood splatter on kitchen floor and counter, were relevant "to illustrate to the jury the conditions described in the testimony of the several witnesses concerning the aspects of the proof with which they were concerned"); *State* v. *Michael G.*, 107 Conn. App. 562, 573, 945 A.2d 1062 (photographs were relevant because they "tended to corroborate factual details surrounding the defendant's commission of the sexual assaults"), cert. denied, 287 Conn. 924, 951 A.2d 574 (2008); *State* v. *Scuilla*, 26 Conn. App. 165, 171, 599 A.2d 741 (1991) (photographs of victim were relevant to corroborate testimony of "two witnesses who saw the incident while driving on

the highway, as well as the medical examiner's explanation of the cause of death"), cert. denied, 221 Conn. 908, 600 A.2d 1362 (1992). Accordingly, we reject the defendant's claim that the photographic evidence was irrelevant to the crimes charged.

II

Having determined that the challenged photographs were relevant, we next address whether the trial court properly concluded that their probative value outweighed their prejudicial effect. "A potentially inflammatory photograph may be admitted if the court, in its discretion, determines that the probative value of the photograph outweighs the prejudicial effect it might have on the jury." *State* v. *Williams*, 227 Conn. 101, 111, 629 A.2d 402 (1993); see also Conn. Code. Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence").

"[A] trial court has broad discretion in weighing the potential prejudicial effect of a photograph against its probative value. . . . On appeal, we may not disturb . . . [the trial court's] finding absent a clear abuse of discretion." (Internal quotation marks omitted.) *State* v. *Satchwell*, 244 Conn. 547, 575, 710 A.2d 1348 (1998). "[B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . [Accordingly] [t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the

jur[ors].'' (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jacobson*, 283 Conn. 618, 639, 930 A.2d 628 (2007); see also *State* v. *Kulmac*, 230 Conn. 43, 61, 644 A.2d 887 (1994) (''[t]he primary responsibility for making these [evidentiary] determinations rests with the trial court''). Such deference is warranted because the trial court, with ''its intimate familiarity with the case, is in the best position to weigh the relative merits and dangers of any proffered evidence.'' *State* v. *Geyer*, 194 Conn. 1, 13, 480 A.2d 489 (1984); see also *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007) (trial court is ''vested with the discretion to admit or to bar . . . evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence'' that require trial court to make '' 'judgment call' '' involving ''determinations about which reasonable minds may . . . differ'').

The defendant contends that the photographs of the interior of Octavia's car are ''inherently prejudicial'' and, thus, inadmissible ''because of their bloody imagery.'' This contention misapprehends the proper analysis. ''[P]hotographs [that] have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry are not rendered inadmissible simply because they may be characterized as gruesome.'' (Internal quotation marks omitted.) *State* v. *Epps*, supra, 105 Conn. App. 95; see *State* v. *Ross*, 230 Conn. 183, 277, 646 A.2d 1318 (1994) (''even gruesome photographs are admissible if they would prove or disprove a material fact in issue, or illuminate a material inquiry''), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); *State* v. *DeJesus*, supra, 194 Conn. 381 (''The great weight of authority is that photographs, even though gruesome, are admissible in evidence when otherwise properly admitted if they have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material

inquiry. . . . A photograph, the tendency of which may be to prejudice the jury, may be admitted in evidence if, in the sound discretion of the court, its value as evidence outweighs its possible prejudicial effect." (Citation omitted; internal quotation marks omitted.)). The question is not solely whether the evidence is gruesome, disturbing or otherwise "inherently" prejudicial but whether its prejudicial nature is undue or unfair, a question that requires the trial court to undertake the relativistic assessment of probative value versus prejudicial effect at the heart of § 4-3 of the Connecticut Code of Evidence.[3]

As we explained in part I of this opinion, the photographic evidence at issue was relevant to establish the severity of Jones' and Octavia's injuries, to prove the defendant's criminal intent, and to corroborate Octav-

[3] The defendant invites this court to "impose 'some constraints' on graphic images" by limiting the admissibility of "images that are of limited or no relevance and/or probative value." In support of his request, the defendant relies on Chief Justice Thomas G. Saylor's dissenting opinion in *Commonwealth* v. *Woodard*, 634 Pa. 162, 212–15, 129 A.3d 480 (2015), cert. denied, U.S. , 137 S. Ct. 92, 196 L. Ed. 2d 79 (2016), and various scholarly articles. See, e.g., id., 213–15 (Saylor, C. J., dissenting) (recognizing that "decisions about admissibility may depend upon the individualized case circumstances, particularly in light of the uncertainties and emerging evidence," but suggesting that "appellate courts should impose some constraints upon the introduction of graphic photographs into the courtroom" by excluding, for example, "graphic, visceral portrayals of a dead child"); S. Bandes & J. Salerno, "Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements," 46 Ariz. St. L.J. 1003, 1015–29, 1055 (2014) (reviewing social science studies analyzing impact of gruesome photographs on deliberative process and noting that "[s]ome of the concerns raised by the studies . . . can be addressed by a variety of means, including jury instructions, expert testimony, rules on the handling or presentation of evidence, diverse juries, and judicial education, among others"). We see no reason to consider the need to promulgate further guidance of the kind suggested by the defendant because the photographs at issue in the present case, in our view, do not trigger the heightened concerns that are raised by Chief Justice Saylor. We offer no opinion about the desirability or wisdom of adopting such additional constraints under other circumstances.

ia's version of events. The defendant's intent in particular was hotly disputed at trial in light of the defendant's testimony that he shot Octavia and Jones either accidentally or in self-defense. Although the probative value of the challenged photographs under the circumstances was somewhat attenuated; see footnote 2 of this opinion; we nonetheless cannot conclude that the trial court abused its discretion in determining that, on balance, their probative value outweighed their prejudicial effect. See, e.g., *State* v. *DeJesus*, supra, 194 Conn. 382 n.7 ("[w]here . . . much of the evidence in a case is such as to indicate that a crime was committed with extreme atrocity and violence, photographs, regardless of their gruesomeness, can add little to inflame or prejudice the jury" (internal quotation marks omitted)); see also *State* v. *Satchwell*, supra, 244 Conn. 576 (upholding trial court's admission into evidence of six photographs of victims "in accordance with the principle that the trial court is afforded broad leeway in determining whether the probative value of such evidence outweighs its prejudicial effect"); *State* v. *Doehrer*, supra, 200 Conn. 651 ("it was reasonable for the trial court to conclude that the admission of the photograph would not inflame the passions of the jurors or unduly prejudice the defendant" because "[t]he photograph was not gruesome, and the jury had already heard testimony concerning the more serious injuries inflicted upon the other members of the [victims'] family"); *State* v. *Osbourne*, supra, 162 Conn. App. 375 ("although the photographs admitted into evidence depicted blood found at the scene and the victim's bloody clothing, the trial court's determination that they were more probative than prejudicial [did] not constitute an abuse of discretion").

The judgment is affirmed.

In this opinion the other justices concurred.

