CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JOHN DOE *v.* TOWN OF MADISON
(SC 20508)

JOHN DOE *v.* TOWN OF MADISON ET AL.
(SC 20509)
(SC 20510)

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

Syllabus

The plaintiffs, X, Y and Z, three former high school students, sought to recover damages from the defendant town, its board of education, and the town high school principal, S, for injuries the plaintiffs allegedly sustained as a result of sexual abuse by A, a teacher at the high school. A was acquainted with the plaintiffs through her roles as an English teacher, faculty yearbook advisor, and conditioning coach for the high school football team, of which the plaintiffs were members. At various points, A started exchanging messages with each of the plaintiffs on a social networking platform. A's messages initially concerned school, athletics, and the yearbook, but the messages progressed to include personal topics, such as A's marital problems with her husband, R, who also was employed as a teacher at the high school, and sexually suggestive photographs and banter containing sexual overtones. A had summoned X to her classroom more than twenty times, and she had called Y and Z to her classroom approximately five times each. To avoid detection, A varied the days and times at which she summoned the plaintiffs and often used an issue related to the yearbook as a pretext for the meetings. On one of those occasions, A performed fellatio on Y. She also touched Z in an inappropriate manner several times. Although A had a good reputation and strong performance evaluations, her attire at summer football practices, specifically, tight fitting shorts and only

a sports bra for a top, attracted the coaches' attention. Additionally, R took issue with A's attire and what he believed to be her flirtatious, attention seeking behavior. R was concerned that a rumor had spread among the teachers that A had been flirting with X, and he confronted A about her social media contact and one-on-one meetings with X, as well as certain flirtatious behavior he witnessed A displaying toward players at a Friday night football game. The plaintiffs alleged, inter alia, that the defendants were negligent in supervising A and in failing to train school employees to identify and report inappropriate relationships between teachers and students. Various teachers and coaches, including C, the high school's athletic director, were deposed during discovery. C testified that he expected his subordinates to enforce certain standards of professionalism, including requiring any coach to cover up if shirtless. The defendants thereafter filed motions for summary judgment, claiming that the plaintiffs could not establish negligence or causation and that the defendants were entitled to governmental immunity. The trial court granted the defendants' motions, concluding that, although the defendants had a ministerial duty to report abuse or an imminent risk of serious harm pursuant to the mandatory reporting statute (§ 17a-101a) and the reporting policy set forth in the board of education policies and bylaws, there was no evidence that any of the school employees had reasonable cause to suspect that A was sexually abusing the plaintiffs. The court also concluded that the identifiable persons subject to imminent harm exception to discretionary act immunity did not apply. The trial court rendered judgments for the defendants, and the plaintiffs appealed. *Held*:

1. The trial court correctly concluded that no genuine issue of material fact existed as to whether the defendants breached their ministerial duty to report a reasonable suspicion of child abuse, as imposed by the mandatory reporting statute and the board of education reporting policy: in view of the totality of the circumstances, the school faculty and the coaching staff did not have reasonable cause to suspect that A was sexually abusing the plaintiffs or exposing them to an imminent risk of sexual abuse, as A had an unblemished personnel record and was held in uniformly high regard by her colleagues and students at the high school, she was known to handle student crushes appropriately by politely rebuffing them, and none of the teachers or coaches who testified ever witnessed A flirting with any of the plaintiffs or any other student; moreover, the plaintiffs' repeated visits to A's classroom did not appear unusual to other faculty members in light of A's role as a yearbook advisor, the measures A took to avoid detection, and the common practice of students visiting other teachers' classrooms; furthermore, even if A's attire during football practices was inappropriate, there was no evidence that A ever exhibited nudity or that her attire indicated that she was inclined to engage in sexual impropriety with students, and any flirtatious behavior A may have displayed at the foot-

ball game was too far removed from any type or instance of sexual abuse to supply reasonable cause to suspect an imminent risk of such abuse.

2. Y could not prevail on his claim that C's testimony established a ministerial duty of professionalism and that there was a genuine issue of material fact with respect to whether the failure of staff members, including coaches, to address the issue of A's attire during football practices constituted a breach of that duty: S testified that the school had no dress code, and there was no evidence that C's views of professionalism as they related to attire ever were communicated to school employees in a manner that clearly established a duty to dress in a prescribed way, without the exercise of judgment or discretion; accordingly, C's testimony concerning his expectations of his subordinates and his opinion of what constituted professionalism, standing alone, was not sufficiently definite to establish an enforceable ministerial duty of professionalism, and the trial court properly granted summary judgment with respect to this issue.

3. There was no merit to Y and Z's claim that the trial court incorrectly determined that the imminent harm to identifiable persons exception to governmental immunity did not apply in the present case, as it would not have been apparent to a reasonable school official that the defendants' acts and omissions were so likely to cause harm that a clear and unequivocal duty to act immediately to prevent such harm was created: the evidence suggested that A's conduct, and particularly her sexual assaults of Y and Z, were the culmination of a generally clandestine pattern of behavior, and, although some might have viewed her attire at football practices as inappropriate for an educational setting, there was nothing to suggest that anyone would reasonably anticipate that a sexual assault of a student would be the immediate result of that attire, especially in light of A's otherwise unblemished record and the uniformly high regard her students and colleagues had for her; moreover, there was no evidence that the plaintiffs' repeated visits to A's classroom were abnormalities that should have been apparent to staff members, as it was undisputed that students routinely visited teachers' classrooms at numerous times for legitimate pedagogical or extracurricular reasons, and A took measures to avoid raising any suspicion; furthermore, R's negative response to A's interaction with the players at the Friday night football game did not evince a belief that A was imminently about to engage in an inappropriate sexual relationship with any student, let alone one of the plaintiffs.

4. The trial court properly granted the town's motion for summary judgment with respect to Z's claim that the town was liable for the failure of its police officer, who was assigned to the high school as a resource officer, to monitor the school's security camera footage, which Z claimed would have shown him entering A's classroom, as Z did not establish that the defendants had a ministerial duty to monitor the security camera footage; S's testimony that, although the police had access to the security footage,

the footage was not regularly monitored and reviewed only when an incident was reported demonstrated that there was no policy governing the manner and frequency with which security cameras and their footage were monitored, and, accordingly, the failure of the school resource officer to monitor the security cameras was a discretionary act subject to governmental immunity.

Argued January 20—officially released July 30, 2021*

Procedural History

Three actions to recover damages for, inter alia, the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven, where, in the first case, the court, *Agati*, *J.*, granted the plaintiff's motion to add the named defendant's Board of Education as a defendant; thereafter, the court, *Abrams*, *J.*, granted the motions to consolidate filed by the named defendant et al. and consolidated the three cases; subsequently, the actions in the first and second cases were withdrawn as to the named defendant; thereafter, the court, *Abrams*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgments thereon, from which the plaintiffs filed separate appeals. *Affirmed.*

James M. Harrington, for the appellant in Docket No. SC 20508 (plaintiff John Doe I).

Matthew D. Popilowski, with whom, on the brief, was *Brendan J. Keefe*, for the appellant in Docket No. SC 20509 (plaintiff John Doe II).

William B. Bilcheck, Jr., for the appellant in Docket No. SC 20510 (plaintiff John Doe III).

Catherine S. Nietzel, with whom, on the brief, was *Jonathan C. Zellner*, for the appellees (named defendant et al.).

* July 30, 2021, 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. These appeals present several issues of governmental immunity under General Statutes § 52-557n arising from the sexual abuse of the plaintiffs, John Doe I, John Doe II and John Doe III,[1] by Allison Marchese (Allison), who was an English teacher at their high school, the Daniel Hand High School (high school) in Madison. The plaintiffs appeal[2] from the judgments of the trial court granting the motions for summary judgment filed by the defendants, the town of Madison (town), the Board of Education of the Town of Madison (board), and Anthony Salutari, Jr., the principal of the high school,[3] on the ground of governmental immunity. On appeal, the plaintiffs claim that the trial court incorrectly concluded that (1) there was no genuine issue of material fact with respect to whether the teachers and football coaching staff at the high school had reasonable cause to believe that Allison was sexually abusing the plaintiffs, which would have triggered their ministerial duty to report suspected child abuse under No. 5120.4.2.5 of the board's policies and bylaws (board reporting policy) and the mandatory reporting statutes, General Statutes §§ 17a-101[4] and 17a-

[1] We refer to the plaintiffs individually where appropriate for purposes of clarity.

[2] The plaintiffs appealed from the judgments of the trial court to the Appellate Court, and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Although the appeals were briefed and argued separately, we resolve them in a single opinion given that they were consolidated in the trial court and present several common factual and legal issues.

[3] John Doe I initially named only the town as a defendant; subsequently, the trial court, *Agati*, *J.*, granted his motion to add the board as a defendant. Thereafter, John Doe I and John Doe II withdrew their claims against the town.

John Doe II and John Doe III also named Allison as a defendant. Allison has not appeared in these appeals. Accordingly, unless otherwise noted, all collective references herein to the defendants are to the board, the town, and Salutari.

[4] General Statutes § 17a-101 provides in relevant part: "(a) The public policy of this state is: To protect children whose health and welfare may

101a,[5] (2) the testimony of Craig Semple, the high school's athletic director, did not establish a ministerial

be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse or neglect, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

"(b) The following persons shall be mandated reporters . . . (9) any school employee, as defined in section 53a-65, (10) any social worker, (11) any person who holds or is issued a coaching permit by the State Board of Education, is a coach of intramural or interscholastic athletics and is eighteen years of age or older, (12) any individual who is employed as a coach or director of youth athletics and is eighteen years of age or older . . . (15) any police officer . . . ."

Like the trial court and the parties, we refer to the current revision of the statute. We note, however, that the legislature has made significant changes to § 17a-101 since the 2013 revision of the statute, which would have governed when the events underlying this appeal began, including in 2014; see Public Acts 2014, No. 14-186, § 6 (effective October 1, 2014); when those events were ongoing. None of those amendments changed the obligations of any of the various actors in these cases.

[5] General Statutes § 17a-101a provides in relevant part: "(a) (1) Any mandated reporter, as described in section 17a-101, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any child under the age of eighteen years (A) has been abused or neglected, as described in section 46b-120, (B) has had nonaccidental physical injury, or injury which is at variance with the history given of such injury, inflicted upon such child, or (C) is placed at imminent risk of serious harm, or (2) any school employee, as defined in section 53a-65, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any person who is being educated by the Technical Education and Career System or a local or regional board of education, other than as part of an adult education program, is a victim under the provisions of section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, and the perpetrator is a school employee shall report or cause a report to be made in accordance with the provisions of sections 17a-101b to 17a-101d, inclusive.

"(b) (1) Any person required to report under the provisions of this section who fails to make such report or fails to make such report within the time period prescribed in sections 17a-101b to 17a-101d, inclusive, and section 17a-103 shall be guilty of a class A misdemeanor, except that such person shall be guilty of a class E felony if (A) such violation is a subsequent violation, (B) such violation was wilful or intentional or due to gross negligence, or (C) such person had actual knowledge that (i) a child was abused or neglected, as described in section 46b-120, or (ii) a person was a victim described in subdivision (2) of subsection (a) of this section.

duty of professionalism, (3) they were not identifiable persons subject to imminent harm for purposes of that exception to discretionary act immunity under § 52-557n (a) (2) (B), and (4) John Doe III did not plead or establish a ministerial duty on the part of the town's police officers, one of whom was assigned as the high school's school resource officer, to monitor the high school's security camera footage. We disagree with the plaintiffs' claims and affirm the judgments of the trial court.

The record reveals the following facts, which we view in the light most favorable to the nonmoving plaintiffs, along with the procedural history of these cases. In the spring of 2014, when the events giving rise to this appeal began, the three plaintiffs were students at the high school, where they were members of the football team. At that time, John Doe I was a fourteen year old freshman, John Doe II was a seventeen year old junior, and John Doe III was a fifteen year old sophomore. In addition to her duties as an English teacher, Allison also served as the high school's faculty yearbook advisor and as a core conditioning coach for the football team. Until the events leading to this appeal, she had an excellent reputation in the school and the community, with strong performance evaluations and "a sterling disci-

"(2) Any person who intentionally and unreasonably interferes with or prevents the making of a report pursuant to this section, or attempts or conspires to do so, shall be guilty of a class D felony. . . .

* * *

"(d) For purposes of this section and section 17a-101b, a mandated reporter's suspicion or belief may be based on factors including, but not limited to, observations, allegations, facts or statements by a child, victim, as described in subdivision (2) of subsection (a) of this section, or third party. Such suspicion or belief does not require certainty or probable cause."

Section 17a-101a, like § 17a-101, has undergone significant revisions since 2013. See, e.g., Public Acts 2017, No. 17-237, §§ 95 and 96; Public Acts 2015, No. 15-205, § 2; see also footnote 4 of this opinion. Those revisions do not have any effect on this appeal, and, like the trial court and the parties, we refer to the current revision of the statute.

plinary record . . . .” Allison’s husband, Robert Marchese (Robert), was also employed at the high school as an English teacher and the head of the English department.

Allison first met John Doe I in the spring of 2014, when he was a student in her freshman literature class. John Doe I, who had a reputation for being unusually bold and mature for a freshman,[6] bantered with Allison during class. Although she did not banter or flirt back with John Doe I publicly, they later developed a relationship through one-on-one meetings in school and messaging through various social media platforms, including Instagram. The messaging began when John Doe I messaged Allison through Instagram, initially about a book; the correspondence then progressed to more private and sexual topics. The messaging continued into the summer until John Doe I left for a family vacation to Africa; he asked her not to contact him during the summer. Over the rest of that summer and into the fall of 2014, however, Allison pursued John Doe I by paying special attention to him at football practices, summoning him to her classroom approximately twenty to thirty times, sending him a bagel with a note while he was in another class, and sending him dozens of sexually explicit online messages and photographs through social media platforms, including Instagram. Around this time, Robert learned that Allison and John Doe I had connected on Instagram when John Doe I began to follow her profile; he confronted Allison multiple times about this connection and their one-on-one meet-

[6] Andrea Donovan, a paraprofessional employed by the board, was present for this exchange; she believed that John Doe I had “teas[ed]” Allison in class by acting as a “prankster” or “jokester . . . .” Afterward, Donovan told Allison that she believed that John Doe I was very mature for a freshman, which was a view that had been shared by several other teachers at the high school. Donovan also shared that John Doe I had been attracting an unusual amount of attention for a freshman—even from senior girls, who had been asking him to the prom.

ings, as well as rumors that Robert believed had spread among the teachers that Allison had been flirting with John Doe I.[7] There is no evidence, however, that Robert was aware of the content of Allison's private Instagram messages. Although John Doe I tried to end his contacts with Allison, she persisted in sending him messages through the fall of 2014, continuing until her arrest on January 7, 2015, for charges arising from the sexual assault of John Doe II, which we will discuss subsequently.

Around the same time, Allison attempted to develop her relationship with John Doe I by initiating a similar online relationship on Instagram with John Doe III, who was John Doe I's best friend. John Doe III initially went to Allison's classroom a few weeks into the 2014–2015 school year at the request of John Doe I to try to resolve the tension that had developed between Allison and John Doe I by the end of the summer, as John Doe I had tired of their communications and did not want to speak with her any more. Thereafter, Allison called John Doe III to her classroom approximately six times during school hours, summoning him from multiple classes, for conversations about her private life, her marriage, and her fantasies. She also asked John Doe III to relay messages to John Doe I. During several of those classroom visits, Allison touched John Doe III inappropriately by hugging him tightly in a way that put her breasts in close proximity to his face.

During the summer of 2014, Allison also became acquainted with John Doe II, first in her capacity as a core conditioning coach for the high school's football team, and later as the faculty yearbook advisor. John Doe II learned that Allison and John Doe I were exchang-

[7] John Doe I testified at his deposition that he felt uneasy during his meetings with Allison because he suspected that Robert did not like him, and she had told him that Robert did not like how much time they were spending together.

ing messages on Instagram after he asked John Doe I several times about the special attention that she was giving him during football practices and conditioning sessions. John Doe II did not think that anyone else at practices, including players or coaches, had noticed these interactions. During a subsequent conversation after summer conditioning practice had ended, John Doe I showed John Doe II the various Instagram messages between John Doe I and Allison, which John Doe II described as "creepy" and akin to what a "high school girl" would send a "high school guy . . . ."

In the fall of 2014, John Doe II and Allison also worked together in the school gym, which she helped to manage, and where he went on a daily basis in order to stay conditioned during recovery from a football injury. Their conversations initially focused on exercise. Subsequently, Allison and John Doe II exchanged Instagram contact information in connection with her role as a yearbook advisor and John Doe II's drafting of his senior quote. Allison, who was not one of John Doe II's teachers, summoned him from his classes to her classroom on more than five occasions during school hours, ostensibly to review his yearbook quote. She repeatedly declined to approve his quote on the ground that it was not appropriate for publication; John Doe II disagreed with her assessment because the quote made no references to profanity, drug or alcohol use, or sexual activity. During these brief visits, Allison raised the topic of the recent passing of John Doe II's father and offered to help because she had experience involving a friend's suicide attempt. Their conversations then became more personal and included the topic of her troubled marriage to Robert.

John Doe II and Allison also began to exchange messages on Instagram; John Doe II was curious to see whether her communications with him would be as inappropriate as they were with John Doe I. Several

weeks later, the content of the messages progressed from school or athletic topics to "[s]trictly . . . personal" topics, including Allison's marital problems, and she sent him sexually suggestive photographs of herself and engaged in banter containing sexual overtures. Although John Doe II became increasingly uncomfortable with the conversations, he did not report or try to stop them because he was afraid of the social repercussions should other students learn of his relationship with Allison.

In December, 2014, Allison sent an Instagram message inviting John Doe II to her classroom during a free period, where she closed the blinds, locked the door, kissed him, and performed fellatio on him. This was the sole occasion that Allison and John Doe II had physical contact. After that encounter, John Doe II was "scared" and "ghosted" Allison; she continued, however, to try to contact him, with further Instagram messages inviting him over to her home for sexual activity because Robert would be away performing with his band.