AMAADI COLE *v.* CITY OF NEW HAVEN ET AL. (SC 20425)

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

Syllabus

The plaintiff sought to recover damages from the defendants, the city of New Haven and one of its police officers, C, in connection with injuries the plaintiff sustained when he crashed his dirt bike to avoid colliding with C's police cruiser. C was driving northbound on a New Haven street when she spotted a group of dirt bikes and all-terrain vehicles driving the other way down the street in violation of a city ordinance. Without giving any warning or operating her lights or sirens, C executed a roadblock maneuver by pulling her cruiser diagonally across the double yellow line into the southbound lane and directly in front of the group. To avoid a head-on collision, the plaintiff jumped the curb onto the sidewalk, where he lost control of his dirt bike and struck a tree. The plaintiff alleged, inter alia, that C was negligent in responding to the dirt bikes and all-terrain vehicles because she initiated a pursuit and engaged in a roadblock maneuver in violation of the city police department's pursuit policy and the uniform statewide pursuit policy set forth in the applicable state regulation (§ 14-283a-4 (d) (5)), both of which prohibit the use of roadblocks, except when necessary to save human life or when specifically authorized by a supervisor, respectively. Accordingly, the plaintiff claimed that C violated a ministerial duty and that the city was liable pursuant to statute (§ 52-557n (a) (1) (A)) for the negligent acts of its employee. The defendants moved for summary judgment, claiming that C was engaged in a discretionary act when responding to the dirt bikes and all-terrain vehicles, and that the defendants therefore were protected by governmental immunity pursuant to § 52-557n (a) (2) (B). In opposing the defendants' motion, the plaintiff also relied on the deposition testimony of M, a sergeant with the city's police department, that, at the time of the incident, it was the police department's policy not to pursue dirt bikes or all-terrain vehicles on public roads as a matter of public safety, and that C had breached the department's pursuit policy by, inter alia, executing a complete roadblock without providing an opening for oncoming vehicles. The trial court granted the defendants' motion and rendered judgment for the defendants, concluding that they were entitled to governmental immunity. Crediting C's deposition testimony, the court concluded that there was no evidence that C engaged in a pursuit, and, accordingly,

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

neither the statewide nor the department pursuit policy was applicable to the present case. The court instead determined that C's response was discretionary rather than ministerial and that, even if C had initiated a pursuit, the language of the statewide and department pursuit policies nonetheless rendered her decision to do so discretionary. The plaintiff appealed from the trial court's judgment. *Held* that the trial court improperly granted the defendants' motion for summary judgment on the ground that C was engaged in a discretionary act when responding to the dirt bikes and all-terrain vehicles, and, therefore, this court reversed the trial court's judgment and remanded the case for further proceedings: the portions of the statewide and department pursuit policies relating to roadblocks and the pursuit of dirt bikes and all-terrain vehicles presented the type of bright-line directives that created a ministerial duty regarding the manner of pursuit, and, viewing the facts in the light most favorable to the plaintiff, there was a genuine issue of material fact with respect to whether a pursuit had occurred within the meaning of those policies, which was a predicate for establishing whether C had violated a ministerial duty; moreover, although M was not C's direct supervisor, his employment with the department gave him sufficient knowledge, training, and experience with respect to the department's policies and procedures such that his testimony was relevant to establishing the existence of a ministerial duty.

Argued May 4—officially released October 15, 2020**

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

James J. Healy, with whom was *Thomas M. McNamara*, for the appellant (plaintiff).

Thomas E. Katon, with whom were *Philip G. Kent*, *Roderick Williams* and, on the brief, *Adam D. Miller*, for the appellees (defendants).

** October 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. This appeal requires us to consider the limits of our recent decision in *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), with respect to whether applicable state and municipal policies render a police officer's acts during a pursuit of a motorist ministerial, rather than discretionary, for purposes of governmental immunity. The plaintiff, Amaadi Cole, brought this negligence action against the defendants, the city of New Haven (city) and one of its police officers, Nikki Curry, seeking damages for personal injuries sustained when Curry pulled her police cruiser directly into an oncoming traffic lane in which the plaintiff was traveling on his dirt bike, causing him to swerve and strike a tree. The plaintiff appeals[1] from the granting of summary judgment by the trial court in favor of the defendants on the ground that they were entitled to governmental immunity for discretionary acts pursuant to General Statutes § 52-557n (a) (2) (B).[2] On appeal, the plaintiff claims, inter alia, that the trial court incorrectly determined that Curry's decision to drive her cruiser into the oncoming traffic lane was a discretionary act because her actions violated several policies that imposed ministerial duties regarding roadblocks, the operation

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we granted the plaintiff's motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[2] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (2) *Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by*: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) *negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law*." (Emphasis added.) See also General Statutes § 52-557n (b) (providing specific immunities for certain acts).

of police vehicles, and pursuits. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record reveals the following facts, which we view in the light most favorable to the plaintiff, who was the nonmoving party on the motion for summary judgment. See, e.g., id., 8. On July 16, 2011, at approximately 6:43 p.m., Curry was operating a city police cruiser on Howard Avenue in New Haven in a northbound direction at approximately thirty miles per hour. Curry was on duty and on the lookout for dirt bikes and "quads,"[3] the operation of which on public streets violates a city ordinance, because several anonymous complaints had been received of dirt bikes operating "reckless[ly]" in the vicinity of Ella T. Grasso Boulevard and Howard Avenue. Curry then spotted a group of approximately seven dirt bikes and quads traveling in a southbound direction on Howard Avenue. That group, which included the plaintiff, was traveling at approximately twenty-five miles per hour and not doing any wheelies or other stunts.

When she spotted the group of dirt bikes, Curry suddenly and without warning executed a roadblock maneuver by pulling her cruiser diagonally across the double yellow line into the southbound lane directly in front of them. To avoid a head-on collision with Curry's cruiser, which was not operating with lights or sirens at the time,[4] three of the bikes jumped the curb onto the sidewalk, and one veered into the northbound lane.

[3] As the trial court noted, "[a] 'quad' is a four-wheeled vehicle also known as an 'all-terrain vehicle' . . . ."

[4] Curry testified at her deposition that she had witnessed the group of dirt bikes and quads operating recklessly in a way that "consumed the entire road," and that, *prior to pulling into the southbound lane*, she had activated her cruiser's emergency lights and siren both to warn other drivers. Curry intended to execute a U-turn in order to stop the group and to advise her dispatcher by radio of their direction of travel.

In contrast, Anthony Maebry, a neighborhood resident who witnessed the collision from outside his nearby residence, testified that Curry's cruiser

The plaintiff was riding one of the dirt bikes that went up onto the sidewalk, at which point he lost control of the bike and struck a tree. When the various vehicles stopped, the front of Curry's police cruiser was about ten feet from the tree and the plaintiff's bike. Curry then radioed for medical and additional police assistance. The plaintiff was transported by ambulance to Yale-New Haven Hospital, where he was treated for severe personal injuries, including skull fractures, optic nerve damage resulting in a near total loss of vision, memory loss and cognitive deficits, and permanent facial scarring.[5]

The plaintiff brought this negligence action against the defendants in July, 2013. In the operative complaint, the plaintiff claims, inter alia, that Curry (1) "violated proper police department procedures by pulling into the oncoming lane of traffic," (2) engaged in a roadblock or attempted roadblock in violation of certain policies, including New Haven Department of Police Services General Order No. 94-2 (General Order) and the Department of Public Safety's Uniform Statewide Pursuit Policy, namely, § 14-283a-4 (d) (5) of the Regulations of Connecticut State Agencies (Statewide Policy), (3) drove her vehicle into the plaintiff's travel lane in violation of certain motor vehicle statutes, namely, General Statutes §§ 14-230,[6]

was not operating with emergency lights or sirens when she pulled into the southbound lane. Raymond Jones, a friend who was biking with the plaintiff, and Martese Allen, another biker who was in front of a nearby package store and also witnessed the collision, testified consistently with Maebry, stating that Curry activated her lights and sirens only *after* the collision had occurred. Viewing the evidence in the light most favorable to the nonmoving plaintiff, we adopt this version of the facts for purposes of this appeal.

[5] Curry subsequently went to the hospital and handed the plaintiff's mother a summons for the plaintiff for numerous motor vehicle offenses, including operating without a license and insurance.

[6] General Statutes § 14-230 provides in relevant part: "(a) Upon all highways, each vehicle . . . shall be driven upon the right, except (1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked or standing vehicles, animals, bicycles, electric bicycles, mopeds, scooters, electric foot scooters, vehicles moving at a slow speed, as defined in section 14-220, or obstructions on the right side of the highway, (3) when the right side of a highway is

4-236[7] and 14-242,[8] and (4) "began a pursuit when [it] was unwarranted under the circumstances, in violation of proper police procedure . . . ."[9] With respect to the city, the plaintiff claimed that it was liable (1) directly

closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic. . . ."

Although § 14-230 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2019, No. 19-162, § 5; Public Acts 2018, No. 18-165, §7; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[7] General Statutes § 14-236 provides in relevant part: "When any highway has been divided into two or more clearly marked lanes for traffic, (1) a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has ascertained that such movement can be made with safety . . . ."

[8] General Statutes § 14-242 provides in relevant part: "(a) No person shall turn a vehicle at an intersection unless the vehicle is in a proper position on the highway as required by section 14-241, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a highway unless such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner provided in section 14-244.

* * *

"(e) The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or within the area formed by the extension of the lateral lines of the private alley, road or driveway across the full width of the public highway with which it intersects, or so close to such intersection of public highways or to the area formed by the extension of the lateral lines of said private alley, road or driveway across the full width of the public highway as to constitute an immediate hazard. . . ."

Although § 14-242 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2019, No. 19-162, § 8; Public Acts 2018, No. 18-165, § 10; these amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[9] The plaintiff also alleged that Curry (1) negligently pulled her vehicle into the travel path of the dirt bikes, (2) "was inattentive and failed to properly operate her police cruiser in a safe and prudent manner," (3) operated her cruiser "at a rate of speed that was unreasonable, improper, and excessive under the circumstances," (4) "failed to sound her horn or [to] give the plaintiff a timely warning, or any warning whatsoever, before pulling into his lane of traffic," (5) "failed to slow her vehicle while

for Curry's negligence under § 52-557n, and (2) to indemnify Curry under General Statutes § 7-465 (a). The defendants filed an answer, alleging, inter alia, the special defense of governmental immunity for discretionary acts under § 52-557n (a) (2) (B). In avoidance of that special defense, the plaintiff claimed that Curry had violated ministerial duties and that the plaintiff was an identifiable person subject to imminent harm.

Following the completion of discovery, the defendants moved for summary judgment on governmental immunity grounds under § 52-557n (a) (2) (B), claiming that Curry's actions were discretionary and that no genuine issue of material fact exists concerning the identifiable victim-imminent harm exception to discretionary act immunity. In its memorandum of decision granting the defendants' motion, the trial court rejected the plaintiff's claim that Curry had breached a ministerial duty by executing a roadblock maneuver that was proscribed by the General Order, the Statewide Policy, and several motor vehicle statutes, including §§ 14-230, 14-236 and 14-242. The trial court also rejected the plaintiff's reliance on the expert testimony of Carlos Maldonado, a sergeant with the city's police department, that Curry had breached police pursuit policy by blocking the oncoming vehicles without providing an opening to get by and by pursuing riders on dirt bikes or quads. Instead, the trial court agreed with the defendants' argument that the pursuit policies were inapplicable because there was no evidence of an actual "chase" that would constitute a "pursuit," observing that Curry had testified at her deposition that she had activated her lights to warn other motorists and simply changed lanes while operating her cruiser. Accordingly, the trial court concluded that Curry had "exercised her discretion in

approaching oncoming traffic while driving in the wrong lane," and (6) failed to "take corrective action by either turning her vehicle to the left or the right, or decelerating by putting on her brakes when a collision with oncoming traffic was likely to occur."

responding to a situation that could pose a threat to others," namely, the report of dirt bikes and quads that had been seen operating illegally on city streets. The trial court also concluded that, even if Curry had initiated a pursuit, the language of the General Order and the Statewide Policy rendered her decision to do so discretionary in nature. With respect to the claimed statutory violations of §§ 14-230 and 14-236, which require vehicles to stay to the right and within a single lane, and § 14-242, which permits only those turns that can be made with "reasonable safety," the trial court held that Curry was privileged to disregard those statutes under the emergency vehicle statute, General Statutes § 14-283,[10] because her operation of the police

[10] General Statutes § 14-283 provides in relevant part: "(a) As used in this section, 'emergency vehicle' means any ambulance or vehicle operated by a member of an emergency medical service organization responding to an emergency call, any vehicle used by a fire department or by any officer of a fire department while on the way to a fire or while responding to an emergency call but not while returning from a fire or emergency call, any state or local police vehicle operated by a police officer or inspector of the Department of Motor Vehicles answering an emergency call or in the pursuit of fleeing law violators or any Department of Correction vehicle operated by a Department of Correction officer while in the course of such officer's employment and while responding to an emergency call.

"(b) (1) The operator of any emergency vehicle may (A) park or stand such vehicle, irrespective of the provisions of this chapter, (B) except as provided in subdivision (2) of this subsection, proceed past any red light or stop signal or stop sign, but only after slowing down or stopping to the extent necessary for the safe operation of such vehicle, (C) exceed the posted speed limits or other speed limits imposed by or pursuant to section 14-218a or 14-219 as long as such operator does not endanger life or property by so doing, and (D) disregard statutes, ordinances or regulations governing direction of movement or turning in specific directions.

"(2) The operator of any emergency vehicle shall immediately bring such vehicle to a stop not less than ten feet from the front when approaching and not less than ten feet from the rear when overtaking or following any registered school bus on any highway or private road or in any parking area or on any school property when such school bus is displaying flashing red signal lights and such operator may then proceed as long as he or she does not endanger life or property by so doing.

"(c) The exemptions granted in this section shall apply only when an emergency vehicle is making use of an audible warning signal device, including but not limited to a siren, whistle or bell which meets the requirements

cruiser was a discretionary act. The trial court further concluded that there was no genuine issue of material fact with respect to whether the identifiable person-imminent harm exception to discretionary act immunity applied. Finally, the trial court determined that the city would not be liable for indemnification under § 7-465 (a), given the governmental immunity shield of § 52-557n (a) (2) (B). Accordingly, the trial court granted the defendants' motion for summary judgment and rendered judgment accordingly. This appeal followed.