All three plaintiffs tired of Allison's advances and conduct, particularly as they feared the spread of rumors about what Allison had done with John Doe II. The plaintiffs then met—in the words of John Doe II—to create a plan "to get rid of her." The plaintiffs subsequently met with Allison in a contentious encounter, after which John Doe I and John Doe II reported her to Salutari, the high school's principal. On January 7, 2015, Allison was arrested and charged with the sexual assault of John Doe II. She ultimately pleaded guilty and was sentenced to two years imprisonment.[8]

[8] John Doe III's relationship with Allison did not come to light until more than one year later. In the spring of 2015, he asked his guidance counselor, Christine Coyle, to allow him to transfer out of Robert's class, but he did not disclose any personal involvement with Allison to Coyle, and she believed that his request was because of his friendship with John Doe I.

Although Allison was secretive about her activities with the plaintiffs, her appearance and attire had attracted attention around the school and the community.[9] At summer football practices, Allison would wear only a sports bra and tight fitting athletic shorts made of a spandex type material,[10] leading some of the male football coaches to compliment her appearance and ask her to wear the shorts again.[11] She did not think that request was appropriate but was not offended because she considered it "good-natured teasing amongst friends . . . ." Most of the football coaches, including Steve Filippone, the head football coach, con-

[9] Allison also began to draw attention online, particularly on a now defunct social media app called Yik Yak, which permitted users to post discussions anonymously based on their location. The ubiquity of Yik Yak's use by students resulted in its ban from the high school's Wi-Fi network because of its reputation for enabling cyberbullying and other student conflicts. Allison first learned of this online attention on Yik Yak in the spring of 2014, when she accompanied some female students to Salutari's office to report some negative or sexual comments that had been made on the app about those students. Salutari was already aware of her mentions on the app, as were other teachers, with one, Paul Coppola, jokingly calling Allison an "Internet sensation . . . ." She then informed Salutari of the sexual nature of the comments; because of Yik Yak's anonymous nature, she did not know who had made them. Salutari informed Phil Rosati, the high school's school resource police officer, of Allison's complaint about the Yik Yak post, although he was skeptical that anything could be done because there was no illegal content and the post was anonymous. On Rosati's advice, Salutari told Allison to keep Salutari informed if there were any more posts and if she heard the names of any students who might be involved; Rosati himself offered to continue to monitor the situation, as he often first learned of problems directly from students.

[10] The plaintiffs also emphasize that Allison dressed similarly on runs through town, attracting attention from motorists who would honk their horns. They claim that this was unusual behavior, given that many teachers make efforts to avoid running into students and their families outside of school.

[11] John Doe III claims that Allison's attire exposed her breasts and genitalia to the students, which constituted "a form of mental sexual abuse" that triggered the football coaches' reporting obligations. The cited deposition transcripts do not, however, support the assertion of actual exposure, indicating only that the color of her thong undergarment and the outlines of her buttocks were visible through the thin fabric of her athletic shorts; John Doe III testified that he could not see any skin color through the fabric.

sidered Allison's attire to be appropriate because it was consistent with what they often saw young women wear to exercise in settings like the gym, particularly given the summer heat. The coaches flirted with Allison often, and they frequently engaged in "locker [room] talk" among themselves about her appearance.[12] They believed that she was trying to get the attention of the male students, with one coach, Michael Ferraiolo, joking that she would not be interested in a group of "middle-aged bald men" like themselves.

Semple, the high school's athletic director, believed that it would have been unprofessional and inappropriate for any female coach to wear only a sports bra around the student athletes; although he did not personally witness Allison dressed that way, had he done so, he would have asked her to cover up by giving her a high school T-shirt.[13] Allison was not the first woman who worked professionally with the football team; they frequently had women contracted as athletic trainers. The coaches hired Allison because of her training expertise and excellent reputation as a teacher. No member of the high school's athletic staff ever witnessed Allison flirting with any student athletes.

Finally, we note that Allison attributed her behaviors that gave rise to these cases to her troubled marriage to

[12] One assistant coach, Erick Becker, stated that he was "pretty darn surprised" about Allison wearing only a sports bra and thought the attire was inappropriate in a school setting. He thought she was trying to attract the attention of the coaching staff. He nevertheless viewed any locker room talk about Allison's appearance to be inappropriate commentary on a woman's body, and he attempted to avoid such conversations.

[13] Although there was no formal dress code for student athletes, it was undisputed that the female students at the high school would have been directed to cover up had they been dressed similarly at an athletic practice. John Doe II testified that Allison's shorts were consistent with what the female student athletes wore to practice, but he thought it was "unusual" for an "authority figure" not to wear a tank top to cover a sports bra, given that the female student athletes would not be allowed to dress similarly.

Robert; those difficulties were exacerbated by Robert's view of the public attention that she was attracting on social media and around the school, including attention from male students who had been flirting with her. Allison and Robert often fought publicly at the school in front of other faculty and students, during lunch in the teachers' lounge, at staff meetings, and in her classroom, where he once threw items off her desk and across the room. One incident involving their marriage occurred at a Friday night football game, where Robert witnessed Allison interacting from the stands with three suited up football players, who were standing on the sideline below, in a way that made him feel uneasy; Robert was angered by Allison "act[ing] as though she was a wonderful mother" by holding their toddler daughter as a "prop." He was "disgusted" because he believed that she was "very appreciative" of how the football players were watching her while she was elevated above them in the stands, smiling, laughing, and flicking her head back to clear the hair from her eyes. Robert thought that Allison's "preening and posturing behavior" was intended to elicit a reaction from him, given their marital difficulties.[14] He told her that "we're

[14] During another episode in which Robert was concerned about Allison's conduct at the high school, he asked another department head, Peter Nye, to speak to Allison about her attire, namely, the propriety of a slim fitting red dress and high heeled shoes that she had worn to school, including for a back-to-school night with parents. Robert was upset that "people were talking" about Allison's dress, and Nye himself—who did not think the dress was inappropriate—had heard approximately six conversations about it among faculty and staff members who believed that Allison wore that dress to highlight her recent weight loss. Mia Corvino, a female colleague, similarly did not believe that the dress was inappropriate or excessively revealing. When Robert and Nye met with Allison, the conversation ended abruptly when she said that Principal Salutari "likes the way I dress." Robert and Nye did not escalate the matter further because they believed that Salutari would not be receptive to their concerns about her attire, especially as there was no dress code for faculty and staff at the high school, and it would have been difficult from a labor relations perspective to approach that issue with a faculty or staff member.

going to read about [you] in the newspaper someday." Robert believed Allison to be "a woman [who] was teetering on the precipice of being kind of unhealthy and making some bad decisions and being very unhealthy and making some bad decisions, never at the expense of [her] students but at the expense of [their] marriage and [their] own . . . security."[15] Indeed, Robert described Allison as someone who, to that point, had otherwise been a "law-abiding" person "who walked the straight and narrow," which made the news of her sexual activities with the plaintiffs even more shocking to him. Subsequently, Robert wrote a book about the events of these cases.[16]

The plaintiffs brought these actions for damages pursuant to the municipal liability statute, § 52-557n, claiming in the operative complaints that they were injured by the defendants' failure, among other things, (1) to prevent and/or interrupt Allison's inappropriate relationship with the plaintiffs and her participation in extracurricular activities involving the physical training of male students, (2) to report Allison's conduct to the proper authorities in violation of their ministerial duties under the board reporting policy and the mandatory reporting statutes, given their "constructive notice" of her conduct because multiple teachers had reasonable cause to believe that she was sexually abusing the plaintiffs, (3) to monitor Allison's social media usage to ascertain whether she was violating policies concerning communications between teachers and students, and (4) to properly train and supervise their employees,

[15] Robert testified, however, that this comment was unconnected to the conversation with the football players, and he did not believe that she was engaging or was going to engage in sexual conduct with them; instead, he intended to shock her given the negative effect technology had been having on their family and his anger that he was carrying the majority of the domestic responsibilities in their household.

[16] See generally R. Marchese, Land of July: A Real Life Scandal of Sex & Social Media at a Connecticut High School (2018).

particularly with respect to the warning signs of inappropriate relationships between students and teachers, and the use of classrooms and hallways.[17] The trial court subsequently granted the defendants' motions to consolidate the three cases for discovery, trial and apportionment of liability. See Practice Book § 9-5 (a).

After discovery, the defendants moved for summary judgment, arguing, with respect to the issues in this appeal, that the plaintiffs could not establish negligence and causation and, further, that they were entitled to governmental immunity under § 52-557n. In response, the plaintiffs contended that there were numerous genuine issues of material fact that precluded summary judgment, including (1) whether the defendants had breached their ministerial duty to report Allison under the board reporting policy and the mandatory reporting statutes, and (2) whether the plaintiffs were identifiable persons subject to imminent harm for purposes of that exception to discretionary act immunity under § 52-557n (a) (2) (B).

The trial court granted the defendants' motions for summary judgment in all three cases. Determining that the duty to report the abuse of students is ministerial in nature given the dictates of the mandatory reporting statute and the board reporting policy, the trial court nevertheless concluded that there was no evidence to provide any of the high school staff members with the requisite "reasonable cause to suspect" that Allison was sexually abusing the plaintiffs. See General Statutes § 17a-101a (a) (1). The trial court contrasted the record in these cases with other Superior Court cases in which "the mandatory reporter either witnessed the abuse or

[17] John Doe II and John Doe III also claimed indemnity from the town and from the board pursuant to General Statutes §§ 7-465 and 10-235, respectively, for the negligence of Salutari. John Doe II also brought claims against Allison personally for assault and for negligent and intentional infliction of emotional distress. See footnote 3 of this opinion.

the child told the mandatory reporter or school employee about the abuse." The trial court emphasized testimony that no school employee, including the football coaches, had ever witnessed Allison flirt with any male students and that she had always reacted appropriately when male students flirted with her. The trial court observed that none of the social media posts at issue would have triggered a "reasonable suspicion that a student was being abused or was at risk of imminent harm," and rejected the plaintiffs' reliance on Allison's attire at football practices because "the fact that [she] dressed inappropriately is not enough alone or in conjunction with any other event to cause reasonable suspicion in a school employee that a student is being abused or at risk of imminent harm." Further, the court observed that the plaintiffs' visits to Allison's classroom would not have created reasonable cause to suspect abuse, insofar as they were brief in duration and spaced out in frequency, giving no reason for any teacher to question the plaintiffs' whereabouts or the legitimacy of their visits to her classroom. For the same reasons, the court also concluded that the plaintiffs had not raised a genuine issue of material fact with respect to the applicability of the identifiable person-imminent harm exception to discretionary act immunity.[18]

Finally, with respect to other issues, the trial court declined to consider the arguments of John Doe II and John Doe III that a ministerial duty of professionalism was established by the testimony of Semple, the high school athletic director. The court concluded in footnotes that a breach of any such duty was not pleaded in the complaints. Similarly, the court concluded that

[18] The trial court then applied these principles to conclude that common-law immunity for discretionary acts similarly barred attempts by John Doe II and John Doe III to use an indemnification theory under General Statutes §§ 7-465 and 10-235 to hold the board liable for Salutari's alleged negligence, including a breach of any policy.

John Doe III had failed to plead the claim, first asserted in his objection to the motion for summary judgment, that the town or its police department had breached an obligation to monitor the security cameras at the high school and emphasized that a plaintiff cannot make a factual allegation for the first time in response to a motion for summary judgment.[19] Accordingly, the court granted the defendants' motions for summary judgment in all three cases and rendered judgments accordingly. These appeals followed.

Before turning to the plaintiffs' specific claims, we note the following relevant background principles. Beyond the well established standard by which we engage in plenary review of a trial court's grant of summary judgment, the "following principles of governmental immunity are pertinent to our resolution of the [plaintiffs'] claims. The . . . 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 discretionary 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. . . .

[19] The trial court nevertheless considered the merits of this claim, as it rejected John Doe III's assertions that the defendants breached a duty to monitor the security video cameras in the hallways, which would have shown when he entered Allison's classroom. The court relied on Salutari's testimony that he or the police view the camera footage only when there is a reported event and that the video footage is automatically erased every few weeks when the storage is full. The court stated that, "[w]ithout [John Doe III's] reporting [Allison's] conduct, there was no reason for the [high] school or the police department to watch the security camera footage."

"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." (Internal quotation marks omitted.) *Cole* v. *New Haven*, 337 Conn. 326, 336–38, 253 A.3d 476 (2020).

I

MINISTERIAL DUTY CLAIMS

This appeal presents two issues with respect to claimed violations of a ministerial duty. First, the plaintiffs contend that there was a genuine issue of material fact with respect to whether the defendants breached their ministerial duty to report a reasonable suspicion of child abuse, as imposed by the mandatory reporting statute and the board reporting policy. Second, John Doe II claims that the testimony of Semple, the athletic director, established a ministerial duty of professionalism and that there was a genuine issue of material fact with respect to whether Allison's attire constituted a breach of that duty. We address each claim in turn.

A

Mandatory Reporting of Sexual Abuse

The plaintiffs first claim that the trial court incorrectly concluded that there was no genuine issue of material fact that the defendants had not breached their ministerial duty under the mandatory reporting statute and the board reporting policy to report child abuse,

the language of which mirrors the statute in all relevant aspects. The plaintiffs argue that the trial court improperly required them to prove that the teachers involved had actual knowledge of abuse, rather than applying the objective standard of "reasonable cause" to believe the existence of abuse. The plaintiffs then cite an array of conduct by Allison that they argue constituted reasonable cause for numerous high school employees to suspect an imminent risk of sexual abuse or sexual abuse of students by Allison. With respect to the football practices, they contend—in the words of John Doe III—that Allison's "sexually explicit" act of wearing "skimpy shorts and sports bras that exposed her genitalia and breasts" created reasonable cause for the coaches to "suspect or believe" that they were at "imminent risk of sexual mental abuse," particularly given the coaches' apparent belief that she dressed that way to get the attention of the male student athletes. Turning to events during school hours, they also rely on Robert's claimed awareness of Allison's inappropriate attire in numerous settings and her flirtatious behavior with students, observing that John Doe I specifically believed that Robert did not like him and was aware that he had connected on social media with Allison, and Robert's confrontation of her at a Friday night football game, some of which Robert highlighted in a book he wrote about this incident. See footnotes 7 and 16 of this opinion. John Doe I and John Doe II also argue that reasonable cause for suspicion of sexual abuse or the imminent risk of sexual abuse is established by their repeated visits to Allison's classroom, with John Doe II being summoned from multiple classes to revise his yearbook quote, and the fact that she had locked her room for ten minutes during the school day when she assaulted John Doe II. John Doe III cites the unmonitored security cameras, which would have aroused a reasonable suspicion with respect to the plaintiffs' visits to Allison's

classroom if monitored, as illustrative of the "lackadaisical environment" at the high school that he contends reflected a dereliction of duty, reminiscent of "the three sitting monkeys: Hear no evil. See no evil. Speak no evil."

In response, the defendants concede the existence of a ministerial duty to report a reasonable suspicion of sexual abuse but argue that there was no breach of that duty because the facts in this record do not support a reasonable belief of sexual abuse given the "totality of the circumstances" at the time. They observe that there are no cases supporting a finding of reasonable suspicion without a reporter witnessing or being told firsthand of abuse. Turning to the specific facts of this case, the defendants argue that evidence of Robert's anger at Allison's attention seeking behavior, including her interaction with the football players at the Friday night game, did not amount to reasonable cause because Robert did not think that Allison was a danger to students.[20] The defendants also rely on undisputed testimony that it was not unusual for students to be called out of classes or to visit with teachers individually, and that Allison's visits with the plaintiffs were brief in duration and occurred in a way that would not draw the attention from any individual teacher. They emphasize that there was no evidence that any teacher ever saw Allison actually flirt with or make sexual overtures to any student, including the closest situation,

[20] The defendants also argue that Robert had no duty to report under § 17a-101a because he was not acting within the scope of his employment when he remarked, with respect to Allison's interaction with the three football players at a Friday night game, that "we're going to read about [you] in the newspaper someday" or when he learned of her attracting attention while running through town. We need not address this scope of employment argument because, even if we assume, without deciding, that Robert's duties as a mandated reporter extended beyond school hours, we conclude that the facts of this case, viewed both individually and collectively, did not give rise to a reasonable suspicion of abuse or imminent abuse.

namely, when Robert saw her interact with the football players at the Friday night game. Similarly, the defendants argue that there is no evidence that any staff member was aware of the social media messaging between the plaintiffs and Allison or Allison's paying attention to John Doe I during football practices. Finally, the defendants contend that Allison's attire would not support a conclusion that she was abusing students because (1) most teachers and staff members viewed her attire as appropriate, and (2) as is reflected in the advisory committee notes to rule 412 of the Federal Rules of Evidence, the use of a person's attire to establish her sexual proclivities is "unreliable, at best, and sexist and narcissistic, at worst."[21] We agree with the defendants' argument that, on the facts of this case, there is no evidence to support reasonable cause for any of their employees to suspect that Allison was sexually abusing the plaintiffs or exposing them to an imminent risk of sexual abuse by her.

We begin by noting that it is undisputed that the employees of the town and the board—Principal Salutari, all teachers, including Robert, and the various football coaches—had a ministerial duty under the board reporting policy and the mandatory reporting statute to report to the Commissioner of Children and Families if, "in the ordinary course of [their] employment or profession," they obtained "reasonable cause to suspect" abuse of or "imminent risk of serious harm" to a child or student.[22] General Statutes § 17a-101a (a) (1); see also General Statutes § 17a-101a (b) (providing criminal penalties for failure to report); General Statutes § 17a-101b (prescribing content of report, twelve

[21] See Fed. R. Evid. 412, advisory committee notes.