On appeal, the plaintiff claims that the trial court improperly granted the motion for summary judgment on the ground that Curry's actions were discretionary acts afforded governmental immunity under § 52-557n (a) (2) (B) because she had violated a ministerial duty not to pull her cruiser into the plaintiff's travel lane. To establish that ministerial duty, the plaintiff relies on, inter alia,[11] the testimony of Maldonado, a New Haven police sergeant, and the General Order and the Statewide Policy, which strictly limit the use of roadblocks and preclude the chasing of dirt bike riders. Citing, among other cases, *Strycharz* v. *Cady*, 323 Conn. 548, 148 A.3d 1011 (2016), the plaintiff emphasizes that Maldonado's testimony alone was sufficient to establish the existence of a ministerial duty in this respect. To

of subsection (f) of section 14-80, and visible flashing or revolving lights which meet the requirements of sections 14-96p and 14-96q, and to any state or local police vehicle properly and lawfully making use of an audible warning signal device only.

"(d) The provisions of this section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property. . . ."

As with §§ 14-230 and 14-242; see footnotes 6 and 8 of this opinion; § 14-283 has been amended by the legislature since the events underlying the present case. See, e.g., Public Acts 2014, No. 14-221, § 1. These amendments, however, have no bearing on the merits of this appeal, and, in the interest of simplicty, we refer to the current revision of the statute.

[11] See footnote 18 of this opinion for our discussion of the plaintiff's other claims with respect to the existence of a ministerial duty.

this end, the plaintiff observes that, "[i]n short . . . Curry was either chasing the plaintiff or driving into the lane of traffic of the bikes. Either action violated a clear directive."

In response, the defendants contend that there was no ministerial duty because the various pursuit policies cited by the plaintiff are not applicable because "[t]his is not a pursuit case," as Curry was engaged in "a traffic control function while on patrol . . . thereby partially blocking a portion of Howard Avenue," and "never chased the plaintiff or any of the other riders." The defendants argue that Curry's activation of the cruiser's lights and sirens did not ipso facto constitute a pursuit under the applicable policies. Relying heavily on *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), the defendants also contend that *Strycharz* is distinguishable and that Maldonado's testimony is insufficient to establish the existence of a ministerial duty because it was "vague and contradictory" with respect to a city policy prohibiting blocking the road and because Maldonado was not Curry's "direct supervisor." We agree, however, with the plaintiffs and conclude that the trial court improperly granted the defendants' motion for summary judgment because the plaintiff has established the existence of a ministerial duty under the applicable city and state policies and because a genuine issue of material fact exists with respect to the factual predicate for that ministerial duty.[12]

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden

[12] Given our conclusion that a ministerial duty exists in this case, we need not reach the plaintiff's claim that, even if the duty were discretionary in nature, he was an identifiable victim subject to imminent harm for purposes of that exception to discretionary act immunity. See, e.g., *Borelli* v. *Renaldi*, supra, 336 Conn. 26–27.

of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy [this] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 53, 213 A.3d 1110 (2019).

"The following principles of governmental immunity are pertinent to our resolution of the plaintiff's claims. The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or dis-

cretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [a ministerial act] refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts. . . .

"The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or

discretion as an official function of the authority expressly or impliedly granted by law. . . .

"For purposes of determining whether a duty is discretionary or ministerial, this court has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions. . . . A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. . . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary. . . .

"In accordance with these principles, our courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . Because the construction of any such provision, including a municipal rule or regulation, presents a question of law for the court . . . whether the provision creates a ministerial duty gives rise to a legal issue subject to plenary review on appeal. . . .

"Because this appeal concerns the actions of police officers and the [city] police department, we also observe that [i]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the

municipality. . . . Indeed, this court has long recognized that it is not in the public's interest to [allow] a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a [police officer's] discretionary professional duty. Such discretion is no discretion at all. . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer." (Citations omitted; internal quotation marks omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 10–13; see also *Coley* v. *Hartford*, 312 Conn. 150, 164–65, 95 A.3d 480 (2014) (noting, with respect to officers' alleged failure to "adhere to specific police response procedures . . . the considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis"); *Shore* v. *Stonington*, 187 Conn. 147, 153–55, 157, 444 A.2d 1379 (1982) (whether to detain suspected drunk driver was discretionary act).

Having reviewed the record, we first conclude that there is a genuine issue of material fact with respect to the predicate for a ministerial duty, namely, whether a "pursuit" occurred, thus rendering summary judgment improper in this case. See *Ventura* v. *East Haven*, supra, 330 Conn. 636 n.11 ("although the ultimate determination of whether governmental immunity applies is typically a question of law for the court, there may well be disputed factual issues material to the applicability of the defense, the resolution of which are properly left to the trier of fact"). First, Curry's decision to pull her cruiser across the oncoming traffic lane of Howard Avenue may be viewed in the light most favorable to the plaintiff as a roadblock maneuver intended to stop the bikers, thus implicating city and state pursuit policies that clearly compelled her to "act in a prescribed manner, without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Borelli* v.

Renaldi, supra, 336 Conn. 12. Although the defendants are correct that, under the General Order, merely activating the cruiser's lights and siren to effectuate a stop did not ipso facto constitute a pursuit under the applicable policies; but see footnote 4 of this opinion; Curry's act of using her vehicle to apprehend the plaintiff and the bikers raises an issue of material fact as to whether a pursuit occurred in light of her deposition testimony that she activated her lights and sirens and that some members of the group reacted to seeing her by fleeing, at which point she executed the maneuver at issue in this case. Specifically, the General Order does not define the term "pursuit," and the Statewide Policy defines that term more broadly than the "chase" envisioned by the trial court and the defendants. Consistent with its authorizing statute; see General Statutes § 14-283a (b); the Statewide Policy does not expressly contemplate a "chase" but, instead, defines "pursuit" as "an attempt by a police officer in an authorized emergency vehicle to apprehend any occupant of another moving motor vehicle, when the driver of the fleeing vehicle is attempting to avoid apprehension by maintaining or increasing the speed of such vehicle or by ignoring the police officer's attempt to stop such vehicle." Regs., Conn. State Agencies § 14-283a-3 (1). The use of the cruiser under these circumstances to physically attempt to apprehend the plaintiff and the other bikers may reasonably be viewed as a pursuit—albeit brief—consistent with that definition and the public safety goals that underlie the adoption of the Statewide Policy, which recognizes that "[p]ursuits of fleeing motor vehicles may present a danger to the lives of the public, officers, and those vehicle occupants involved in the pursuit." Regs., Conn. State Agencies § 14-283a-2; see also *Borelli* v. *Renaldi*, supra, 155–58 (*Ecker*, *J.*, dissenting) (discussing legislative history of police pursuit statute, § 14-283a).

Turning to the applicable policies governing such pur suits, we note that the first such written policy is the city's General Order, which provides: "Roadblocks will not [be] utilized EXCEPT in cases where this action is necessary to save human life." There is nothing in the record—including any deposition testimony from Curry herself—to indicate a perception that anyone's life was in immediate danger before Curry executed the roadblock maneuver. Second, the Statewide Policy, which the Department of Public Safety promulgated pursuant to the police pursuit statute; see General Statutes § 14-283a (b); provides in relevant part: "Roadblocks are prohibited unless specifically authorized by the supervisor in charge after consideration of the necessity of applying deadly physical force to end the pursuit." Regs., Conn. State Agencies § 14-283a-4 (d) (5). There is nothing in the record to indicate that Curry even attempted to obtain supervisory approval to block Howard Avenue with her cruiser in order to stop the plaintiff. Accordingly, Curry's actions with her cruiser, viewed in the light most favorable to the plaintiff, are an unmistakable violation of these written city and state policies.