[22] Numerous Superior Court decisions, which were followed by the trial court in this case, hold to this effect. See, e.g., *Doe* v. *Kennedy*, Superior Court, judicial district of Waterbury, Docket No. CV-09-5013921-S (November 29, 2012) (55 Conn. L. Rptr. 193, 196).

hour reporting deadline from point at which reasonable cause to suspect abuse occurs, and reporting process). Consistent with case law governing the concept of "reasonable suspicion" in the criminal law context, the mandatory reporting statute provides that "suspicion or belief may be based on factors including, but not limited to, observations, allegations, facts or statements by a child, victim . . . or third party. *Such suspicion or belief does not require certainty or probable cause*." (Emphasis added.) General Statutes § 17a-101a (d); see, e.g., *State* v. *Peterson*, 320 Conn. 720, 730–31 n.4, 135 A.3d 686 (2016) ("Reasonable and articulable suspicion is a lower standard than probable cause. . . . Proof of probable cause requires less than proof by a preponderance of the evidence, or in other words, less than proof that something is more likely than not." (Citation omitted; internal quotation marks omitted.)). Thus, reasonable cause to suspect "is an objective standard that focuses not on the actual state of mind of the [decision maker], but on whether a reasonable person, having the information available to and known by the [decision maker], would have had that level of suspicion." (Internal quotation marks omitted.) *State* v. *Peterson*, supra, 730. The assessment considers the "totality of the circumstances" at the time of the decision and must be based on "specific and articulable facts" and "rational inferences" taken therefrom. (Internal quotation marks omitted.) Id., 731. Whether reasonable cause or suspicion exists in view of a given set of facts presents a question of law subject to plenary review. See, e.g., *State* v. *Houghtaling*, 326 Conn. 330, 353–54, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018); *State* v. *Butler*, 296 Conn. 62, 72, 993 A.2d 970 (2010).

Considering the totality of the circumstances demonstrated by the evidence produced by the defendants, and unchallenged by the plaintiffs, we conclude that

none of the defendant's employees had reasonable cause to suspect that Allison was sexually abusing any of the plaintiffs or exposing them to an imminent risk of sexual abuse. First, Allison's personnel record was unblemished, and she was held in uniformly high regard by her colleagues and students at the high school; indeed, she was known to handle the common situation of student crushes appropriately by politely rebuffing them.[23] Second, although all of the teachers and coaches who testified at depositions in these cases agreed that it would be inappropriate and reportable misconduct for a teacher to flirt with a student, none of those teachers or coaches ever witnessed Allison flirting with a student, including any of the three plaintiffs. Even if we assume, without deciding, that Allison had acted in a flirtatious manner—consciously or not—at the Friday night football game by smiling, laughing, and tossing her hair in front of Robert and three football players, that conduct is simply too far removed from any type or instance of sexual abuse to supply reasonable cause to suspect an imminent risk of such abuse.

Third, the three plaintiffs' repeated visits to Allison's classroom did not appear unusual to other faculty members at the school because, as numerous faculty and staff members testified, teachers frequently called students to different classrooms at various points during the school day. It also was common for teachers to visit students in other classrooms for a variety of academic and extracurricular reasons, often to address academic performance issues, such as incomplete work. There also were open periods at the end of the day when

[23] We note that Allison had told Mia Corvino, a colleague, that John Doe I, among other male students, had a crush on her; Corvino believed that Allison properly laughed that off and acted appropriately and professionally. Corvino had heard during her classes that other boys had similar crushes on Allison, which she did not consider unusual; it was "the nature of the business" for some students to have crushes on teachers and the responsibility of the teachers to respond appropriately.

students could freely visit teachers for extra help. Moreover, Allison had a seemingly legitimate reason to summon students in her capacity as faculty yearbook advisor, and she varied the days and times at which she summoned the plaintiffs in order to avoid detection. John Doe II and John Doe III testified that they were never called out from any individual teacher's class more than twice.

Fourth, even if we assume, without deciding, that Allison's attire at the football practices and in the gym pushed the boundaries of propriety in an educational setting, there is absolutely no evidence of nudity in front of students; see footnote 11 of this opinion; and her attire does not indicate that she was engaged, or inclined to engage, in sexual impropriety with students. Cf. Fed. R. Evid. 412, advisory committee notes ("The rule has been amended to . . . exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. . . . Admission of such evidence would contravene [r]ule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b) (2) exception is satisfied, *evidence such as that relating to the alleged victim's mode of dress*, speech, or [lifestyle] will not be admissible." (Emphasis added.)).

In his brief, John Doe II identifies a seventeen fact chain[24] that, he argues, would suggest that people at

[24] John Doe II identifies the following seventeen facts that he claims establish reasonable cause to suspect that Allison was sexually abusing him: (1) Robert, as her husband and department head, "thought her dress and appearance [were] so inappropriate that he asked another teacher to address the issue with her"; (2) Robert testified about an evening at a high school football game where he "saw some players flirting with [Allison], and he commented to her that 'we're going to read about [you] in the [newspaper] someday' "; (3) Allison and Robert "routinely fought with each other—in front of students and staff—in order to start a fight or make a scene for the purpose of making [Robert] jealous"; (4) Robert "testified that [Allison's] personality had changed and that she was disappointed that the students

the school should have known what was happening with the plaintiffs. We agree with the trial court that this piling of inferences distorts the actual reality apparent to the various employees in real time. See *Doe ex rel. Brown* v. *Pontotoc County School District*, 957 So. 2d 410, 418 (Miss. App. 2007) ("[i]n retrospect, it is easier to see the signs of inappropriateness in [the coach's] actions, but at the time they were occurring, there was insufficient proof to claim the [school] [d]istrict was negligent in not taking action"); see also *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 575, 717 A.2d 215 (1998) ("virtually all harms, in hindsight, are literally foreseeable" (internal quotation marks omitted)). By aggregating the facts as they do, the plaintiffs impermissibly attribute knowledge of all of the facts to each of the high school's employees. As the plaintiffs themselves

no longer flirted with her—a fact she attributed to her 'mom' status"; (5) "on at least one occasion, Allison . . . sent John Doe I a bagel during school hours and in front of students and other teachers"; (6) "in her role as yearbook [advisor], [Allison] required John Doe II to change his yearbook quote at least five times, each time requiring him to be pulled out of a class and meet with her in person"; (7) "on some of these occasions, [Allison] would call [some] of [John Doe II's] teachers to request that he come to her classroom for the ostensible purpose of discussing his yearbook quote"; (8) "students commented to [John] Doe II that it was unusual to see an authority [figure] remove her tank top to reveal only a sports bra during a workout with the football team"; (9) "it was not permitted for the female student athletes to wear only their sports bras"; (10) "during the summer football program, [John] Doe II observed [Allison] paying special attention to [John] Doe I"; (11) "[John] Doe I and [Allison] were exchanging private messages on Instagram, and [John] Doe II learned that it turned into flirting"; (12) Allison "had multiple conversations with the football coaches about her attire, including one conversation [during which a] coach asked her to wear her tight fitting pink shorts again"; (13) Allison "testified that she believes much of her conduct at the time was designed to fuel a need for attention she did not feel she was getting through her marriage"; (14) Allison "testified that the coaches flirted with her incessantly"; (15) "an assistant coach, Erick Becker, testified that [Allison] dressed provocatively such that it was hard not to notice"; (16) "Becker further testified that it was an inappropriate way to dress around students"; and (17) "Becker and another coach had a conversation about the fact that Allison . . . appeared to be trying to get the attention of the students." (Emphasis omitted.)

agree, each defendant must be judged on the basis of only those particular facts known to that person. Put differently, aggregating the seventeen facts to create reasonable cause to suspect sexual abuse or imminent risk thereof is akin to charging the various high school employees with the responsibility of viewing a completed jigsaw puzzle, when all any of them could see at any relevant time was a piece or two. We do, however, emphasize that mandated reporters, such as the school employees involved in this case, should not hesitate to ask questions or to act further—including by making a report—when confronted with a situation that might in fact be an indicator of abuse. Indeed, the legislature envisioned such difficult decisions when it extended immunity to good faith reporters of suspected abuse or neglect in General Statutes § 17a-101e (b). See *Ward* v. *Greene*, 267 Conn. 539, 559–60, 839 A.2d 1259 (2004).

Moreover, even when the facts of this case are viewed in the aggregate and with the benefit of hindsight, they are still far less compelling than those in cases in which sister state courts have held that there was no duty to report under mandatory reporting statutes.[25] See, e.g.,

[25] Looking beyond mandatory reporting statutes, we note that other Connecticut, federal, and sister state courts have held similarly in the context of negligent hiring and retention claims in considering whether it was foreseeable, for duty purposes, that a school or church employee would sexually abuse a child in his or her charge—some in cases with fact patterns akin to this one. See *Gough* v. *Saint Peter's Episcopal Church*, 143 Conn. App. 719, 731–32, 70 A.3d 190 (2013) (existence of church's sexual abuse prevention policies did not render it reasonably foreseeable that priest would sexually abuse teenage boy, given "the uncontested evidence . . . that no one who knew [the priest] saw, heard or observed anything that alerted them that [the priest] would harm anyone in any manner," and "the plaintiff averred that he did not think that anyone at [the church] was aware of the incident and that he did not disclose to anyone that the incident occurred until decades later"); *Doe 175 ex rel. Doe 175* v. *Columbia Heights School District, ISD No. 13*, 873 N.W.2d 352, 360–61 (Minn. App. 2016) (there were insufficient "red flags" to make sexual abuse of teenage girl by high school football coach foreseeable, even when (1) girl had yelled " 'I love you' " to him at practice, prompting another coach to say " '[t]hat's trouble' " and to ask her to leave, (2) girl and coach were spotted talking in parking lot, which was

Doe ex rel. Doe v. *Boy Scouts of America*, 4 N.E.3d 550, 556–57, 562–63 (Ill. App. 2014) (distinguishing case from those involving more "unequivocally salacious overtures" and concluding that volunteer's report that scouting executive was " 'weird around kids' " at church and would go to YMCA on day of boys' swim team practices and position himself in way that he could use mirror to watch boys change clothes did not trigger mandatory reporting obligations because it was "not so clearly prurient, and did not signal such an immediate danger to scouts, as to warrant depriving him of any opportunity to explain himself"); *Doe* v. *Logan*, 602 S.W.3d 177, 187–88 (Ky. App.) (teacher was not obligated to report colleague because he was not aware of colleague's abuse of special education student, despite fact that he had observed colleague engage in otherwise "inappropriate behavior" that he did not "believe . . . was sexual in nature," including "holding, hugging, or putting arms around students"), review denied, Kentucky Supreme Court, Docket No. 2020-SC-0085 (July 1, 2020); *Doe ex rel. Brown* v. *Pontotoc County School District*, supra, 957 So. 2d 418 (school did not breach duty to

considered common occurrence, (3) girl used computer in weight room office while coach was supervising weight room, and (4) coach had been seen "alone with an unknown 'young girl' " in weight room on Saturday); *Dia CC* v. *Ithaca City School District*, 304 App. Div. 2d 955, 956, 758 N.Y.S.2d 197 ("[There was] no evidence that the [school] [d]istrict had any knowledge or notice that the [English as a Second Language] teacher may molest a student," given the teacher's good employment history for more than fifteen years "without incident," the teacher's clean background checks prior to hiring, and the fact that the student's "classroom teacher acted reasonably in releasing [him] to another teacher. Allowing a teacher to work alone one-on-one with a student did not breach the [school] [d]istrict's duty to supervise students . . . ." (Citation omitted.)), appeal denied, 100 N.Y.2d 506, 795 N.E.2d 38, 763 N.Y.S.2d 812 (2003); *A.H. ex rel. C.H.* v. *Church of God in Christ, Inc.*, 297 Va. 604, 629–30, 831 S.E.2d 460 (2019) (church's knowledge of past sexual abuse allegation did not trigger duty to terminate youth pastor when there was no pleading that church was aware of specifics or that allegation had been verified by social services or law enforcement authorities).

report affair between teacher and teenaged student when evidence consisted of single "uncorroborated rumor," all physical contact occurred while teacher and student were alone, except for rubbing of shoulders at basketball game that "apparently went unnoticed by attendees," teacher had good reputation and employment history, and their interactions were "under the guise of innocence," such as tutoring); cf. *Doe* v. *Dimovski*, 336 Ill. App. 3d 292, 296–97, 783 N.E.2d 193 (contrasting case to one consisting only of rumors that had been denied by students themselves and concluding that female student's direct report of sexual abuse to school counselor created ministerial duty to report), appeal denied, 204 Ill. 2d 658, 792 N.E.2d 306 (2003). Accordingly, we conclude that the trial court correctly determined that, on the facts in this record, none of the high school personnel had reasonable cause to believe that Allison was sexually abusing any of the plaintiffs or exposing them to an imminent risk of sexual abuse.

B

Whether Semple's Testimony Established a Ministerial Duty of Professionalism

We next address John Doe II's contention that the trial court incorrectly concluded that the testimony of Semple, the high school athletic director, did not establish a "ministerial duty of professionalism for his subordinates." Specifically, John Doe II relies on Semple's testimony that he "expected his subordinates, including head [football] coach Filippone, to enforce certain standards of professionalism, including requiring any coach, male or female, to cover up if shirtless." John Doe II argues that the "failure to enforce this duty" resulted in "the defendants' permitting the now convicted sexual predator Allison . . . to dress in only the most fundamental attire while addressing the high school football

team in her role as a core conditioning coach." John Doe II then contends that there is ample evidence to establish that Semple failed to communicate the duty of professionalism to his staff, which itself raises a question of fact precluding summary judgment.

In response, the defendants rely on *Ventura* v. *East Haven*, 330 Conn. 613, 199 A.3d 1 (2019), and argue that, with no formal dress code or policy in place at the high school, Semple's testimony about "professionalism" did no more than establish a general practice by which discretion is exercised, particularly given that the faculty collective bargaining agreement would have created problems with enforcing his version of "common sense" rules about attire. See footnote 14 of this opinion. We agree with the defendants and conclude that Semple's opinion of what constitutes professionalism, standing alone, cannot provide the basis for a clearly promulgated policy directed toward all school employees and does not, therefore, create a ministerial duty.[26]

"[O]ur 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 judg-

[26] As a preliminary matter, we note that John Doe II relies on *Haynes* v. *Middletown*, 314 Conn. 303, 315 n.8, 101 A.3d 249 (2014), and argues that the trial court improperly declined to address the issue on the ground that it had not been pleaded in the complaint. The defendants argue in response that the trial court correctly determined that John Doe II did not plead a theory of negligence arising from Allison's wardrobe, which distinguishes this case from *Haynes*, in which we held only that the plaintiff need not affirmatively plead an exception to discretionary act immunity. Given our conclusion with respect to the merits of John Doe II's claim, we need not address this pleading issue.

We also note that, although John Doe III raised a similar claim before the trial court, he does not renew it on appeal.

ment or discretion." (Emphasis added; internal quotation marks omitted.) *Cole* v. *New Haven*, supra, 337 Conn. 338. A ministerial duty need not be written and may be created by oral directives from superior officials, the existence of which are established by testimony. See *Ventura* v. *East Haven*, supra, 330 Conn. 639–41; see also *Cole* v. *New Haven*, supra, 342 ("[w]hen the facts are viewed in the light most favorable to the plaintiff, we conclude that [the police sergeant's] testimony, in combination with the [municipal pursuit policy] and the [statewide pursuit 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 [the police officer] violated that ministerial duty"); *Ventura* v. *East Haven*, supra, 640 n.14 ("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"). In contrast, descriptions of general practices or expectations that guide an employee's exercise of discretion do not create a ministerial duty. See *Ventura* v. *East Haven*, supra, 640–41 ("There are, no doubt, any number of guidelines and practices that police officers adhere to when responding to the myriad situations they confront on a daily basis. 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."). Specificity is required in all aspects of the directive. See *Strycharz* v. *Cady*, 323 Conn. 548, 566–67, 148 A.3d 1011 (2016) (concluding that school superintendent's "testimony provided a sufficient basis to conclude that school administrators had the ministerial duty to assign staff members to monitor students throughout the school" but also "contains no directive sufficient to support a finding that [the administrators] had the min-

isterial duty to ensure that assigned staff members, once notified of their responsibilities, *actually* reported to and adequately discharged their assignments" (emphasis in original)); see *Marvin* v. *Board of Education*, 191 Conn. App. 169, 176–78, 213 A.3d 1155 (2019) (ministerial duty was not created by custodian's "job description [that] provides [only] generally that the custodial staff '[p]erforms necessary work to maintain the cleanliness and appearance of all hard surface flooring, including . . . mopping,' " and "there was no specific policy, procedure, or directive that applied to the inspection and maintenance of the floors at the school, and . . . there existed only a general policy that the school should be maintained in a clean and safe condition").

We agree with the defendants that Semple's testimony about "professionalism" lacked the specificity necessary to create an enforceable ministerial duty. In contrast to a specific dress code—which Salutari testified did not exist at the high school because of collective bargaining issues; see footnote 14 of this opinion; there is no evidence that Semple's views of professionalism in attire ever were communicated to the school employees in a manner that clearly established a duty to dress in a prescribed way, without the exercise of judgment or discretion. Accordingly, we conclude that Semple's conception of professionalism is not by itself a sufficiently definite and specific concept to serve as the basis for a ministerial duty and that the trial court properly granted summary judgment with respect to this issue.

II

IDENTIFIABLE PERSON-IMMINENT HARM EXCEPTION TO DISCRETIONARY ACT IMMUNITY

John Doe II and John Doe III next claim that the trial court incorrectly concluded that the identifiable person-

imminent harm exception to discretionary act immunity, as explicated in *Haynes* v. *Middletown*, 314 Conn. 303, 312–23, 101 A.3d 249 (2014), and *Doe* v. *Petersen*, 279 Conn. 607, 616–21, 903 A.2d 191 (2006), does not apply in this case. Acknowledging that the trial court correctly determined that he was an identifiable person during school hours, John Doe II argues that the seventeen facts that provide reasonable cause to report a suspicion of sexual abuse; see footnote 23 of this opinion; also render him a person subject to imminent harm, with the likelihood of that harm apparent to the defendants as public officials. John Doe III argues similarly, relying on (1) Allison's attire at summer football practices, "in full view and knowledge of the coaching staff three times a week for six weeks," (2) his deposition testimony about how often he was summoned from class, and (3) numerous hall monitors' collective failure to question any of the plaintiffs "as to their reasons for being out of class or going to [Allison's] classroom." John Doe III also relies on the fact that the school resource officer and the school administration did not actively monitor the high school's video security system.

In response, the defendants argue that John Doe II and John Doe III were identifiable victims only during school hours, and not during the optional summer football program, meaning that only four of the claimed circumstances apply to support a claim that there was imminent harm. Citing the remoteness of the harm considered in *Brooks* v. *Powers*, 328 Conn. 256, 178 A.3d 366 (2018), the defendants emphasize that no one was aware that the plaintiffs had been called out of class excessively, as it was not unusual for a student to visit a different classroom or to receive a bagel from a teacher. They also contend that there is no evidence to support the proposition that Allison's attire made it more likely that she would perform a sexual act on a student, particularly given that the act did not occur until December,

2014, and that she wore the attire in question during the summer. Quoting *Edgerton* v. *Clinton*, 311 Conn. 217, 231, 86 A.3d 437 (2014), the defendants emphasize that there is no duty to inquire and that "[t]he 'apparentness' prong of the identifiable person-imminent harm exception is an objective test pursuant to which the courts 'consider the information available to the [school official] at the time of [his or] her discretionary act or omission.' " The defendants emphasize that, because additional inquiry is not required, "the same reason that the circumstances did not support reasonable suspicion of abuse of" John Doe II or John Doe III means that "there is no evidence that the circumstances would have made it apparent to a reasonable school official that harm . . . was imminent . . . ." We agree with the defendants' argument that there is no genuine issue of material fact with respect to the apparentness element of the identifiable person-imminent harm exception to governmental immunity.[27]

It is well established that "[§] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the 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. . . .

[27] The defendants also argue, as an alternative ground for affirming the judgments in the cases of John Doe II and John Doe III, that their failure to proffer expert testimony to support their claims as to the defective supervisory structure at the high school is inherently fatal to their negligence claims. We need not address this argument, given our conclusion as to discretionary act immunity.

"This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Citations omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018).

We begin by noting that it is undisputed that, because John Doe II and John Doe III were "public school student[s] at school during school hours, [they were] . . . identifiable person[s] for purposes of the imminent harm to identifiable persons exception"; id., 9; and, for the purpose of addressing the plaintiffs' claims in this appeal, we assume without deciding that they occupied that status during football practices, as well.[28] But see *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436, 165 A.3d 148 (2017) ("[O]ur decisions underscore . . . that

[28] Describing as "unconscionable" this court's failure "to expand the exception for identifiable victim[s] to include any student on school property who has a right and purpose to be there," John Doe III asks us to overrule the line of cases standing for the proposition that the "only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." *Durrant* v. *Board of Education*, 284 Conn. 91, 107, 931 A.2d 859 (2007); see also *St. Pierre* v. *Plainfield*, 326 Conn. 420, 437–38, 165 A.3d 148 (2017) (citing cases). Because we assume, without deciding, that John Doe II and John Doe III were identifiable persons at all relevant times, we do not address this request.

whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . . Accordingly, [t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours . . . .'' (Internal quotation marks omitted.)); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 656–57, 235 A.3d 599 (middle school soccer player was not identifiable person given voluntary nature of participation in sport), cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). Accordingly, our focus in this appeal is on whether the trial court correctly concluded that the defendants' acts or omissions did not implicate either an imminent harm or ''a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.'' (Internal quotation marks omitted.) *Martinez* v. *New Haven*, supra, 328 Conn. 8.

Our recent decision in *Martinez* aptly summarizes the line of decisions in the wake of *Burns* v. *Board of Education*, 228 Conn. 640, 649, 638 A.2d 1 (1994), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), which apply the identifiable person-imminent harm exception to discretionary act immunity in the public school context, and we need not repeat that detailed analysis here. See *Martinez* v. *New Haven*, supra, 328 Conn. 8–10. It suffices to say that ''the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that *the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm*.'' (Emphasis added; internal quotation marks omitted.) Id., 9. Applying that standard, we conclude that there is no genuine issue of material fact

with respect to either the imminence or apparentness prongs. Sexual abuse causes unmistakably serious harm to its victims, but the facts of this case suggest that Allison's actions—in particular her sexual assaults of John Doe II and John Doe III—were the culmination of a generally clandestine pattern of behavior. Although some might have viewed Allison's attire at the summer football practices as inappropriate for an educational setting, there is nothing to suggest that anyone would reasonably anticipate a sexual assault of a student would be the immediate result of that attire.[29] Cf. *Brooks* v. *Powers*, supra, 328 Conn. 273–75 (woman who drowned in water one-half mile from where she was seen standing in field during storm was not identifiable person subject to imminent harm for purposes of constables' failure to respond given attenuation between drowning and risk of being in field); *Maselli* v. *Regional School District No. 10*, supra, 198 Conn. App. 658–59 ("exacerbated postconcussion symptoms and diminished academic performance" were "too attenuated" from injury and allegedly negligent response by coach when middle school soccer player was struck in face by ball to be imminent or apparent). This is particularly so, given that Allison's professional record had been unblemished until the events of this case, and she was held in uniformly high regard by students and faculty alike. Moreover, there is no evidence that the plaintiffs' repeated visits to Allison's classroom were abnormalities that should have been apparent to any staff members, given the undisputed evidence that students routinely visited teachers' classrooms at numerous times for legitimate pedagogical or extracurricular reasons, and Allison avoided raising suspicion by summoning the plaintiffs at a diverse array of times over

[29] Contrary to John Doe III's characterization of her attire as "a form of mental sexual abuse," there is no evidence that she actually exposed any intimate body parts to him or any other students at the football practices. See footnote 11 of this opinion.

an extended period of months. Indeed, those staff members, such as hallway monitors, were under no duty to ask questions beyond what was immediately apparent. See, e.g., *Edgerton* v. *Clinton*, supra, 311 Conn. 231–32; see also *Doe* v. *Petersen*, supra, 279 Conn. 609, 619–21 and n.11 (fifteen year old tennis player who suffered emotional distress when supervisor " 'cut [her] off' " from further disclosure of sexual abuse suffered at hands of coach was not subject to exception when manager had no idea of sexual assault that had been suffered). Finally, Robert's apparently negative reaction to Allison's interaction with the football players at the Friday night game cannot be understood as evincing a belief that she was *imminently* about to engage in an illegal sexual relationship with any student, let alone any of the plaintiffs specifically. Accordingly, we conclude that the trial court correctly determined that neither John Doe II nor John Doe III satisfied the imminent harm to identifiable persons exception to governmental immunity.

III

VIDEO MONITORING CLAIMS

Finally, we address the claim of John Doe III that the trial court incorrectly determined that he failed to allege in his complaint that the town was liable for the inactions of a police officer assigned as a school resource officer at the high school because that officer was an employee of both the town and the board. John Doe III contends that the trial court incorrectly determined that he had raised this claim for the first time in his memorandum of law objecting to summary judgment when his complaint "clearly alleged" that the town, acting through the police department, "failed to properly monitor the classrooms and hallways with proper personnel or through the use [of] video surveil-

lance that existed [when] the sexual assault of John Doe [III] took place."

In response, the defendants do not challenge John Doe III's argument that the trial court improperly construed his complaint, but argue—ostensibly as an alternative ground on which to affirm the judgment of the trial court—that the "trial court rightly analyzed the evidence, which was that [Principal Salutari] said the police had access to the footage, not that they had a duty to monitor the classrooms or anywhere else [that John Doe III's] activity may have occurred." The defendants contend that there was no evidence that "the police [had] the ability to monitor security video transmissions" and that, "even if they did, it does not establish that the police had any duty to do so. . . . Salutari expressly stated that the video was not monitored, much less that anyone had a duty to monitor it in any way differently from the way he testified it was used, namely, to go back after an incident to determine if the cameras detected it." We agree with the defendants and conclude that there is no evidence of any ministerial duty to monitor the security camera footage, rendering this a classic discretionary act subject to governmental immunity under § 52-557n (a) (2) (B).

Having reviewed the record in the absence of a reply brief challenging the defendants' assertions, we conclude that the trial court correctly determined that there was no evidence of a policy governing the manner and frequency with which security cameras and their footage are monitored. See footnote 19 of this opinion. Insofar as the plaintiffs failed to establish the existence of a ministerial duty in this regard, the high school's use of the security cameras remained a discretionary act. See, e.g., *Lewis* v. *Newtown*, 191 Conn. App. 213, 232, 214 A.3d 405 ("it is clear that the adoption of the school security guidelines by the defendants was an act of discretion encompassed within their general duty

to manage and supervise their employees and the schoolchildren, and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B)"), cert. denied, 333 Conn. 919, 216 A.3d 650 (2019); see also *Strycharz* v. *Cady*, supra, 323 Conn. 568–69 (public school administrators' "general responsibility to manage and supervise school employees" is discretionary act). Accordingly, we conclude that the trial court properly granted the defendants' motions for summary judgment.

The judgments are affirmed.

In this opinion the other justices concurred.

ROCHDI MAGHFOUR *v.* CITY OF WATERBURY (SC 20502)

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

Syllabus

The plaintiff, an employee of the defendant city, sought to resolve a dispute concerning a lien the city placed on certain settlement proceeds that he had received as a result of a motor vehicle accident that occurred in 2016. At all relevant times, the city was self-insured and paid for the medical care that the plaintiff received in connection with the accident. In July, 2017, the legislature passed an amendment (P.A. 17-165, § 1) to a statute (§ 7-464) concerning group insurance benefits for municipal employees that allowed a self-insured city that provides health benefits for its employees to file a lien on the portion of any settlement proceeds that represents payment for medical expenses incurred by a city employee when such expenses result from the negligence or recklessness of a third party. Later in July, 2017, the plaintiff filed an action against the third-party tortfeasor who had caused the plaintiff to sustain injuries in the accident. Thereafter, on October 1, 2017, P.A. 17-165, § 1, became effective. In October, 2018, the city filed a notice of lien, claiming a right to reimbursement for amounts that it had paid for the plaintiff's medical expenses from any judgment or settlement the plaintiff might receive arising from the accident. Approximately one week later, the plaintiff settled his civil action against the third-party tortfeasor. The plaintiff then brought the present action, claiming that P.A. 17-165, § 1, did not authorize the lien filed by the city because the plaintiff's injuries

occurred and his action against the third-party tortfeasor was commenced before the effective date of P.A. 17-165, § 1. The trial court granted the plaintiff's motion for summary judgment and rendered judgment thereon, concluding, inter alia, that the legislature did not expressly indicate that it intended for P.A. 17-165, § 1, to apply retroactively to pending actions and, therefore, that the statute (§ 55-3) precluding a new law that imposes any new obligation from being construed to have retroactive effect barred the city's lien. On the city's appeal from the trial court's judgment, *held* that the trial court properly granted the plaintiff's motion for summary judgment, as that court correctly determined that the city's lien stemmed from an improper, retroactive application of P.A. 17-165, § 1: the legislature did not explicitly provide that P.A. 17-165, § 1, should apply retroactively, and, because that public act created a new right for a self-insured municipality to assert a lien to recover medical expenses that it has paid and eliminated the right of a municipal employee to retain sums that he or she recovers from a third-party tortfeasor if those sums represent medical expenses paid by the municipality, P.A. 17-165, § 1, was substantive, and, pursuant to § 55-3, could operate prospectively only; moreover, there was no merit to the city's claim that allowing it to place a lien on the plaintiff's settlement proceeds would not effect a retroactive application of P.A. 17-165, § 1, in view of the fact that the plaintiff settled his action against the third-party tortfeasor after the effective date of that public act, as the settlement was not independent of the motor vehicle accident that ultimately led to the settlement and that occurred prior to the public act's effective date.

Argued December 8, 2020—officially released August 3, 2021*

Procedural History

Action for interpleader to resolve a dispute concerning a lien claimed by the defendant on certain settlement proceeds, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the plaintiff's motion for summary judgment, denied the defendant's motion for summary judgment, and rendered judgment for the plaintiff, from which the defendant appealed. *Affirmed.*

Daniel J. Foster, corporation counsel, for the appellant (defendant).

Jonathan H. Dodd, for the appellee (plaintiff).

* August 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

MULLINS, J. The defendant, the city of Waterbury (city), appeals from the judgment of the trial court rendered in favor of the plaintiff, Rochdi Maghfour. On appeal, the city contends that the trial court improperly granted the plaintiff's motion for summary judgment because it erroneously concluded that General Statutes § 7-464, as amended by § 1 of No. 17-165 of the 2017 Public Acts (P.A. 17-165), did not authorize the city's lien in this case. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts, as found by the trial court and contained in the record, and procedural history are relevant to our disposition of this appeal. On June 20, 2016, the plaintiff was injured in a motor vehicle accident. He was an employee of the city, which is a self-insured municipality. Therefore, the city paid for medical care resulting from his injuries.

On July 14, 2017, the plaintiff initiated an action against the third-party tortfeasor who had caused his injuries in the motor vehicle accident. Earlier that month, the legislature had enacted P.A. 17-165, § 1, which amended § 7-464 by adding subsections (c) and (d).[1] See P.A. 17-165, § 1; 60 S. Proc., Pt. 8, 2017 Sess., pp. 3076–77, 3101–3102; 60 H.R. Proc., Pt. 13, 2017 Sess., pp. 5329–35. The new subsections allow a self-insured

[1] General Statutes § 7-464 provides in relevant part: "(c) A self-insured town, city or borough that provides group health benefits for its employees has a lien on that part of a judgment or settlement that represents payment for economic loss for medical, hospital and prescription expenses incurred by its employees and their covered dependents and family members when such expenses result from the negligence or recklessness of a third party. . . .

* * *

"(d) As used in subsection (c) of this section: (1) 'Self-insured town, city or borough' means a town, city or borough that provides group health benefits to its employees by paying submitted medical, hospital and prescription expense claims from its revenues . . . ."

city, town, or borough to file a lien on the portions of judgments or settlements that represent payment for medical expenses incurred by its employees when such expenses result from the negligence or recklessness of a third party. See P.A. 17-165, § 1. Public Act 17-165, § 1, had an effective date of October 1, 2017.

After the effective date of P.A. 17-165, § 1, the city filed a notice of lien dated October 15, 2018, with the plaintiff's attorney. In that notice, the city claimed a right to reimbursement of medical expenses for which it had paid from any judgment or settlement the plaintiff might receive arising from his June 20, 2016 motor vehicle accident. Thereafter, on October 23, 2018, the plaintiff settled his civil action against the third-party tortfeasor.

Following the settlement, the plaintiff and the city could not reach an agreement to resolve the issue of whether the city was entitled to a lien on the settlement for the amount of the medical expenses it had paid. Consequently, the plaintiff initiated the present action in the trial court contesting the validity of the city's lien on the proceeds of his settlement.[2] In his petition, the plaintiff claimed that § 7-464, as amended by P.A. 17-165, § 1, did not authorize the lien filed by the city because the plaintiff's injury occurred and his action against the third-party tortfeasor was commenced before the effective date of the act.

Each party filed a motion for summary judgment. The trial court granted the plaintiff's motion for summary

[2] The plaintiff initiated this action under § 7-464 (c) (4) (C), which provides in relevant part: "If agreement cannot be reached on the application of equitable defenses to the claimed lien amount, then either the employee, covered dependent, family member or the self-insured town, city or borough may petition the Superior Court for resolution on the application of equitable defenses. . . ."

The parties do not dispute that the trial court had jurisdiction to hear the plaintiff's claim, so we do not address the issue of whether the plaintiff's action was appropriately brought under § 7-464 (c) (4) (C).

judgment and denied the city's motion for summary judgment. In doing so, the trial court concluded that the legislature did not expressly indicate that it intended for P.A. 17-165, § 1, to apply retroactively to pending actions and, therefore, that General Statutes §§ 1-1 (u)[3] and 55-3[4] barred the lien from affecting pending litigation and from applying retroactively. This appeal followed.[5]

On appeal, the city asserts that the trial court improperly granted the plaintiff's motion for summary judgment because the plain language and legislative intent of § 7-464, as amended by P.A. 17-165, § 1, indicate that the city's lien would apply to the proceeds of the plaintiff's settlement reached after the act's effective date. The city contends that, because the plaintiff reached his settlement after the effective date of P.A. 17-165, § 1, and the plain language of the statute applies to settlements, its lien under the act would not operate retroactively in the present case. According to the city's reasoning, P.A. 17-165, § 1, simply applies to any settlements reached after the effective date of the act. The plaintiff responds that the trial court correctly determined that the city was not authorized to file a lien on the proceeds of his settlement in this matter because § 55-3 bars P.A. 17-165, § 1, from applying retroactively and § 1-1 (u) prevents it from applying to existing litigation.

We begin by setting forth the standard of review governing this appeal. "The scope of our review of the

[3] General Statutes § 1-1 (u) provides: "The passage or repeal of an act shall not affect any action then pending."

[4] General Statutes § 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

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

trial court's decision to grant the [plaintiff's] motion for summary judgment is plenary." *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020). "To the extent that the trial court's decision . . . requires us to construe a [statute], our review is also plenary and is guided by our well established legal principles regarding statutory construction. . . . In construing statutes, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Citations omitted; internal quotation marks omitted.) Id., 410–11.

Both the plaintiff and the city agree that their competing motions for summary judgment gave rise to no genuine issue as to any material fact. Thus, the issue of whether the trial court properly granted the plaintiff's motion for summary judgment turns solely on a point of statutory interpretation, namely, whether, as a matter of law, § 7-464, as amended by P.A. 17-165, § 1, authorizes the city to file a lien on the plaintiff's settlement from his civil action against the third-party tortfeasor.

As instructed by § 1-2z, we begin our analysis with the text of § 7-464 (c), which provides in relevant part that "[a] self-insured town, city or borough that provides group health benefits for its employees has a lien on that part of a judgment or settlement that represents payment for economic loss for medical, hospital and prescription expenses incurred by its employees and their covered dependents and family members when such expenses result from the negligence or recklessness of a third party. . . ." As we noted previously, P.A. 17-165, § 1, provided that the amendment to § 7-464 became effective on October 1, 2017. The legislature,

however, did not expressly indicate whether it intended the amendment to apply retroactively to events that occurred before its effective date, such as the plaintiff's motor vehicle accident. Therefore, the plain language of the statute does not answer the question on appeal, and we must examine the relationship of § 7-464 (c) with our law governing the retroactivity of statutes.