Further, the deposition testimony of Maldonado, a New Haven police sergeant, amplifies the applicability of the General Order and the Statewide Policy under the circumstances of this case, and provides evidence from which a reasonable fact finder could conclude that Curry violated numerous ministerial duties with respect to pursuits and police officer interactions with dirt bikes. Maldonado stated that, in 2011, the policy of the city's police department was not to "chase" or "pursue" vehicles such as dirt bikes or quads on public roads as a matter of public safety. An officer was permitted only to "follow at a normal . . . speed but not chase." Maldonado stated that the practice consistent with that policy was not to "intervene, chase or pursue" but to "[g]et descriptive . . . information, and possibly

seize the bike later based on any of the other information that the department can collect . . . ."[13]

Turning to roadblocks, we observe that Maldonado testified that, consistent with that policy, he would never seek to safely stop an oncoming dirt bike or quad by driving his vehicle into the opposing lane of traffic and that officers were never instructed or trained to do so. Furthermore, a complete roadblock violates police department policy, as "there always has to be an opening for that vehicle to be able to continue on." Even if lights and sirens are used, a roadblock is not appropriate for a "traffic law" violation. Maldonado stated that an officer could engage in a pursuit only for felonies "of a serious nature" and not "for minor violations."[14] When the facts are viewed in the light most favorable to the plaintiff, we conclude that Maldonado's testimony, in combination with the General Order and the Statewide Policy, establishes the existence of a ministerial duty as a matter of law not to use a complete roadblock maneuver to stop the plaintiff simply for violating the city's dirt bike ordinance, and also provides evidence from which a reasonable fact finder could conclude that Curry violated that ministerial duty.

The defendants rely, however, on our recent decision in *Ventura* v. *East Haven*, supra, 330 Conn. 640 and n.14, for the proposition that Maldonado's deposition was (1) "vague and contradictory" with respect to a city policy prohibiting blocking the road, and (2) insufficient as a matter of law to establish the existence of a ministerial

[13] Beyond this policy, Maldonado testified that the better practice with respect to interacting with dirt bikes or quads was to follow one and to approach when it stopped at a traffic light or when the operator was stopped to speak with a pedestrian because the engine would often shut off at that time, making it safer to approach.

[14] We note that Curry acknowledged at her deposition that the city had a no pursuit policy in effect at the time of the collision in July, 2011. Indeed, the sergeant who responded to the collision had "strongly wanted to make sure that [Curry] was not in pursuit of the dirt bikes and vehicles and quads."

duty because he was not Curry's "direct supervisor." We disagree. In *Ventura*, we held that the tow rules of the town of East Haven applied only to towing operators and did not create a ministerial duty on the part of its police officers to have a truck towed when the officer could not confirm during a traffic stop that its driver had a valid driver's license or proper vehicle registration. Id., 640–42. We rejected the plaintiff's argument that the jury reasonably could have found, based on the testimony of an East Haven police lieutenant, that the patrol officer had a ministerial duty to have the truck towed, "independent of any duty allegedly imposed on him by the tow rules." Id., 628, 639. We emphasized that the lieutenant had "testified unequivocally *that there was no rule*, written or unwritten, dictating the manner in which an East Haven police officer must handle an unregistered vehicle or one with misused plates. [The lieutenant] also testified that an officer's decision to tow a vehicle is *always* within the officer's discretion."[15] (Emphasis in original.) Id., 639–40; see id., 640 ("the plaintiff's own expert testified that he was aware of no Connecticut law requiring an officer to tow an unregistered vehicle or a vehicle determined to have misused plates").

In the *Ventura* footnote, on which the defendants in the present appeal rely, we observed that the plaintiff in *Ventura* had relied on *Strycharz* v. *Cady*, supra, 323 Conn. 566, and *Wisniewski* v. *Darien*, 135 Conn. App. 364, 373, 42 A.3d 436 (2012), "for the proposition that,

[15] The lieutenant had testified that "unregistered vehicles are routinely towed in East Haven" and that, "based on his training and experience, he did not let anybody drive off in an unregistered vehicle following a traffic stop, and that the general rule among police officers is to tow and impound such vehicles, albeit with certain exceptions." (Internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 330 Conn. 640. We stated, however, that the "mere fact that an officer, either by training or experience, ordinarily responds to a situation in a particular manner does not transform his or her response into a ministerial duty." Id., 640–41.

in the absence of an explicit written directive, the testimony of a municipal official may be sufficient to establish the existence of a ministerial duty." *Ventura* v. *East Haven*, supra, 330 Conn. 640 n.14. We then stated: "*Strycharz* and *Wisniewski* bear no resemblance to [*Ventura*], however, because, in both cases, the testimony relied on to establish the ministerial duty *did so unequivocally and was elicited directly from the municipal official alleged to have breached that duty, or from that person's direct supervisor*. See *Strycharz* v. *Cady*, supra, 566 ('the deposition testimony of [the superintendent of schools], who testified that [the school principal] had a duty to assign school staff members to different posts, including the bus port, and that he lacked the discretion not to do so . . . provided a sufficient basis to conclude that school administrators had the ministerial duty to assign staff members to monitor students throughout the school' . . .); *Wisniewski* v. *Darien*, supra, 376–77 ('[i]n this case . . . the plaintiffs provided evidence through [the tree warden's] own testimony that he had a nondiscretionary duty to inspect the trees on the town's right-of-way in front of the property'). No testimony was elicited by the plaintiff in [*Ventura*] that was even remotely comparable to the testimony elicited by the plaintiffs in *Strycharz* and *Wisniewski* concerning the existence of an unwritten municipal rule or policy." (Emphasis added.) *Ventura* v. *East Haven*, supra, 640 n.14.

We conclude that *Ventura* is not controlling in the present case. First, viewed in the light most favorable to the plaintiff, Maldonado's testimony "unequivocally" established a lack of discretion in this case, in contrast to that of the police lieutenant in *Ventura*, which expressly acknowledged a discretionary component with respect to East Haven police officers' implementation of the towing policies at issue.[16] Second, and most

[16] Moreover, the language in footnote 14 of *Ventura* with respect to the "direct supervisor" was nonbinding dictum because it was not necessary

significant, like the school superintendent in *Strycharz* v. *Cady*, supra, 323 Conn. 566, Maldonado qualified by rank and experience to be Curry's direct supervisor, despite the fact that he was not specifically assigned to that position; he was employed as a supervisor of patrol officers in the city's police department at all relevant times in this case and, in fact, responded to the scene of the collision between Curry and the plaintiff. Put differently, Maldonado's employment with the city's police department gave him sufficient knowledge, training, and experience with respect to its policies and practices to render his testimony relevant to establish the existence of a ministerial duty.

We also emphasize that our conclusion in the present case is consistent with our recent decision in *Borelli* v. *Renaldi*, supra, 336 Conn. 1, which held that the decision of a police officer for the town of Seymour to pursue a motorist who had fled when the officer attempted to stop him for having illegal underglow lighting was discretionary under § 14-283 and the applicable state and municipal pursuit policies. See id., 5–6, 23. Specifically, we held in *Borelli* that, in the context of an officer's decision whether to pursue, the "due regard" language of § 14-283 (d) did not impose a ministerial duty on the officer, observing that, "[b]y its very definition . . . the duty to act with due regard is a discretionary duty." (Emphasis omitted.) Id., 15. We also followed *Coley* v. *Hartford*, supra, 312 Conn. 165–66,[17] and relied

to the holding in that case with respect to the effect of the lieutenant's testimony. See *Ventura* v. *East Haven*, supra, 330 Conn. 640 n.14; see also, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009).