"In considering the question of whether a statute may be applied retroactively, we are governed by certain well settled principles, [pursuant to] which our ultimate focus is the intent of the legislature in enacting the statute. . . . [O]ur point of departure is . . . § 55-3 . . . ." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 292, 215 A.3d 149 (2019). Section 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." "[W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively. . . . [Although] there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Procedural statutes . . . therefore leave the preexisting scheme intact."[6] (Inter-

[6] The city asserts on appeal that the trial court incorrectly determined that § 1-1 (u) applied to its lien because the lien was not at issue in the plaintiff's civil action against the third-party tortfeasor and, therefore, would not affect that action. The plaintiff responds that the trial court correctly determined that § 1-1 (u) bars P.A. 17-165, § 1, from affecting his litigation, as it was pending at the time of the act's effective date. We need not decide whether § 1-1 (u) is applicable to this case because we conclude that § 55-3 is dispositive of the matter.

nal quotation marks omitted.) *King* v. *Volvo Excavators AB*, supra, 292.

Because the legislature did not expressly provide that P.A. 17-165, § 1, should apply retroactively, the presumption stands that, if § 7-464, as amended by the act, affects *substantive rights*, then it shall apply prospectively only. See id. Here, then, we must determine whether § 7-464, as amended by P.A. 17-165, § 1, affects a substantive or procedural right in order to answer the question of whether the city is entitled to the lien in this case.

Prior to the passage of P.A. 17-165, § 1, a self-insured municipality did not have the express right to assert a lien to recover medical expenses paid as benefits from the proceeds of an employee's litigation against third-party tortfeasors.[7] See, e.g., P.A. 17-165, § 1; see also, e.g., Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 1, 2017 Sess., p. 247, remarks of Representative Stephanie E. Cummings (state representative who previously spoke with city's leadership acknowledged during her testimony in support for passage of house bill that became P.A. 17-165, § 1, that, as self-insured municipality, city lacked right under Connecticut law to recover collateral source benefits). After P.A. 17-165, § 1, went into effect, however, a self-insured municipality had the right to assert a lien to recover medical expenses it had paid. See General Statutes § 7-464 (c) and (d).

The statutory change thus confers a new right on a self-insured municipality, such as the city. Correspondingly, the statute, as amended, simultaneously eliminates the right of plaintiffs, held prior to the enactment

[7] Any right to subrogation or a lien under the workers' compensation scheme did not apply in the present case because there was no allegation that the plaintiff's injuries occurred during the course of his employment with the city. Prior to the passage of P.A. 17-165, § 1, General Statutes § 52-225c prohibited the city from recovering the amount of benefits provided to the plaintiff as a collateral source.

of P.A. 17-165, § 1, to retain sums they recover from negligent or reckless third-party tortfeasors who have harmed them if those sums represent medical expenses paid by the municipality. Thus, because P.A. 17-165, § 1, created a new right for self-insured municipalities and limited the rights of their employees, we conclude that § 7-464, as amended by the act, is substantive. See, e.g., *Koskoff*, *Koskoff & Bieder* v. *Allstate Ins. Co.*, 187 Conn. 451, 455–57, 446 A.2d 818 (1982) (holding that amendment affecting insurance company's lien recovery amount was substantive rather than procedural); see also, e.g., *Little* v. *Ives*, 158 Conn. 452, 457, 262 A.2d 174 (1969) ("[l]egislation which limits or increases statutory liability has generally been held to be substantive in nature").[8] The statute therefore must operate prospectively only.

The city asserts that allowing it to file a lien on the plaintiff's settlement proceeds in the present case would not present a retroactive application of the statute. Specifically, the city asserts that, because the plaintiff settled his action against the third-party tortfeasor on October 23, 2018, after the effective date of P.A. 17-165, § 1—which was October 1, 2017—upholding its lien does not require a retroactive application of the act. We disagree.

As this court has previously concluded, "a statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based

[8] Public Act 17-165, § 1, also imposes a new obligation on the plaintiff that did not previously exist, namely, that he was being forced to pay money in the form of a lien from a sum he recovered as a result of his applicable settlement under § 7-464 (c). See, e.g., *Little* v. *Ives*, supra, 158 Conn. 453–57 (holding that statute could not apply retroactively under § 55-3 when it imposed new obligation and liability on defendant highway commissioner, i.e., filing certificate of taking within reasonable amount of time after filing highway layout map and being subject to paying additional damages for not doing so, respectively).

in prior law. *Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.*" (Emphasis in original; internal quotation marks omitted.) *Shannon* v. *Commissioner of Housing*, 322 Conn. 191, 204, 140 A.3d 903 (2016). In other words, "a law has retroactive effect when it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (Internal quotation marks omitted.) Id., 205–206. This court further cautioned that "[t]he conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (Internal quotation marks omitted.) Id., 204. Moreover, this court noted that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." (Internal quotation marks omitted.) Id.

We conclude that allowing the city to pursue statutory lien rights in the present case would result in an improper, retroactive application of P.A. 17-165, § 1, because it would attach new legal consequences to events completed before the act's effective date. Those events are the legal rights to which the plaintiff became entitled as a result of personal injuries sustained by him on June 20, 2016, the date of the motor vehicle accident. The act impaired the right of the plaintiff to obtain compensation for personal injuries caused by the tortfeasor's negligence on certain conditions, one of those being that any such recovery would be free and clear of any claims by the city requiring repayment of sums expended for medical care relating to those injuries. Public Act 17-165, § 1, created a new liability or obligation on the part of the plaintiff to pay proceeds

of his settlement to the city to reimburse the city for past payments made by it. It also created a correlative, new right entitling the city to obtain reimbursement for medical expenses from the proceeds of the plaintiff's settlement.

Indeed, neither the plaintiff's obligation nor the city's corresponding right existed at the time of the plaintiff's motor vehicle accident or at the time the city paid most of the medical expenses, and, in this particular case, even the commencement of the plaintiff's underlying civil action predated the effective date of P.A. 17-165, § 1. Thus, applying P.A. 17-165, § 1, to a settlement related to a motor vehicle accident that occurred prior to the effective date of the act is a retroactive application of the act. Contrary to the city's position, the settlement does not stand on its own. Rather, the settlement stems from the motor vehicle accident that occurred prior to the effective date of P.A. 17-165, § 1, and the respective substantive rights and obligations of the parties relating to that accident cannot be altered retroactively. Accordingly, we conclude that allowing the city to file a lien on the plaintiff's settlement proceeds in the present case would constitute an improper, retroactive application of the act.

In summary, because the legislature did not explicitly provide that § 7-464, as amended by P.A. 17-165, § 1, should apply retroactively, and, because it is substantive in nature, § 55-3 requires that the statute operate prospectively. The postevent amendments to § 7-464 cannot attach new legal consequences to the plaintiff's motor vehicle accident, from which his settlement arose. Therefore, the trial court correctly determined that the city's lien stemmed from an improper, retroactive application of P.A. 17-165, § 1, and properly granted the plaintiff's motion for summary judgment.

The judgment is affirmed.

In this opinion the other justices concurred.

JOSEPH HALLADAY *v.* COMMISSIONER OF CORRECTION (SC 20369)

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

Syllabus

Pursuant to this court's decision in *State* v. *Curcio* (191 Conn. 27), certain interlocutory orders and rulings of a trial or habeas court may be appealable when the order or ruling terminates a separate and distinct proceeding or when the order or ruling so concludes the rights of the parties that further proceedings cannot affect them.

The petitioner, who had been convicted, on a guilty plea, of murder and tampering with physical evidence, sought a writ of habeas corpus, claiming that his plea agreement was the result of the ineffective assistance of trial counsel. The respondent, the Commissioner of Correction, subsequently filed a motion for the production of relevant materials from the petitioner's underlying criminal defense and investigative files. The habeas court rejected the petitioner's claim that those materials were protected by the attorney-client privilege, granted the respondent's motion, and ordered the petitioner to produce from the criminal defense file copies of any materials related to his ineffective assistance claim, as well as a privilege log identifying any undisclosed materials the petitioner contended were unrelated to that claim. The habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, which granted the respondent's motion to dismiss the appeal for lack of a final judgment. On the granting of certification, the petitioner appealed to this court, claiming that the Appellate Court improperly dismissed his appeal for lack of a final judgment and claiming, alternatively, that this court should reach the merits of his privilege claims pursuant to the statute (§ 52-265a) allowing direct appeals from interlocutory orders in matters involving a substantial public interest. *Held*:

1. The Appellate Court properly dismissed the petitioner's appeal for lack of subject matter jurisdiction, as the habeas court's discovery order was not an appealable final judgment under either prong of *Curcio*: an interlocutory discovery order terminates a separate or distinct proceeding under the first prong of *Curcio* only if the lower court has issued a clear and unequivocal order that is sufficiently definite, specific, and comprehensive concerning a discovery request served on a nonparty for information that is not required to resolve the underlying issue in the case, and, because the petitioner was a party to the habeas proceedings, the discovery order did not terminate a separate and distinct proceeding concerning his property interest in his criminal defense file; moreover, the second prong of *Curcio* was not satisfied because the

right that the petitioner sought to vindicate, namely, the right to confidentiality in his criminal defense file, could still be affected by further proceedings insofar as the habeas court would conduct, in response to the privilege log that it ordered the petitioner to produce, an in camera review of the petitioner's individual claims of privilege as to specific items within the file.

2. This court declined the petitioner's request to reach the merits of his privilege claims by treating his appeal as a direct appeal from an interlocutory order on certification by the Chief Justice pursuant to § 52-265a, as the present case did not present a matter of substantial public interest or urgency.

Argued February 17—officially released August 5, 2021*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New Haven, where the court, *Hon. Jon C. Blue*, judge trial referee, granted the respondent's motion for production and ordered the petitioner to produce certain materials; thereafter, the court, *Hon. Jon C. Blue*, judge trial referee, denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, which granted the respondent's motion to dismiss the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, for the appellant (petitioner).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Christine Perra Rapillo, chief public defender, *Emily H. Wagner*, assistant public defender, and *Jennifer Bourn*, supervisory assistant public defender, filed a brief for the Office of the Chief Public Defender as amicus curiae.

* August 5, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ROBINSON, C. J. The principal issue in this certified appeal is whether a discovery order issued by a habeas court that implicates the attorney-client privilege between a petitioner and the attorneys who represented him during the underlying criminal proceedings is an appealable final judgment under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). The petitioner, Joseph Halladay, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court, which dismissed his appeal from the order of the habeas court directing the petitioner to produce certain investigative materials contained in the file of his criminal defense attorneys. On appeal, the petitioner claims that (1) the Appellate Court improperly dismissed his appeal for lack of subject matter jurisdiction, and (2) the habeas court improperly granted the motion for production filed by the respondent, the Commissioner of Correction, over his claims of privilege. Because the habeas court's order does not constitute an appealable final judgment, we cannot review whether the habeas court properly rejected the petitioner's claim that his attorneys' case file was privileged. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. On February 9, 2011, pursuant to a plea agreement, the petitioner pleaded guilty to the crimes of murder in violation of General Statutes § 53a-54a (a) and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1). The plea agreement provided that the petitioner would receive

[1] We granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly dismiss the petitioner's appeal for lack of a final judgment?" And (2) "If the answer to the first question is 'no,' did the trial court properly reject the petitioner's claim of privilege in his attorneys' case file?" *Halladay* v. *Commissioner of Correction*, 333 Conn. 921, 921–22, 217 A.3d 634 (2019).

a sentence in a range of twenty-seven to forty years' imprisonment; the trial court sentenced him to forty years' imprisonment. Subsequently, on May 25, 2018, the petitioner filed a revised amended petition for a writ of habeas corpus, claiming, inter alia, that the plea agreement was the result of the ineffective assistance of the public defenders who had been assigned to represent him in the underlying criminal proceedings. Specifically, the petitioner alleged that the assistance of counsel was ineffective because of their failure, among other things, to perform adequate factual investigation and legal research, to adequately impeach or cross-examine certain witnesses, to investigate and present evidence on specific matters, to consult or present the testimony of various experts and professionals, to present the petitioner's testimony, to adequately prepare a defense, to present mitigating evidence during sentencing, and to preserve the petitioner's appellate rights, as well as numerous other failures regarding the plea negotiations.

The respondent subsequently filed a motion for the production of relevant materials from the petitioner's underlying criminal defense and investigative files.[2] The habeas court heard the respondent's motion on February 22, 2019. In its order granting the respondent's motion, the habeas court stated: "Given the breadth

[2] Prior to filing the motion for the production of the relevant materials, the respondent filed a motion requesting *all* the materials in the criminal defense file. The court, *Newson, J.*, denied the motion, stating that it exceeded the limited discovery provided for in habeas proceedings and that there were other means by which to develop defenses to the petition. We note that the habeas court, *Hon. Jon C. Blue*, judge trial referee, which issued the ruling that is the subject of the present appeal, was not bound by that earlier decision. See, e.g., *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 624, 35 A.3d 260 (2012) ("[a] judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision" (internal quotation marks omitted)).

and generality of the allegations made in the revised amended petition . . . it seems unlikely that any investigative materials in . . . trial counsel's files are unrelated to those allegations, but, in the absence of an in camera inspection of the files in question, this issue cannot be definitively determined by the court. In the event that the petitioner contends that certain materials in the files in question are unrelated to his claims, he is ordered to create a privilege log identifying those materials. . . .

"The motion for production is granted. The petitioner is ordered to produce copies of any materials contained within his underlying criminal defense investigative files that relate to his claim that criminal defense counsel rendered ineffective assistance . . . in connection with their representation. The petitioner is additionally ordered to produce a privilege log of undisclosed materials.

"Compliance is ordered by March 15, 2019. It is understood that, if the petitioner chooses to file an amended habeas petition narrowing his claims, the scope of materials deemed relevant to such amended claims may also be narrowed." (Citation omitted.)

On March 15, 2019, the petitioner filed both a motion for reconsideration with the habeas court and an appeal from the habeas court's discovery order with the Appellate Court.[3] The habeas court denied the motion for reconsideration, and the Appellate Court subsequently granted the respondent's motion to dismiss the appeal

[3] Following the habeas court's order of production, the petitioner's habeas counsel contacted the Office of the Chief Public Defender (OCPD) to inform it of the court's order requiring production of the defense file. Counsel from the OCPD informed the petitioner's habeas counsel of its objection to the disclosure of any work product contained in the file and took the position that the petitioner could not consent to the disclosure of any such material because it belonged to the petitioner's criminal defense counsel and the OCPD, not the petitioner.

for lack of a final judgment. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the petitioner claims that (1) the Appellate Court improperly dismissed the petitioner's appeal for lack of a final judgment, and (2) we should reach the merits of his claims and conclude that the habeas court's order would have violated his attorney-client privilege, as waiver does not commence until trial begins. We address each claim in turn.

I

The petitioner claims, inter alia, that the habeas court's discovery order constituted an appealable final judgment under *State* v. *Curcio*, supra, 191 Conn. 31, because it (1) terminated a separate and distinct proceeding regarding his property interests in the case file, and (2) concluded the petitioner's right to maintain the confidentiality of the case file so that no further proceedings could affect that right.

We begin by setting forth the applicable standard of review. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review [as to whether the Appellate Court had jurisdiction] is plenary." (Internal quotation marks omitted.) *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 312–13, 210 A.3d 554 (2019).

"Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." *State* v. *Curcio*, supra, 191 Conn. 30. Under General Statutes §§ 52-263 and 51-197a, the "statutory right to appeal is limited to appeals by aggrieved parties from final judgments." Id. "In both criminal and civil

cases, however, we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, or (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. We address each *Curcio* prong in turn.

A

We begin with the petitioner's claim that the habeas court's order effectively terminated a separate and distinct legal proceeding for purposes of the first prong of *Curcio* because the discovery dispute resolved a property interest in his case file, which was separate from the merits of the habeas petition. The petitioner relies on *Abreu* v. *Leone*, 291 Conn. 332, 340–41, 968 A.2d 385 (2009), and *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 755–56, 48 A.3d 16 (2012), two cases in which this court held discovery orders to be final judgments. In response, the respondent relies on *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 207 A.3d 493 (2019), and argues that the discovery order is not a separate and distinct proceeding under *Curcio* but, rather, a mere step along the road to the final judgment in the habeas proceeding to which the petitioner is a party, thus distinguishing this case from the authorities relied on by the petitioner. We agree with the respondent and conclude that the discovery order did not terminate a separate and distinct legal proceeding.

In *Abreu*, the intervening plaintiff, the Department of Children and Families (department), appealed from the order of the trial court compelling it to disclose information that would violate General Statutes § 17a-28 (b), which prohibits the disclosure of records main-

tained by the department. See *Abreu* v. *Leone*, supra, 291 Conn. 334–35. In determining that the challenged order was an appealable final judgment, we focused on the fact that the department was not a party to the underlying action and, thus, lacked the statutory right to appeal from the conclusion of that proceeding. See id., 349–50. We also emphasized that the trial court order at issue was unequivocal in its directives and that there were no further proceedings concerning the matter between the plaintiff and the defendant that involved the department. See id., 345–47.

Subsequently, in *Woodbury Knoll, LLC*, a nonparty law firm brought a writ of error from the trial court's order to produce materials that it claimed were protected by attorney-client privilege and the attorney work product doctrine. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 752. In determining whether there was subject matter jurisdiction, this court identified three guiding principles emerging through its final judgment jurisprudence: (1) "the court's focus in determining whether there is a final judgment [under the first prong of *Curcio*] is on the order immediately appealed, not [on] the underlying action that prompted the discovery dispute"; (2) "determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly"; and (3) "although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order."[4] (Emphasis

[4] Relying on these principles, the petitioner also argues that he should not have to be subject to a contempt finding before being entitled to appellate review of the discovery order. See, e.g., *Barbato* v. *J. & M. Corp.*, 194 Conn. 245, 250, 478 A.2d 1020 (1984) ("If the party chooses to keep the information confidential, even after being ordered by the trial court to divulge it, he or she may be held in contempt. A judgment of contempt is a final, reviewable

omitted; internal quotation marks omitted.) Id., 760–61. In applying these principles and holding that there was an appealable final judgment in *Woodbury Knoll, LLC*, we expressly articulated an exception to our final judgment jurisprudence for nonparties to the underlying matter.[5] See id., 769.

Our recent decision in *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 711, articulates the status of the *Woodbury Knoll, LLC* nonparty exception, as narrowed by other cases: "[A]n interlocutory discovery order [terminates a separate or distinct proceeding] under the first prong of *Curcio* only if the trial court has issued a clear and unequivocal order that is sufficiently definite, specific, and comprehensive concerning a discovery request served on a *nonparty* for information that is not required to resolve the underlying issue."[6] (Emphasis added.) Id., 736; see also *McConnell* v.

judgment."). We disagree. In *Abreu* and *Woodbury Knoll, LLC*, the challenged orders directly conflicted with a statute or ethical duty, respectively, that precluded the attorney from complying. In this case, no such obligation binds the petitioner.

We acknowledge the petitioner's claim that complying with the habeas court's order would have exposed him to possible legal action by the Office of the Chief Public Defender (OCPD). In addition to this being merely hypothetical, neither the petitioner nor the OCPD, which filed an amicus curiae brief in support of the petitioner's position, cites any legal theory under which the OCPD could take legal action against the petitioner for turning over the case file as ordered. Thus, we have no occasion to consider any counterbalancing factor that might militate against requiring the parties to be held in contempt, as in *Abreu* and *Woodbury Knoll, LLC*.

[5] In so concluding, we emphasized that a "*different rule for nonparties* would not undermine the rules governing the discovery process between parties in any manner." (Emphasis added.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 771.

[6] *Redding Life Care, LLC*, concerned a tax appeal between the plaintiff property owner and the defendant town. See *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 714–15. The town filed a motion to depose the plaintiff in error, who had completed appraisals on the property in dispute in connection with the tax appeal. See id., 715. The appeal arose from the trial court's denial of the plaintiff in error's motion seeking a protective order to avoid the deposition. Id.

McConnell, 316 Conn. 504, 512–13, 113 A.3d 64 (2015); *Niro* v. *Niro*, 314 Conn. 62, 72–73, 100 A.3d 801 (2014). Because the petitioner is indeed a party to the habeas proceedings, we conclude that the discovery order did not terminate a separate and distinct proceeding and, accordingly, is not an appealable final judgment under the first prong of *Curcio*.[7]

B

An interlocutory order is appealable under the second prong of *Curcio* "[when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31. The petitioner contends that the second prong of *Curcio* is satisfied because the discovery order threatens the preservation of his right to confidentiality in his defense counsel's case file. The petitioner claims that the right was established in two ways, namely, (1) by the habeas court's decision entitling him to withdraw any claims prior to disclosing the file, and (2) by the Superior Court's decision in *Breton* v. *Commissioner of Correction*, 49 Conn. Supp. 592, 600–602, 899 A.2d 747 (2006), which provides that, when a party places the contents of an attorney's advice at issue by filing a habeas petition claiming ineffective assistance of counsel, that party impliedly waives the attorney-client privilege but can reassert that privilege by withdrawing the applicable portions of the habeas petition. In response, the respondent contends that the discovery order did not conclude the rights of the parties because there very well could have been future proceedings following the receipt of the ordered privilege log. See, e.g., *State* v. *Jamar D.*, 300 Conn. 764, 773, 18 A.3d

[7] Because the petitioner is a party to the habeas proceedings, we need not consider whether the discovery order in the present case is a clear and unequivocal order that is sufficiently definite, specific, and comprehensive; all elements of the standard are required to satisfy the first prong of *Curcio*. See *Redding Life Care, LLC* v. *Redding*, supra, 331 Conn. 738.

582 (2011) (defendant's transfer from youthful offender docket was not appealable final judgment under *Curcio* because it was still subject to future proceeding and not yet finalized). We conclude that there was no final judgment under the second prong of *Curcio*.

"The second prong of the *Curcio* test, on which the [petitioner] relies in the present case, permits an appeal if the decision so concludes the rights of the parties that further proceedings cannot affect them. . . . That prong focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . . In other words, the [appellant] must do more than show that the trial court's decision threatens him with irreparable harm. The [appellant] must show that that decision threatens to abrogate a right that he or she *then* holds. . . . The right itself must exist independently of the order from which the appeal is taken." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745–46, 150 A.3d 1109 (2016); accord *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 226–27, 901 A.2d 1164 (2006).

The key to appellate jurisdiction under the second prong of *Curcio* is not so much that the right is already secured to a party; indeed, what is at issue in an appeal is the effect of the challenged order on the scope of the claimed right at issue. Rather, the second prong of *Curcio* boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing the litigation to proceed before the trial court will—in and of itself—

function to deprive a party of that right. See, e.g., *Blakely* v. *Danbury Hospital*, supra, 323 Conn. 746 ("[t]he rationale for immediate appellate review is that the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation" (internal quotation marks omitted)); *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 231 ("even when an order impinges on an existing right, if that right is subject to vindication after trial, the order is not appealable under the second prong of *Curcio*"). Paradigmatic examples of such rights that require immediate vindication via an interlocutory appeal are double jeopardy violations resulting in successive prosecutions; see, e.g., *State* v. *Crawford*, 257 Conn. 769, 777, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); collateral estoppel and res judicata; see, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011); and various immunities from suit. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (absolute immunity for statements made in judicial and quasi-judicial proceedings); *Shay* v. *Rossi*, 253 Conn. 134, 166, 749 A.2d 1147 (2000) (colorable claim to state's sovereign immunity is appealable final judgment because that "doctrine protects against suit as well as liability—in effect, against having to litigate at all"), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003); see also *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 233–34 (denial of motion for prepleading security by unauthorized insurer pursuant to General Statutes § 38a-27 (a) is appealable under second prong of *Curcio* because, "once the trial has concluded, the court will be unable to restore to the plaintiffs either their right to have the defendants post security or their right to obtain a default

judgment against the defendants"); cf. *Blakely* v. *Danbury Hospital*, supra, 751–52 (This court held that the defendant's interlocutory appeal challenging the trial court's decision that a savings statute permitted the plaintiff's wrongful death action was not a final judgment under the second prong of *Curcio*, even when the limitations period was jurisdictional in nature, because "jurisdictional prerequisites to suit are [not] intended to confer immunity from suit. If that were the case, an interlocutory appeal would be permitted every time a party challenged the satisfaction of any of the numerous justiciability matters that we have deemed to be jurisdictional in nature (standing, mootness, ripeness, political question doctrine) . . . or any condition precedent to suit in a statutorily created cause of action that similarly has been deemed jurisdictional," meaning that "appellate courts would be inundated with interlocutory appeals, in contravention of our intention that the *Curcio* exceptions to the final judgment rule be narrow." (Citation omitted; internal quotation marks omitted.)).

The issue presented in the present case falls squarely into the realm of discovery orders in pending cases that are not subject to interlocutory appeals under the second prong of *Curcio*, even when they concern the disclosure of materials that are potentially subject to the attorney-client privilege or other protections. The leading case on this point is *Melia* v. *Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987), in which this court concluded that the trial court's order to an insurance company to disclose its claims file was not an appealable final judgment, despite the insurance company's assertion of the attorney-client privilege and attorney work product doctrine. See id., 253, 259. The court rejected the insurer's argument that "the privacy interests protected by the attorney-client privilege cannot be completely restored once they have been invaded

by a disclosure order," observing that, although "a remand for a new trial resulting from an erroneous order to disclose information protected by the privilege cannot wholly undo the consequences of its violation . . . the rights of the client in respect to use of privileged material during further proceedings in the litigation can be adequately safeguarded." Id., 257. The court further observed that its "concern for the efficient operation of the judicial system, which is the practical consideration behind the policy against piecemeal litigation inherent in the final judgment rule . . . has induced [it] to dismiss appeals [when] statutorily created rights of privacy, no less significant than the right of confidentiality for attorney-client communications, have been at stake." Id., 258. Thus, the court determined that "the occasional violation of the attorney-client privilege . . . is a lesser evil than that posed by the delay in the progress of cases in the trial court likely to result from interlocutory appeals of disclosure orders." Id., 259; see *State* v. *Fielding*, 296 Conn. 26, 39–40, 994 A.2d 96 (2010) (order directing state to duplicate and provide to defense counsel materials seized in connection with defendant's child pornography arrest was not appealable by state under second prong of *Curcio*, despite claim that, "once the materials at issue . . . are disclosed, the proverbial horse is out of the barn"); *Massachusetts Mutual Life Ins. Co.* v. *Blumenthal*, 281 Conn. 805, 807–809, 815, 917 A.2d 951 (2007) (denial of application for temporary injunction to enforce confidentiality protection for internal investigative reports provided to attorney general pursuant to General Statutes (Rev. to 2007) § 35-42 was not appealable under second prong of *Curcio*).

Applying these principles to the present case, we observe that the petitioner's claimed right to maintain the confidentiality of the case file is one that is not akin to that narrow set of rights that require immediate

appellate vindication by interlocutory appeal to avert their loss. This is particularly so given that the petitioner filed his appeal prior to producing a privilege log to the habeas court, which means that the appeal preceded any resolution by the habeas court in camera of individual claims of privilege as to specific items. The habeas court's rulings on these individualized determinations might well have been to the petitioner's satisfaction, obviating any perceived need for an interlocutory appeal. Put differently, the timing of this interlocutory appeal renders it a potentially piecemeal appeal even as to the privilege issue, let alone the habeas action as a whole.[8] Accordingly, we conclude that it is not appealable under the second prong of *Curcio*.

Because the discovery order at issue does not satisfy either prong of *Curcio*, we conclude that it is not an appealable final judgment. Accordingly, the Appellate Court properly dismissed the petitioner's appeal for lack of subject matter jurisdiction.

[8] In arguing that *Melia* v. *Hartford Fire Ins. Co.*, supra, 202 Conn. 252, is not dispositive, the petitioner contends that (1) his interests should be given more weight than concerns about judicial economy because of the relationship between the attorney-client privilege and his constitutional right to counsel, and (2) judicial efficiency concerns are not as poignant in the habeas context because "discovery disputes involving attorney-client privilege are almost nonexistent in habeas corpus cases." The respondent conceded the second point at oral argument before this court, and, indeed, this court has, subsequent to its decision in *Melia*, rejected the proposition that allowing interlocutory appeals of discovery orders would open the floodgates. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 767–68 ("Simply put, any concern over a flood of discovery order appeals is both misinformed and speculative. Indeed, we need look no further than the fact that, in the three years since *Abreu* was decided, no flood of appeals from discovery orders has occurred."). Although these pragmatic considerations are well taken, disclosure orders such as the one at issue in the present case do not fit within the narrow exception provided by the second prong of *Curcio*, given our repeated rejections of "the horse has left the barn" arguments to establish a right that requires immediate vindication by interlocutory appeal, lest it be lost. See, e.g., *State* v. *Fielding*, supra, 296 Conn. 39.

II

Notwithstanding our conclusion that we lack subject matter jurisdiction over this appeal, the petitioner nevertheless asks us to reach the merits of his privilege claims. The petitioner argues in his reply brief that the Chief Justice should certify this issue for an expedited appeal as a question of great public importance pursuant to General Statutes § 52-265a.[9]

On the rare occasion, this court has treated a case certified for appeal from a judgment of the Appellate Court as a late petition to the Chief Justice under § 52-265a,[10] which does not require a final judgment for appellate jurisdiction. See, e.g., *State* v. *Komisarjevsky*, 302 Conn. 162, 164–65, 25 A.3d 613 (2011) (raising issue sua sponte); see also *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 713 n.1, 189 A.3d 578 (2018) ("[t]his court has construed § 52-265a to allow the Chief Justice to certify an appeal in matters of public importance even if the order challenged is not a final judgment"). As we pointed out in *Komisarjevsky*, however, this remedy is highly unusual. See *State* v. *Komisarjevsky*, supra, 165–66 n.3. The Chief Justice granted the request for § 52-265a relief in that case because it presented urgent matters concerning a death penalty trial arising from the defendant's connection with a triple murder,

[9] The petitioner also argues in his reply brief that we should invoke our supervisory authority over the administration of justice to consider the merits of his claims. We decline the defendant's invitation given the extraordinary nature of that remedy, which nevertheless depends on the existence of subject matter jurisdiction in the first instance. See *State* v. *Reid*, 277 Conn. 764, 777–78, 894 A.2d 963 (2006).

[10] The Chief Justice may waive the "failure to follow the normal certification procedure" including a delay in filing, and consider the merits of an untimely petition for certification of a public interest appeal under § 52-265a. *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 300, 695 A.2d 1051 (1997); see id., 300–301; *State* v. *Ayala*, 222 Conn. 331, 342, 610 A.2d 1162 (1992).

sexual assault, and arson. See id., 166–67 and n.3. In *Komisarjevsky*, the defendant appealed from the trial court's granting of a motion to vacate the sealing order filed by the intervenors, who were members of the media, claiming that the vacating of that order would violate his right to a fair trial. See id., 164–66. The Appellate Court dismissed the appeal for lack of a final judgment, and this court granted certification to consider that issue. See id., 172. By the time the appeal was argued before this court, the start of evidence was scheduled for a date less than three months away. See id., 166 n.3. Given the urgent nature of the matter, this court chose "the most expeditious route properly available . . . to avoid potentially irreparable harm" and elected to treat the appeal as a late § 52-265a petition, which it then referred to the Chief Justice for certification. See id., 165, 165–66 n.3. Because the present case does not present a matter of similar public interest or urgency, we decline to exercise our authority to treat the petitioner's appeal as a late petition for certification to appeal under § 52-265a for consideration by the Chief Justice. See *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 301 n.17, 695 A.2d 1051 (1997) (whether to treat appeal as late § 52-265a petition, "despite [the appellant's] failure to follow the procedures of § 52-265a," depends "in large part . . . [on] the importance of the issues in the case"); see also *State* v. *Fielding*, supra, 296 Conn. 35 n.7 (declining to treat jurisdictionally defective appeal as § 52-265a petition given Chief Justice's determination that appeal from order requiring state to duplicate and provide defense counsel child pornography evidence did not present question of substantial public interest because newly enacted statute resolved issue for future cases, and trial court's order addressed state's security concerns). Accordingly, we do not reach the second issue of whether the trial court

properly rejected the petitioner's claim of privilege in his criminal defense file.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ROBERT R.*
(SC 20355)

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

Syllabus

Convicted of sexual assault in the first degree in connection with the sexual abuse of M, the stepsister of the defendant's girlfriend, S, the defendant appealed. At trial, M testified that the defendant had sexually assaulted her on four occasions, the first three of which occurred when M was a minor and the defendant was in his twenties. The fourth incident, which led to the defendant's conviction, occurred when M was eighteen years old. With respect to the latter incident, M testified that she was home alone when the defendant knocked on the door and that, after she asked him to leave, the defendant entered the home, grabbed her arm, pushed her toward the living room couch, and sexually assaulted her. M further testified that, after the defendant was startled by an outside noise, he went into the kitchen, where he ejaculated into a paper towel that he threw into a garbage can. At trial, the defendant denied that he ever sexually assaulted M, but he admitted to having consensual sex with her during that incident. He also denied that he ejaculated into a paper towel and threw it in the garbage. N, a forensic biologist, testified at trial regarding tests she conducted on the paper towel, which M had provided to the police shortly after the incident. N testified that those tests revealed the presence of semen but were negative for spermatozoa. P, a forensic science examiner, testified that tests she performed on the paper towel revealed the presence of the defendant's skin cells but were inconclusive as to whether his sperm cells were also present. Neither N nor P could indicate how the various substances came to be on the towel. During closing arguments, defense counsel focused on attacking M's credibility and exposing her motive to falsely accuse the defendant. Specifically, defense counsel attempted to present the defen-

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

dant's theory of the case that M had planted evidence by wiping herself with the paper towel after engaging in a consensual sexual encounter with the defendant and then presenting that paper towel to the police. The trial court nevertheless sustained the prosecutor's objection and precluded defense counsel from making that argument, concluding that it was not supported by any evidence in the record. On appeal, the defendant contended, inter alia, that the trial court had violated his constitutional right to the assistance of counsel by precluding defense counsel from arguing to the jury that M had planted physical evidence on the paper towel in an effort to falsely accuse the defendant. *Held*:

1. The trial court improperly precluded defense counsel from arguing to the jury during closing argument that M had planted physical evidence on the paper towel in an effort to substantiate her false allegations against the defendant, in violation of the defendant's constitutional right to the assistance of counsel, and, accordingly, this court reversed the judgment of conviction and remanded the case for a new trial:

a. The trial court improperly restricted the scope of defense counsel's closing argument by barring him from presenting the defendant's theory of the case, as there was sufficient evidence in the record from which the jury reasonably could have inferred that M planted the evidence on the paper towel to substantiate her false allegations against the defendant: defense counsel relied on reasonable inferences from the facts in evidence, including the conflicting testimony of M and the defendant regarding the incident and whether the defendant ejaculated into the paper towel, testimony that it was M who provided the paper towel to the police, the testimony of N and P regarding their findings, and the testimony of one of M's stepsisters that M had a history of making false claims; moreover, the evidence presented at trial, namely, that M had a tumultuous relationship with her family, that she had a history of making false claims, and that she had been engaged in a consensual romantic relationship with the defendant, who married S only months after the incident in question, provided a basis for the jury to reasonably infer that M had a motive for planting evidence of the defendant's DNA on the paper towel.

b. The trial court's improper limitation on the scope of defense counsel's closing argument deprived the defendant of his constitutional right to the assistance of counsel, and, accordingly, the defendant was entitled to a new trial; M's testimony was the only source of evidence from which the jury reasonably could have concluded that the sexual encounter with the defendant was not consensual, the only argument presented by defense counsel to establish reasonable doubt as to the defendant's guilt concerned M's credibility, and, because the evidence regarding the paper towel provided the strongest evidence, from the defendant's perspective, that M lied about the incident, depriving defense counsel of the opportunity to make that argument was to deprive the defendant of the full and fair participation of his counsel in the adversary process.

2. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of sexual assault in the first degree on the ground that the state failed to prove that he used force or the threat of force; M's testimony with respect to the alleged sexual assault, including that the defendant grabbed her arm, pushed her toward the couch, removed her underwear, and inserted his penis inside of her as she tried to push him off and protested, was sufficient to establish the force element required for a conviction of first degree sexual assault.

3. This court declined to address the defendant's claim that the trial court had abused its discretion in admitting the testimony of an expert in the field of child and adolescent sexual abuse, insofar as the expert's expertise was in child sexual abuse and M was eighteen years old when the incident at issue occurred; although it was possible that the defendant's claim would arise during the defendant's new trial if the prosecutor elected to call the same expert, the trial court may further evaluate the issue on remand, as the prosecutor may call that expert and probe her experience in working with eighteen year olds or may call a different expert, in which case the record would look different from the one presently before this court.

Argued May 6—officially released August 6, 2021**

Procedural History

Substitute information charging the defendant with three counts of the crime of risk of injury to a child, and with one count each of the crimes of sexual assault in the first degree and sexual assault in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Russo*, *J.*; verdict and judgment of guilty of sexual assault in the first degree, from which the defendant appealed. *Reversed*; *new trial.*

Cameron L. Atkinson, with whom, on the brief, were *Norman A. Pattis*, *Kevin Smith* and *Zachary Reiland*, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Ann F. Lawlor*, supervisory assistant state's attorney, for the appellee (state).

** August 6, 2021, 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 defendant, Robert R., appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the first degree. On appeal, the defendant claims that (1) the trial court violated his sixth amendment right to the assistance of counsel by precluding defense counsel during closing argument from arguing to the jury that the complainant, M, had planted physical evidence on a paper towel in an effort to substantiate her false allegations against the defendant, (2) there was insufficient evidence to prove that the defendant used force or the threat of force, as required to sustain his conviction of sexual assault in the first degree, and (3) the trial court improperly admitted expert testimony from a witness who specializes in child and adolescent sexual abuse. We agree with the defendant with respect to his first claim and, accordingly, reverse the judgment of conviction.

The jury reasonably could have found the following relevant facts. When M was twelve years old, she moved to Bridgeport to live with her father, Louis, stepmother, Dora, and stepsister, Isabelle. Another of M's stepsisters, Stephanie, was dating the defendant. Stephanie and the defendant lived together down the street from Louis and Dora. At the time M moved to Bridgeport, the defendant was in his mid-twenties. M testified that the defendant sexually assaulted her on multiple occasions and exposed her to sexually inappropriate situations when she was between the ages of thirteen and eighteen years old. Specifically, M testified to four incidents.

The first incident described by M occurred when she was thirteen years old. One evening, the defendant came to M's house because he had an argument with Stephanie. Louis told the defendant that he could "stay on the couch." M testified that, when she brought the

defendant a blanket, he "touch[ed] [her] butt," followed her to her bedroom, and sexually assaulted her. M testified that, the next morning, the defendant sexually assaulted her a second time in her bedroom. M told Louis about the sexual assaults, and Louis and Dora then took her to Bridgeport Hospital. M ultimately left the hospital before being examined by a physician. Louis' testimony regarding this incident, however, varied from M's. He testified that, on the evening in question, he and the defendant were watching wrestling and drinking beer in the living room. The defendant went upstairs to use the bathroom. Louis recalled that he went upstairs and found the defendant, fully clothed, looking in on M while she slept. He then told the defendant to "get the hell out," and the defendant left the house. Louis also testified that he found the defendant hiding in the closet in M's bedroom one morning but could not recall if it was the morning after he first found the defendant looking in on M.

M also recounted a second incident. She testified that, when she was thirteen years old, the defendant asked her to send him nude pictures of herself. M testified that she complied and that the defendant then sent her a nude picture of himself. Isabelle, however, testified that she was present when the defendant and Stephanie informed Louis that M had been sending the defendant nude pictures of herself. Isabelle also testified that she did not know anything about the defendant sending pictures to M. Finally, Isabelle recalled that M had a history of "making false claims."

M described a third incident that occurred when she was fourteen or fifteen years old. M testified that, one night, when her friend, V, slept over at her house, the defendant came into M's bedroom, removed her clothes, and sexually assaulted her. V confirmed that she regularly slept over at M's house. She stated that, during the sleepovers, she would sleep in M's twin bed with

M. V testified, however, that she did not recall the defendant ever entering M's bedroom while she slept over.

Finally, M testified that a fourth incident occurred on July 28, 2016, when M was eighteen years old. Specifically, M recounted that, after returning home from a summer program at a nearby university, she let her dog out into her fenced in backyard. Shortly thereafter, the defendant knocked on the front door. When M opened the door, she saw the defendant holding her dog, and he explained that he found the dog down the street from M's house. M took the dog from the defendant, and the defendant asked M where Louis was. M responded that he had not arrived home from work. M then asked the defendant to leave because Louis did not want him there when M was home alone. M testified that the defendant, instead of leaving, kept inching into the home, until he grabbed M's arm, pushed her toward the living room couch, and sexually assaulted her. M testified that, during the assault, "I was trying to push him off me with my arms, but he kept holding [them] down, so I kept turning my body like this, with my knees, trying to push him off me, and he didn't want to get off. And I was yelling, help, can you stop, can you get off me, and then he didn't want to get off me." M testified that the defendant ended the assaultive sexual intercourse with her suddenly when he was startled by a car pulling out of a neighbor's driveway. According to M, the defendant got off of her, went into the kitchen, began to masturbate, ejaculated into a paper towel, threw the paper towel into a garbage can, and left.

Following the assault, M called Louis and told him what had just transpired. She also texted Isabelle that the defendant had "touched" her and that she "fe[lt] disgusted." The police were subsequently called, and M reported the incident to officers on the scene and provided them with the paper towel into which she claimed the defendant had ejaculated. M was then taken

by ambulance to the hospital, where medical personnel performed a physical examination and administered a sexual assault evidence collection kit. The defendant was interviewed by the police and denied having any sexual contact with M.

In connection with the allegations made by M, the state charged the defendant with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and two counts of risk of injury to a child in violation of § 53-21 (a) (1).

At trial, the defendant testified in his own defense. He denied each allegation, stating that he never sexually assaulted M. The defendant, however, did admit to having consensual sex with M on July 28, 2016, when she was eighteen years old, a claim that he denied when he was initially questioned by the police. He explained to the jury that he lied to the police initially because he was being interviewed within earshot of Stephanie, and she did not know at that point that he had "cheat[ed] on" her with M. The defendant testified that he began having consensual, physical encounters with M in March, 2016. He stated that the encounters began with "romantic conversations" in the car, then progressed to making out, and eventually led to the two having consensual sex. The defendant testified that they had consensual sex on two occasions: first, approximately one week prior to the July, 2016 incident in M's home, and, the second time, on July 28, 2016.

With respect to the July 28, 2016 incident, the defendant testified that he had found M's dog on the street and took it back to her house. When M opened the door, she hugged him, and they began to kiss. According to the defendant, things quickly progressed, and the two

began having sex against the doorway. The defendant testified that, shortly after moving to the couch, he became self-conscious, realizing that this was the time that Louis typically arrived home from work, and he was worried that Louis would walk in on them. The defendant further testified that, as a result, he ended the encounter, left the house, and went home. The defendant specifically denied M's claim that he ejaculated into a paper towel and threw it in the garbage can, explaining that, after he stopped having sexual intercourse, he just pulled up his pants and left. He also testified that M did not seem upset when he left the house.

Jennifer Nelson, a forensic biologist, also testified at trial. Nelson testified that she analyzed the bodily fluids found on the paper towel at the state forensic laboratory. Specifically, she conducted tests on the paper towel, looking for the presence of semen and spermatozoa.[1] These tests revealed the presence of semen on the paper towel but were negative for spermatozoa. Nelson testified that she did not know how the substances came to be on the paper towel. Angela Przech, who works as a forensic science examiner at the state forensic laboratory, testified that she performed DNA testing on a stain found on the paper towel. Przech's testing revealed that the defendant's DNA profile was included in a DNA mixture found in an epithelial fraction sample of the stain.[2] Przech testified that she assumed that M was the other DNA contributor. Regarding the DNA profile found in the sperm-rich fraction sample, M was eliminated as a source, and the defendant's "profile was inconclusive when compared to the evidentiary sample." In short, Przech's testing revealed

[1] Nelson testified that spermatozoa are "sex cell[s] that [are] deposited in semen when ejaculated from a male."

[2] Przech explained that sperm cells and epithelial cells are different: "[E]pithelial cells are like your skin cells, and the sperm cells are from sperm."

that the defendant's skin cells were on the paper towel, but her testing was inconclusive as to whether his sperm cells were also present. Przech also testified that she did not know how the substances came to be on the paper towel.

The jury ultimately found the defendant guilty of sexual assault in the first degree in connection with the events of July 28, 2016, and not guilty of the remaining charges. The court sentenced the defendant to a total effective sentence of twenty years' incarceration, two of which are the mandatory minimum, suspended after eight years, and ten years of supervised probation. This appeal followed. Additional facts will be set forth as necessary.

I

We first consider the defendant's claim that the trial court improperly precluded defense counsel during closing argument from arguing to the jury that M had planted physical evidence on the paper towel in an effort to substantiate her false allegations against the defendant, thereby violating the defendant's right to the assistance of counsel under the sixth amendment to the United States constitution.

During closing argument, defense counsel focused on attacking M's credibility and exposing her motive to falsely accuse the defendant. Specifically, with respect to the events of July 28, 2016, defense counsel "attempted to present [his] theory that [M] wiped her genitals with the paper towel after the defendant left . . . following their consensual, sexual encounter, and then presented that paper towel to the police in an effort to manufacture evidence to support her false claim that the intercourse was not consensual, but sexual assault." Specifically, the following exchange transpired:

"[Defense Counsel]: So, when you look at that event, you know, July 28, 2016, [M's] version is—is not—is not credible. And I should say it isn't a competition between which version you find more credible. It is whether . . . the evidence that's presented here convinces you beyond a reasonable doubt. And, again, the judge will instruct you as to what that means, but it means more than possibly or probably.

"And with respect to the evidence with the paper towel, you heard . . . Nelson testify that they did not find sperm on that towel, they found components of semen. And I did ask her, wouldn't you expect to find sperm on there if there was ejaculate on there? She said, well, not necessarily, or something along those lines. *But—and you heard* [*the defendant*] *testify, I never touched a paper towel, he doesn't know what they're talking about. Well, then, how does* [*his*] *DNA get on the paper towel? And the answer is it comes from* [*M*]. *That's her house, her kitchen.* And—

"[The Prosecutor]: I'm going to object, Your Honor; there was no evidence to that.

"The Court: [Defense counsel]?

"[Defense Counsel]: It's argument, Your Honor.

"The Court: I don't think there was any evidence in the record of what you are explaining to the jury now. I'm going to sustain the state's objection.

"[Defense Counsel]: Very good, Your Honor. So, again, the case comes down to credibility, and the center of the state's case is the complaining witness, [M], and her testimony is not credible, certainly not credible enough to remove the state's burden of [proof] beyond a reasonable doubt." (Emphasis added.)

During the state's rebuttal closing argument, the prosecutor focused on bolstering M's credibility and attacking

the defendant's credibility. The prosecutor also highlighted M's testimony regarding the paper towel. Specifically, the prosecutor stated: "[M] told us how a neighbor was pulling out of the driveway, [she and the defendant] could hear the neighbor pulling out of the driveway. The driveway, according to [M], was right next to the—or abutted the living room in the home. And the defendant heard that, jumped up, ejaculated into a paper towel in the kitchen, which is a big, open room, and left."

The defendant contends that defense counsel's argument, that M planted the defendant's DNA on the paper towel, was consistent with the physical evidence collected from the paper towel and the defendant's testimony. Had defense counsel been allowed to argue that M planted the evidence on the paper towel, the defendant claims, M's "credibility would have been further challenged." In short, the defendant contends that the state had the opportunity to fully present its theory of the case to the jury but that he was not afforded the same opportunity.

The state disagrees and contends that the defendant's claim on appeal "is meritless because there was no evidence before the jury from which it reasonably could have concluded that the semen stains found on the paper towel were put there by M." Therefore, the state argues, "the trial court properly precluded [defense counsel] from urging the jury to reach a conclusion based solely on speculation." Alternatively, the state contends that, even if the trial court's ruling was improper, it did not deprive the defendant of his sixth amendment right to the assistance of counsel.

We begin with the standard of review and relevant legal principles. "The sixth amendment guarantee in the federal constitution of the right to assistance of counsel has been held to include the right to present

closing arguments."[3] (Internal quotation marks omitted.) *State* v. *Ames*, 171 Conn. App. 486, 516, 157 A.3d 660, cert. denied, 327 Conn. 908, 170 A.3d 679 (2017). As the United States Supreme Court has explained, "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary [fact-finding] process in a criminal trial. Accordingly, it has universally been held that [defense counsel] has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." *Herring* v. *New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

"In general, the scope of final argument lies within the sound discretion of the court . . . subject to appropriate constitutional limitations. . . . It is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, to prevent the jury from considering matters in the realm of speculation and to prevent the jury from being influenced by improper matter that might prejudice its deliberations. . . . [Although] we are sensitive to the discretion of the trial court in limiting argument to the actual issues of the case, tight control over argument is undesirable when counsel is precluded from raising a significant issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Arline*, 223 Conn. 52, 59–60, 612 A.2d 755 (1992). Although defense counsel may not make speculative arguments to the jury, we have explained that "counsel may comment [on] facts properly in evidence and [on] *reasonable inferences* drawn therefrom." (Emphasis

[3] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The sixth amendment right to the assistance of counsel applies to state criminal proceedings by incorporation through the due process clause of the fourteenth amendment. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

added.) *State* v. *Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095 (1977).

It is beyond dispute that, "[i]f the trial court denies the defendant an opportunity to give closing arguments, the reviewing court should grant a new trial." *State* v. *Plaskonka*, 22 Conn. App. 207, 211, 577 A.2d 729, cert. denied, 216 Conn. 812, 580 A.2d 65 (1990). We have gone further and held that "[t]he right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue before the court or the jury after all the evidence has been admitted, but also when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so when . . . the prohibited argument bears directly on the defendant's theory of the defense." *State* v. *Arline*, supra, 223 Conn. 64.

Here, defense counsel's closing argument focused on attacking M's credibility and exposing her motive to falsely accuse the defendant of sexual assault. Defense counsel sought to present his theory of the case to the jury—that M had planted the evidence on the paper towel by wiping herself following a consensual, sexual encounter with the defendant. It is clear to us that this argument was proper because it is based on reasonable inferences from facts in evidence. Contrary to the trial court's conclusion that there was no evidence in the record to support the argument, we conclude that defense counsel's argument relied on reasonable inferences from the following evidence: (1) M's testimony that the defendant ejaculated into the paper towel following the alleged sexual assault; (2) testimony from both M and an officer who responded to the scene that M provided the paper towel to the police; (3) Nelson's testimony that no spermatozoa were present on the paper towel; (4) Przech's testimony that she assumed that the DNA found on the paper towel matched M's;

(5) the defendant's testimony denying M's claim that he ejaculated into a paper towel and his version of events that, after he stopped having sex, he just pulled up his pants and left; (6) the fact that only M and the defendant were home at the time of the incident; and (7) according to at least one witness, M had a history of "making false claims."

Moreover, the jury reasonably could have concluded, on the basis of various testimony throughout trial, that M's relationship with her family was strained and that M and the defendant were engaged in a romantic, consensual relationship. For example, M testified that she was worried that Louis would not believe her about the July 28, 2016 assault because she and Dora did not have a good relationship. The nature of M and Dora's relationship was confirmed by Dora, who testified that she "tried to have a relationship with [M], but she never let me in," and that M told her many times, "you're not my mother." Dora also told the police that M was ruining her relationship with Louis. Additionally, Isabelle testified that she was aware of "a history of [M] making false claims." For her part, Stephanie testified that she does not speak to Louis and they are not on good terms as a result of the July 28, 2016 incident. These facts provided a basis for the jury to reasonably infer that M had a motive for planting the defendant's DNA on the paper towel.

As to the nature of the relationship between M and the defendant, the defendant testified that, in March, 2016, he and M began "having romantic conversations," they began "getting intimate," and were in a "romantic relationship . . . ." The defendant also testified that, by July, 2016, he and M "were already in a relationship, and not a relationship as boyfriend and girlfriend, more as we were making out type stuff." Indeed, during her rebuttal closing argument, the prosecutor emphasized the defendant's characterization of the nature of his

relationship with M as a "love affair . . . ." Finally, the defendant testified that he was engaged to Stephanie and ultimately married her just three months after M alleged that he had sexually assaulted her. Again, these facts tended to make reasonable the defendant's theory regarding the paper towel.

It would not have been an unreasonable inference for the jury to conclude that M had planted the evidence on the paper towel after the sexual encounter with the defendant ceased, either because of her tumultuous relationship with her family or because she was romantically interested in the defendant and was not happy that he was engaged to Stephanie. Moreover, regardless of her motive for allegedly planting the evidence, the jury was presented with two versions of events based solely on the testimony of M and the defendant. M testified that the defendant ejaculated into a paper towel. The defendant testified that he did not. Given that it is undisputed that the only two people in the home at the time of the alleged sexual assault were M and the defendant, if the jury accepted the defendant's testimony that he did not ejaculate into a paper towel, it would not have been an unreasonable inference to conclude that the only other way the defendant's DNA could have gotten on the paper towel was by M's act of placing it there. To be sure, it is no less reasonable than an inference that the defendant ejaculated into the paper towel. As the prosecutor conceded at oral argument, Nelson and Przech did not testify that it was more likely than not that the defendant's DNA ended up on the paper towel as a result of the defendant's ejaculating into it. They both testified that they did not know how the defendant's DNA came to be on the paper towel. Thus, the jury's determination as to how the defendant's DNA came to be on the paper towel was based solely on the testimony of M and the defendant. Defense counsel's argument was not "sheer speculation"

or "rhetorical advocacy"; (internal quotation marks omitted) *State* v. *Manley*, 195 Conn. 567, 580, 489 A.2d 1024 (1985); rather, it was based on logical inferences from the facts as presented to the jury if it credited the defendant's testimony.