[17] In *Coley* v. *Hartford*, supra, 312 Conn. 150, we concluded that General Statutes (Rev. to 2013) § 46b-38b (d), which directs officers who report to the scene of a report of domestic violence, upon determining that no cause exists for arrest, to remain "at the scene for a reasonable time until, in the reasonable judgment of the officer, the likelihood of further imminent violence has been eliminated," imposed a discretionary duty, given that the phrases "reasonable judgment" and "reasonable time" inherently require the exercise of judgment and discretion. (Internal quotation marks omitted.) Id., 152 n.1, 165–66.

on the relevant language of the Statewide Policy, which "contemplates that officers will exercise their judgment and discretion in giving due regard to the safety of all persons and property when determining whether to engage a pursuit." *Borelli* v. *Renaldi*, supra, 16. We distinguished much of the Statewide Policy language that "provides detailed rules governing the conduct of the pursuit"; id., 20; see Regs., Conn. State Agencies §§ 14-283a-1 through 14-283a-4; such as requiring that the "pursuing officer 'activate appropriate warning equipment,' " from the multifactored "determination of whether to pursue." (Emphasis omitted.) *Borelli* v. *Renaldi*, supra, 20; see also id., 22 (discussing similar discretionary language in Seymour pursuit policy that "directs officers to weigh 'many factors' in determining whether to initiate a pursuit"). Consistent with the majority's emphasis on the discretionary nature of the policies governing the decision to pursue, a concurring opinion in *Borelli* emphasized that "there are certain portions of the town and statewide policies governing the manner of pursuit that are phrased in a manner that is susceptible to being read as imposing a ministerial duty, such as mandating the use of emergency lights and sirens during the pursuit and requiring officers to discontinue pursuit when directed by a supervisor, or precluding certain units from engaging in pursuit." Id., 57 n.18 (*Robinson*, *C. J.*, concurring). That concurring opinion cited with approval *Mumm* v. *Mornson*, 708 N.W.2d 475 (Minn. 2006), in which the Minnesota Supreme Court rejected the argument "that all police conduct in emergency situations is discretionary and thus entitled to official immunity unless it is [wilful] or malicious." Id., 492; see *Borelli* v. *Renaldi*, supra, 58 n.18 (*Robinson*, *C. J.*, concurring). The Minnesota court "recognize[d] that the doctrine of official immunity is a complex and difficult area of law that must be applied to [ever changing] fact patterns and governmental policies," and emphasized the distinction between pursuit

policies that "reserved substantial discretion for police officers" from those that contain "express dictates" and limit officers' "independent exercise of judgment." *Mumm* v. *Mornson*, supra, 492–93. In contrast to the multifactored, discretionary analysis at issue in *Borelli*, the particular roadblock and dirt bike policies in the present case present the bright lines that render an officer's duty ministerial.

Finally, we acknowledge the defendants' argument that "[p]ersonal and municipal liability for an officer's use of discretion on patrol would hamper [officers'] ability to perform their duties as caretakers of the public." Although our case law repeatedly emphasizes the broad discretion generally afforded to police officers in the performance of their duties; see, e.g., *Coley* v. *Hartford*, supra, 312 Conn. 164–65; the defendants' arguments in the present case verge on "ask[ing] too much in urging us to conclude that *all* police conduct in emergency situations is discretionary. We do not read our previous cases as establishing the broad proposition that *all* police conduct in emergencies is discretionary, even in the face of binding police department policies. Indeed, [although] often necessary, police pursuits by definition are emergency situations, jeopardizing the safety and lives of those involved, as well as innocent bystanders. We recognize that governmental entities have the authority to eliminate by policy the discretion of their employees, as was done [by the policies at issue in the present case]. By adopting policies specifically intended to apply to pursuits, the [state and the city] implicitly [recognize] that officers should not have unfettered discretion in emergency situations." (Emphasis added.) *Mumm* v. *Mornson*, supra, 708 N.W.2d 493. Accordingly, we conclude that the trial court improperly granted the defendants' motion for summary judgment on discretionary immunity grounds.[18]

[18] Given our conclusion that a genuine issue of material fact exists with respect to the factual predicate for whether Curry violated a ministerial

The judgment is reversed and the case is remanded with direction to deny the defendants' motion for summary judgment and for further proceedings according to law.

In this opinion the other justices concurred.

DENNIS COOKISH *v.* COMMISSIONER OF CORRECTION (SC 20433)

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

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of unlawful sexual contact in the first degree, filed a petition for a writ of habeas corpus, seeking to have his guilty plea withdrawn or vacated. A clerk of the court granted the self-represented petitioner's application

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duty under the state and city pursuit policies, we need not consider the plaintiff's claims that (1) beyond emergency operation in accordance with § 14-283, the state traffic statutes impose ministerial obligations, and (2) as a corollary, nonemergency operation of a motor vehicle is not a discretionary act. See *Borelli* v. *Renaldi*, supra, 336 Conn. 5 (specifically declining to "address the question of whether governmental immunity applies to routine driving of emergency response vehicles by municipal actors"). This is particularly so given that a genuine issue of material fact exists as to whether Curry had activated her emergency lights and sirens and engaged in the emergency operation of her cruiser at the time of the collision. See footnote 4 of this opinion. Because the Statewide Policy, the General Order, and Maldonado's testimony were sufficient to establish the existence of a ministerial duty in this case, we need not consider further this issue concerning the effect of the state traffic statutes to establish a ministerial duty in this case. But see *Daley* v. *Kashmanian*, 193 Conn. App. 171, 187–89, 219 A.3d 499 (2019) (concluding that Hartford police officer engaging in surveillance operations in "soft car" lacking lights and sirens was engaged in discretionary act and did not have ministerial duty to comply with motor vehicle statutes but "declin[ing] to hold that, *under all circumstances*, a municipal police officer operating a motor vehicle is engaged in discretionary conduct, thereby immunizing the officer and municipality from damages arising from all violations of motor vehicle statutes" (emphasis in original)), cert. granted, 335 Conn. 939, 237 A.3d 1 (2020).

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

for a waiver of fees but took no action on his request for the appointment of counsel. Subsequently, the habeas court, in connection with its preliminary consideration of the writ under the rules of practice (§ 23-24), dismissed, sua sponte, the petition for lack of subject matter jurisdiction and ordered the petition returned to the petitioner. The court determined that, pursuant to the rules of practice (§ 23-29), it lacked jurisdiction because it was apparent, on the face of the petition, that the petitioner was not in custody for the conviction being challenged. The court denied the petitioner's petition for certification to appeal, and the petitioner appealed, claiming, inter alia, that the habeas court improperly dismissed the petition under § 23-29 without first appointing him counsel and providing him with notice and an opportunity to be heard. *Held*:

1. The habeas court correctly determined that it lacked subject matter jurisdiction because the petitioner was not in custody for the challenged conviction, but it should have declined to issue the writ pursuant to § 23-24 rather than dismissing the petition pursuant to § 23-29, consistent with this court's prior decision in *Gilchrist* v. *Commissioner of Correction* (334 Conn. 548); moreover, the mere administrative granting of the waiver of fees, without more, did not transform the petitioner's patently defective petition into one in which the procedures of § 23-29 applied, and, because the habeas court should have declined to issue the writ, the petitioner was not entitled to appointment of counsel, notice or an opportunity to be heard; furthermore, the petitioner's claim that this court should apply the doctrine of plain error and reverse the judgment of the habeas court was unavailing because the petitioner failed to satisfy his burden of demonstrating that the habeas court's error was obvious.
2. There was no merit to the petitioner's claim that the habeas court improperly failed to construe his petition as a petition for a writ of error coram nobis, the habeas court having lacked jurisdiction to entertain such a petition; even if this court assumed that the habeas court had a duty to construe the habeas petition as a petition for a writ of error coram nobis, the petitioner still could not prevail on his claim, as his habeas petition was filed well beyond the three year limitation period allowed for petitions for a writ of error coram nobis.

Argued April 29—officially released October 20, 2020**

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition

** October 20, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

for certification to appeal, and the petitioner appealed. *Reversed*; *judgment directed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *Kevin T. Kane*, former chief state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The petitioner, Dennis Cookish, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus and from the denial of his petition for certification to appeal.[1] The habeas court, acting sua sponte and without providing the petitioner with notice or a hearing, dismissed the habeas petition pursuant to Practice Book § 23-29[2] for lack of jurisdiction. The habeas court determined that dismissal pursuant to § 23-29 (1) was warranted and that the petition should be returned because it was apparent, on the face of the petition, that the petitioner was not in custody for the conviction being challenged. On appeal, the petitioner asserts that the habeas court improperly (1) dismissed the petition under § 23-29 without first appointing him counsel and providing him with notice and an opportunity to be heard, and (2)

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

[2] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

failed to construe the habeas petition as a petition for a writ of error coram nobis.

Consistent with this court's recent decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), we conclude that, although the habeas court correctly determined that it lacked subject matter jurisdiction in the present case because the petitioner was not in custody for the challenged conviction, it should have declined to issue the writ pursuant to Practice Book § 23-24[3] rather than dismissing the case pursuant to Practice Book § 23-29. See id., 563. Accordingly, we conclude that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal. As a result, we reverse the judgment of the habeas court and remand the case to that court with direction to decline to issue the writ.

The following undisputed facts and procedural history are relevant to this appeal. In approximately 1974, the petitioner, with the assistance of counsel, pleaded guilty to unlawful sexual contact in the first degree and was sentenced to one and one-half to six years incarceration. The petitioner's sentence therefore expired, at the latest, in approximately 1980. Then, on November 23, 2018, nearly forty years after his sentence expired, the self-represented petitioner filed a petition for a writ of habeas corpus seeking to have his guilty plea withdrawn or vacated.

The petitioner included with the petition a request for the appointment of counsel and an application for a

[3] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

waiver of fees. On December 3, 2018, a clerk of the court granted the waiver of fees but took no action on the petitioner's request for appointment of counsel.[4] On December 5, 2018, the habeas court, in connection with its preliminary consideration of the writ, dismissed the petition and ordered the petition returned to the petitioner. The court reasoned that, pursuant to Practice Book § 23-29 (1), it lacked jurisdiction because the petition and the documents attached thereto demonstrated that the petitioner was not in custody for the conviction being challenged. On December 21, 2018, the petitioner filed a petition for certification to appeal from the judgment of the habeas court, which the court denied. This appeal followed.[5]

On appeal, the petitioner claims, inter alia, that the habeas court abused its discretion in denying the peti-

[4] A review of the record demonstrates that both the request for the appointment of counsel and the application for waiver of fees are on the same form. At the top of the form is the request for the appointment of counsel. The application for waiver of fees is just beneath the request for counsel. Toward the bottom of that document, immediately beneath the application for waiver of fees, the clerk of the habeas court, not a judge, circled "granted," without further notation. The petitioner asserts that, by virtue of the clerk's signing of that document, the court granted the petitioner's request for the appointment of counsel and the application for waiver of fees on December 3, 2018. We disagree.

Admittedly, the form, which contains both requests and only one place for a court or clerk to sign, is not a model of clarity. Indeed, there is no place for a court or clerk to sign specifically directed to whether counsel will be appointed. The circumstances of this case, however, do not lead us to conclude that the request for appointment of counsel was granted simply because the clerk signed this form. First, the habeas court determined that the petition should be returned. Thus, no habeas action was initiated, and, consequently, no counsel was required to be appointed. Second, as we explain subsequently in this opinion, in *Gilchrist*, the clerk's granting of the fee waiver did not lead us to conclude that the court had also granted the request for appointment of counsel. The same conclusion obtains here. And, finally, a review of the online docketing sheet demonstrates that a clerk of the court granted the application for waiver of fees on December 3, 2018, but does not indicate that the request for appointment of counsel was granted.

[5] See footnote 1 of this opinion.

tion for certification to appeal because it is debatable among jurists of reason whether the habeas court properly dismissed the petition without providing the petitioner with assistance of counsel, notice and an opportunity to be heard. The respondent, the Commissioner of Correction, counters that the habeas court properly denied the petitioner's petition for certification to appeal because it is not debatable that the habeas court lacked jurisdiction to issue the writ.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626, 212 A.3d 678 (2019).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petitioner's petition for certification to appeal, we must first address the merits of his claim. To that end, we address the peti tioner's claim that the habeas court improperly dis-

missed the self-represented petitioner's petition for a writ of habeas corpus without appointing him counsel and without providing him with notice and an opportunity to be heard.

We begin with the standard of review. "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) (plenary review of dismissal under Practice Book § 23-29 [2]); *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008) (conclusions reached by habeas court in dismissing habeas petition are matters of law subject to plenary review). Plenary review also is appropriate because this appeal requires us to interpret the rules of practice. See, e.g., *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010)." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553.

The petitioner asserts that, because the habeas court dismissed the petition under Practice Book § 23-29, it was obligated to appoint counsel for the petitioner and provide him with notice and an opportunity to be heard. We disagree.

We recently addressed a strikingly similar scenario in *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548, and we find that the present case is controlled in all material respects by that recent decision. In *Gilchrist*, this court resolved the issue of whether a habeas court can dismiss a petition pursuant to Practice Book § 23-29 before issuing the writ. See id., 553. The petitioner in that case had pleaded guilty to robbery in the third degree in 2013 and received a sentence of unconditional discharge. See id., 551. Thereafter, in 2016, he filed a petition for a writ of habeas corpus, seeking to withdraw his guilty plea and to have his convic-

tion vacated or dismissed. See id., 550. The habeas court granted the petitioner's application for a waiver of fees but took no action as to his request for the appointment of counsel. Id., 551. Shortly thereafter, however, the court, sua sponte and without providing the petitioner with notice or an opportunity to be heard, dismissed the petition pursuant to § 23-29 on the ground that the habeas court lacked jurisdiction because, at the time he filed the petition, the petitioner was not in custody for the conviction that he was challenging. See id., 552.

We noted that there was "understandable confusion" in our courts regarding the proper procedure to be followed in the preliminary stages of review when a petitioner files a habeas petition in the habeas court. Id., 553. We then clarified the appropriate procedure to be followed by explaining: "First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22 . . . the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24.[6] Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law.

[6] We made clear in *Gilchrist* that, "[i]f the [habeas] court declines to issue the writ [pursuant to Practice Book § 23-24], no further action is necessary beyond notifying the petitioner because there is no service of process, no civil action and, accordingly, no need for the appointment of counsel." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 561.

At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." (Citations omitted; footnote added.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

Ultimately, we reasoned that "the habeas court dismissed the petition for lack of jurisdiction under Practice Book § 23-29 (1), even though the court did so in its preliminary consideration of the petition under Practice Book § 23-24, prior to the issuance of the writ. For this reason, the habeas court should have declined to issue the writ pursuant to § 23-24 (a) (1) rather than dismissing the case pursuant to § 23-29 (1)." Id., 563. Accordingly, we reversed the judgment of the Appellate Court, which affirmed the habeas court's judgment of dismissal, and remanded the case to the Appellate Court with direction to remand the case to the habeas court with direction to decline to issue the writ. See id., 550–51, 563.

In the present case, like in *Gilchrist*, the habeas court dismissed the petition for lack of jurisdiction under Practice Book § 23-29 (1), even though the court did so in its preliminary consideration of the petition under Practice Book § 23-24, prior to the issuance of the writ. It did so because the petition was patently defective due to the fact that the petitioner was not in custody for the conviction that he challenged, and, thus, the court lacked jurisdiction. Consequently, as was the case in *Gilchrist*, the habeas court here should have declined to issue the writ pursuant to § 23-24 (a) (1), rather than dismissing the case pursuant to § 23-29 (1).

Nonetheless, the petitioner asserts that the habeas court had granted the waiver of fees and request for

appointment of counsel prior to dismissing the petition and was, therefore, required to appoint counsel and give the petitioner the opportunity for a hearing prior to dismissing the petition. We disagree.

A review of the record reveals that, although the waiver of fees was granted administratively, the habeas court had not acted on the request for appointment of counsel prior to dismissing the petition. See footnote 4 of this opinion. Indeed, the same circumstances existed in *Gilchrist*. The habeas record in that case indicates that a clerk of the court granted the waiver of fees but did not address the appointment of counsel. We nevertheless concluded that, notwithstanding the fact that the habeas court utilized the wrong section of our rules of practice to dismiss the case, namely, Practice Book § 23-29 (1), the writ should have been declined under Practice Book § 23-24 because the petitioner was not in custody for the conviction being challenged. See *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 563. Thus, *Gilchrist* makes clear that the mere administrative granting of the waiver of fees, without more, does not transform a patently defective petition into one in which the procedures of § 23-29 apply.[7] Because the habeas court should have declined to issue the writ, no hearing or appointment of counsel was required.

[7] To the extent that the petitioner asserts that, by granting the waiver of fees, the habeas court thereby issued the writ, we disagree. As in *Gilchrist*, the fact that the habeas court granted the waiver of fees does not mean that the trial court could not have declined to issue the writ under Practice Book § 23-24. Additionally, we note that the habeas court's ruling refutes any notion that the writ was issued. Indeed, the habeas court stated, specifically, that "[t]he petition for habeas corpus is dismissed and *is being returned* because the court lacks jurisdiction pursuant to [Practice Book §] 23-29 (1)." (Emphasis added.) Although the court cited the wrong section of our rules of practice, it is clear to us that, by ordering the return of the petition, the court did not issue the writ. Ordering the petition returned is consistent with the court's not accepting the writ.

To the extent that the petitioner claims that the habeas court violated his constitutional rights by failing to appoint counsel prior to dismissing the petition for lack of jurisdiction, we reject that claim. Again, as we explained in *Gilchrist*, "[i]f the court declines to issue the writ, no further action is necessary beyond notifying the petitioner because there is no service of process, no civil action and, accordingly, no need for the appointment of counsel." Id., 561. We explained further that "it is undisputed that the petitioner is not entitled to the appointment of counsel or notice and an opportunity to be heard in connection with the court's decision to decline to issue the writ . . . ." Id., 563. Thus, as we did in *Gilchrist*, because we conclude that the habeas court should have declined to issue the writ, we conclude that the petitioner was not entitled to appointment of counsel, notice or an opportunity to be heard.

In the alternative, the petitioner asserts that we should apply the doctrine of plain error and reverse the judgment of the habeas court. That claim is unavailing.

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). "It is axiomatic that . . . [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) Id., 813–14. "An appellate court addressing a claim of plain

error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016).

In light of this court's decision in *Gilchrist*, we cannot conclude that the petitioner has met his burden of demonstrating that the error that he alleges the habeas court committed is "obvious in the sense of not debatable." (Internal quotation marks omitted.) Id. To the contrary, as we explained in *Gilchrist*, at the time the habeas court dismissed the petition under Practice Book § 23-29, "[t]here [was] understandable confusion in our courts regarding the proper procedure to be followed in the preliminary stages of review once a petition for a writ of habeas corpus is filed in the habeas court." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553. *Gilchrist*, which had not been decided at the time the habeas court issued its decision in the present case, provides the procedural clarification. Therefore, we conclude that the habeas court's error was not obvious. Having determined that the petitioner's claim fails under the first prong of the plain error doctrine, we need not reach the second prong, which examines whether failure to correct the alleged error would result in manifest injustice. See *State* v. *Blaine*, 334 Conn. 298, 313 n.5, 221 A.3d 798 (2019) (declining to reach second prong of plain error doctrine because defendant's claim failed under first prong).

The petitioner also claims that the habeas court improperly failed to construe his petition as a petition for a writ of error coram nobis. In support of his claim, the petitioner asserts that his petition for a writ of habeas corpus should have been construed as a writ

of error coram nobis because it (1) requested that his plea be vacated, (2) presented new facts not previously before the trial court that would demonstrate that his conviction was void or voidable, and (3) alleged that these facts were not known to him at the time of his underlying criminal trial. The respondent disagrees, claiming that the habeas court is without jurisdiction to entertain such a petition because it was not filed within three years of the petitioner's underlying conviction. We agree with the respondent.

"A writ of error coram nobis is an ancient common-law remedy which authorized the trial judge, within three years, to vacate the judgment of the same court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable. . . . The facts must be unknown at the time of the trial without fault of the party seeking relief." (Citation omitted; internal quotation marks omitted.) *State* v. *Das*, 291 Conn. 356, 370, 968 A.2d 367 (2009).

In the present case, it is undisputed that the petitioner filed his petition for a writ of habeas corpus well beyond the three year limitation period allowed for a writ of error coram nobis. The underlying judgment of conviction was rendered by the trial court in approximately 1974. The petitioner, however, did not file the petition until 2018, more than four decades after the judgment of conviction. Therefore, even if we assume that the court had a duty to construe the habeas petition as a petition for a writ of error coram nobis, the petitioner's claim still fails, as the petition was filed well beyond the three year limitation period.

In sum, although the court correctly determined that it lacked jurisdiction, the dismissal of the petition pursuant to Practice Book § 23-29 was error. The habeas court instead should have declined to issue the writ

pursuant to Practice Book § 23-24. Because the court could have and should have declined to issue the writ pursuant to § 23-24 rather than dismissing the petition under § 23-29, we conclude that the petitioner has demonstrated that the court could have "resolve[d] the [issue in a different manner]" and, therefore, abused its discretion in denying the petitioner's petition for certification to appeal. (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 626.

The judgment is reversed and the case is remanded with direction to decline to issue the writ of habeas corpus.

In this opinion the other justices concurred.