In *Arline*, we "agree[d] with the reasoning of the Maine Supreme [Judicial] Court in *State* v. *Liberty*, 498 A.2d 257 (Me. 1985)." *State* v. *Arline*, supra, 223 Conn. 65 n.11. In *Liberty*, the Maine high court concluded that the trial court erred in restricting defense counsel from arguing in summation certain evidence that had been admitted without objection. *State* v. *Liberty*, supra, 258. The court explained: "In a closing argument each party should be permitted to summarize the case from the perspective of that party's interpretation of all the evidence in the case and the inferences to be drawn therefrom. It is not for the presiding [judge] to proscribe argument as to a portion of the evidence which the jury has heard." Id., 259. Likewise, in the present case, defense counsel should have been permitted to present the defendant's theory of the case to the jury, just as the state did, given that there was sufficient evidence in the record from which the jury reasonably could have inferred that M planted the evidence on the paper towel to substantiate her false allegations against the defendant.

The state nevertheless contends that the defendant's argument relies on "the assumption that, if the jury credited the defendant's testimony, the only way it could have reconciled that testimony with the lab results was by concluding that M had wiped her genitals after a consensual encounter" with the defendant. The state purports to negate that assumption by speculating about other possible conclusions the jury could have reached on the basis of the defendant's testimony and the other evidence in the record. We are not persuaded. The defendant is not required to prove that *the only*

way the jury could have reconciled the testimony and other evidence was by concluding that M wiped herself with the paper towel. The defendant need only establish that *one way* the jury could have reconciled all the testimony and other evidence was by concluding that M wiped herself. In other words, the defendant does not have to conclusively establish that the jury would have accepted his argument; he need only establish that it was a reasonable inference for the jury to make on the basis of the evidence. See, e.g., *State* v. *Kinsey*, supra, 173 Conn. 348 ("counsel may comment [on] facts properly in evidence and [on] reasonable inferences drawn therefrom").

Accordingly, we conclude that the trial court improperly restricted the scope of defense counsel's closing argument when it barred counsel from arguing to the jury that M had planted physical evidence in an effort to substantiate her false allegations against the defendant. We next consider whether the trial court's action in denying the defendant the opportunity to present his theory of the case to the jury denied him the right to the assistance of counsel.

The right to the assistance of counsel ensures an "opportunity to participate fully and fairly in the adversary [fact-finding] process." *Herring* v. *New York*, supra, 422 U.S. 858. "It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Id., 862. "In a criminal trial, which is in

the end basically a [fact-finding] process, no aspect of [partisan] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." Id.

Our appellate courts have previously found reversible error when the trial court precluded defense counsel from discussing certain issues during closing argument, particularly when an issue was significant and "[bore] directly on the defendant's theory of the defense." *State* v. *Arline*, supra, 223 Conn. 64. For example, in *Arline*, this court reversed the judgment of the Appellate Court and remanded the case for a new trial when the trial court improperly precluded defense counsel from questioning the credibility of the complainant during closing argument. Id., 64–65. Specifically, we concluded that the trial court improperly precluded defense counsel during closing argument from commenting on certain facts that had been elicited from the complainant on cross-examination that tended to establish her motive or bias. Id., 55–56, 62–63. We explained that the defendant's theory of defense was centered on attacking the complainant's credibility, and, although there were other pieces of evidence that called the complainant's credibility into question, the testimony elicited on cross-examination provided the only evidence of motive or bias. Id., 64. Given the centrality of the issue to the case, we concluded that preventing defense counsel from arguing motive or bias of the state's chief witness deprived the defendant of his sixth amendment right to the assistance of counsel. Id., 64–65; see, e.g., *State* v. *Ross*, 18 Conn. App. 423, 433–34, 558 A.2d 1015 (1989) (defendant was entitled to new trial when trial court prohibited defense counsel from commenting on fact that sole eyewitness to shooting, under state's theory of case, did not testify at trial).

Here, M's testimony was the only source of evidence from which the jury reasonably could have concluded

that the defendant sexually assaulted her.[4] The results of the forensic testing and the sexual assault evidence collection kit did not establish that the July 28, 2016 sexual encounter, which the defendant admitted occurred, was nonconsensual.[5] The only argument presented by defense counsel to establish reasonable doubt of the defendant's guilt was directed at M's credibility. Although there were numerous evidentiary bases from which M's credibility could be challenged,[6] the testimony and other record evidence regarding the paper towel provided the strongest evidence, from the defendant's perspective, that M lied about the July 28, 2016 encounter. To deprive defense counsel of the opportunity to argue that the state's chief witness lied, when the linchpin of the defense was attacking the credibility of that witness, is to deprive the defendant of the full and fair participation of his counsel in the adversary process. See, e.g., *State* v. *Arline*, supra, 223 Conn. 64 ("The right to present a closing argument is abridged . . . when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence. This is particularly so when

[4] As defense counsel emphasized during closing argument, "[t]his case essentially comes down to one witness. All of these accusations stem from one individual, the complaining witness, [M]. There are medical reports and—and other reports that are there, but she is the source of that information. There isn't any independent information in those reports. So, we should look at her testimony and her credibility and assess [that evidence] to see if it supports a finding of [guilt] beyond a reasonable doubt . . . ."

[5] Although the results of the sexual assault evidence collection kit established that the defendant's DNA was included in the sperm-rich fraction sample of the vaginal swab, they contained no evidence that the July 28, 2016 incident was nonconsensual. Indeed, the nurse who administered the sexual assault evidence collection kit testified that there was no evidence of trauma, scratches, or bruises, and no physical injuries were noted in the report.

[6] For example, although M testified that she was violently sexually assaulted, her text to Isabelle indicated that the defendant had "touched" her. Additionally, the state did not introduce any evidence of physical injuries or ripped clothing.

. . . the prohibited argument bears directly on the defendant's theory of the defense.").

The trial court's restriction on defense counsel's closing argument was particularly significant in this case because the state argued that M's testimony was credible because she had no motive to fabricate her testimony. During the state's rebuttal closing argument, the prosecutor argued: "Why on earth, if [M and the defendant] are in a sexual relationship, would [M] call [Louis] and call and text Isabelle about the defendant sexually assaulting her, and then [talk] to the police about it, [talk] to the people at the hospital about it? Why would she do that? How does [M's] life get any better by making this up? Ask yourselves that." What's more, the prosecutor emphasized to the jury that the defendant had lied to the police when he was initially questioned. Specifically, the prosecutor stated: "In assessing the defendant's credibility, I would ask—I would urge you to consider the lies that the defendant told, that he admitted he told while he was—when he was testifying here. We know that he lied to the police about being in the house on July 28, 2016. He lied. He was in the house. . . . We know that he lied to the police about not having sexual contact with [M] on that date. . . . He lied to [Stephanie]. He admitted to lying about that."

This case turns on questions of credibility, and we find it disconcerting that the defendant was not afforded an equal opportunity to emphasize his theory that M also lied about the July 28, 2016 incident. The entire case with respect to the July 28, 2016 incident centered on the credibility of the only two eyewitnesses to that incident. The effectiveness of the defendant's arguments regarding M's credibility was critical to the outcome, particularly when there was other testimony from M's stepsister, Isabelle, that M had a history of "making false claims." Indeed, this is particularly noteworthy because the jury did not credit M's version of

events with respect to the other instances of alleged misconduct given that it found the defendant not guilty of the remaining charges. Accordingly, we conclude that the trial court's limitation of the scope of defense counsel's closing argument was improper and deprived the defendant of his constitutional right to the assistance of counsel.

Once a violation of the sixth amendment right to the assistance of counsel has been established, we need not inquire as to whether the error resulted in prejudice to the defendant. "[A] per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." *State* v. *Mebane*, 204 Conn. 585, 595, 529 A.2d 680 (1987), cert. denied, 484 U.S. 1046, 108 S. Ct. 784, 98 L. Ed. 2d 870 (1988); see, e.g., *State* v. *Arline*, supra, 223 Conn. 65. We, therefore, reverse the judgment of the trial court and remand the case for a new trial.

II

We next turn to the defendant's contention that the evidence presented at trial was insufficient to prove that he used force or the threat of force, as required to sustain his conviction of sexual assault in the first degree. Although we have determined that the defendant is entitled to a new trial, we address this claim because, if it is meritorious, a retrial would be barred by principles of double jeopardy. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 655, 1 A.3d 1051 (2010).

The defendant concedes that this claim was not properly preserved at trial. It is well established, however, that "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317

Conn. 773, 781, 120 A.3d 1188 (2015)]. . . . Accordingly, because there is no practical significance . . . for engaging in a *Golding* analysis, we review an unpreserved sufficiency of the evidence claim as though it had been preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

To establish that the defendant violated § 53a-70 (a) (1), the state was required to prove that the defendant "compel[led] another person to engage in sexual intercourse by the use of force against such other person . . . or by the threat of use of force against such other person . . . ." The defendant contends that the state's evidence of force or threat of force was improbable and unconvincing, and that the state presented no physical evidence to support M's allegation of sexual assault by force.

"The standard of review [that] we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). Importantly, we have previously held that "a single witness is sufficient to support a finding of guilt beyond a reasonable doubt." *State* v. *Whitaker*, 215 Conn. 739, 757 n.18, 578 A.2d 1031 (1990).

Here, with respect to the July 28, 2016 incident, M testified: "[The defendant] grabbed my arm, and I told

him to let me go, and he did not want to release me. And then I ended up tripping toward the couch, where he pushed me toward . . . . I was wearing a dress, and I had shorts underneath, and he ended up pulling down my pants and my underwear and inserting his penis inside me. . . . I was pushing him off, yelling, telling him to stop and get off me. . . . He kept forcing himself on me." She also testified that, during the assault, "I was trying to push him off me with my arms, but he kept holding [them] down, so I kept turning my body like this, with my knees, trying to push him off me, and he didn't want to get off. And I was yelling, help, can you stop, can you get off me, and then he didn't want to get off me." This testimony alone is sufficient to establish the force element required for a conviction of sexual assault in the first degree in violation of § 53a-70 (a) (1).[7] See, e.g., *State* v. *White*, 139 Conn. App. 430, 436–37, 55 A.3d 818 (2012) (rejecting sufficiency challenge to first degree sexual assault conviction when complainant's testimony, if credited, satisfied all elements of § 53a-70 (a) (1)), cert. denied, 307 Conn. 953, 58 A.3d 975 (2013); see also, e.g., *State* v. *Antonio W.*, 109 Conn. App. 43, 52–53, 950 A.2d 580, cert. denied, 289 Conn. 923, 958 A.2d 153 (2008).

This evidence, viewed in the light most favorable to sustaining the guilty verdict, is sufficient to support the defendant's conviction of sexual assault in the first degree.

III

The defendant's final claim is that the trial court abused its discretion by admitting the testimony of Janet Murphy, an expert in the field of child and adolescent sexual abuse. Specifically, the defendant contends

[7] In addition to M's testimony, the emergency medical technician (EMT) who responded to M's house on July 28, 2016, testified that M was "visibly, tearfully upset" and was "very . . . uncomfortable . . . ."

that the trial court improperly admitted Murphy's testimony given that her expertise was in child sexual abuse and that M was an adult when the July 28, 2016 incident occurred. The defendant further contends that "[t]he state failed to show that Murphy had sufficient knowledge from her experience, training, or education to testify as an expert in the field of adult sexual abuse . . . ." (Emphasis omitted.) As such, the defendant claims that Murphy's expertise was inapplicable to the present case. The state contends that this argument is unpreserved. Alternatively, the state contends that the claim is substantively meritless because M was eighteen at the time of the July 28, 2016 incident and Murphy testified that she "see[s] kids really up into the early twenties, more up to eighteen, but some delayed adults we'll see into the early twenties . . . ."

As a general matter, when our appellate courts reverse a judgment and remand the case for a new trial, only claims likely to arise on retrial are addressed by the reviewing court. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 195, 942 A.2d 1000 (2008). In this case, we are remanding the case for a new trial with respect to the charge of sexual assault in the first degree in connection with the July 28, 2016 incident. It is undisputed that, at the time of this incident, M was eighteen years old. Although we cannot say that the claim relating to Murphy's expert testimony is unlikely to arise on remand, because the state may elect to call Murphy and further probe her experience working with eighteen year olds, or it may call another expert, that evidentiary presentation would involve a record different from the one presently before us, and, accordingly, we decline to address this claim at this time. See, e.g., *State* v. *Jackson*, 334 Conn. 793, 822, 224 A.3d 886 (2020); *State* v. *Rizzo*, 266 Conn. 171, 250–51 n.44, 833 A.2d 363 (2003). We leave it to the trial court to further evaluate the issue if Murphy is called to testify at the defendant's new trial.

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

In this opinion the other justices concurred.

DEBRA NORMANDY ET AL. *v.* AMERICAN MEDICAL SYSTEMS, INC., ET AL.
(SC 20500)

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

Syllabus

The plaintiffs, D and M, sought to recover damages from the defendant B Co. for its alleged negligence, recklessness, and civil conspiracy, and for its alleged violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and the Connecticut Product Liability Act (§ 52-572m et seq.), in connection with a surgical procedure performed at B Co.'s hospital. Specifically, in 2009, D's obstetrician and gynecologist implanted a mesh sling manufactured by the defendant A Co. in D's body for the purpose of treating her stress urinary incontinence. Although D's obstetrician and gynecologist was not an employee of B Co., she has privileges to practice at B Co.'s hospital, where the procedure occurred. The sling implanted in D was stocked by B Co.'s hospital at the request of some of the physicians who have privileges there, and B Co. paid A Co. $900 for the sling and then billed D's health insurance carrier $4230 for it. In 2014, D was diagnosed with "mesh exposure" and had the sling removed. In 2015, the plaintiffs commenced this action against A Co. and B Co. but subsequently withdrew their claims against A Co. The plaintiffs alleged, inter alia, that B Co. had engaged in the business of placing A Co.'s slings into the stream of commerce by purchasing them from A Co., stocking and marketing them, and selling them to patients and medical professionals. The trial court granted B Co.'s motion for summary judgment, concluding that the plaintiffs' product liability claim failed because B Co. was not a product seller and that the plaintiffs' CUTPA and common-law claims were time barred under the three year statutes (§§ 42-110g (f), 52-577 and 52-584) of limitations and repose. The trial court also determined that the limitation and repose periods had not been tolled by either the continuing course of conduct or the fraudulent concealment doctrine. On the plaintiffs' appeal, *held*:

1. The trial court correctly concluded that there was no genuine issue of material fact as to whether B Co. was a product seller of the A Co. sling for purposes of the plaintiffs' product liability claim and, accordingly,

properly granted B Co.'s motion for summary judgment in connection with that claim: the jurisdictions that have considered the issue, which is one of first impression in Connecticut, have predominantly held that hospitals are providers of a service, namely, medical treatment, and are immune from strict liability for the harm caused by defective products used in the medical treatment of patients, and, under the circumstances of the present case, this court agreed that B Co. was not a "product seller," as that term is defined in § 52-572m (a), because the essence of the relationship between D and B Co. was for the furnishing of medical services rather than the sale of goods; moreover, although B Co.'s hospital website contained information regarding different surgical procedures for incontinence, the only mention of the A Co. sling appeared on the website of the medical practice to which D's obstetrician and gynecologist belonged, there was no evidence that B Co. had any control over the content of that website, and D admitted to receiving no marketing information regarding the A Co. sling from B Co., such that any mention of the A Co. sling could not be attributed to advertising by B Co.; furthermore, the facts that B Co. stocked the A Co. sling, billed D's health insurance carrier for it at a significant upcharge, and may potentially have profited from the transaction did not, by themselves, render B Co. a product seller, especially given that services provided by hospitals are often carried out in emergency situations, which require that medical supplies be stocked and ready for use; in addition, the majority of the amount that B Co. had billed D's health insurance carrier was for recovery and operating room services, further indicating that the essence of the transaction was for the provision of services.

2. The plaintiffs, who did not dispute that they commenced their action more than five years after D's surgery took place, could not prevail on their claim that the trial court incorrectly determined that the three year statutes of limitations and repose period were not tolled by either the continuing course of conduct or the fraudulent concealment doctrine:

a. The statute of limitations applicable to the plaintiffs' CUTPA claim and statute of limitations and period of repose applicable to the plaintiffs' common-law claims were not tolled by the continuing course of conduct doctrine: the plaintiffs failed to establish a genuine issue of material fact with respect to whether B Co. ever committed an initial wrong by marketing the A Co. sling, which was a necessary factual predicate for their claim that the continuing course of conduct doctrine tolled the statute of limitations applicable to the CUTPA claim, as the only mention of the sling in any marketing material appeared on the website of the practice to which D's obstetrician and gynecologist belonged, over which B Co. had no control, and D admitted that she never received any such marketing information from B Co.; moreover, because it is solely the responsibility of the treating physician to inform a patient of the risks and benefits of a proposed medical procedure, B Co. did not, as the plaintiffs claimed, have an independent or fiduciary duty to inform D of

the risks associated with the sling procedure that continued even after the procedure had been completed.

b. The statute of limitations and period of repose applicable to the plaintiffs' common-law claims were not tolled by the fraudulent concealment doctrine; the plaintiffs failed to establish a genuine issue of material fact with respect to whether B Co. intentionally concealed any information regarding the risks of the sling procedure generally or the A Co. sling specifically, as B Co.'s website identified risks associated with that procedure, and the record contained no evidence that any alleged concealment by B Co. was for the specific purpose of delaying the plaintiffs' filing of their complaint.

Argued December 10, 2020—officially released August 9, 2021*

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Product Liability Act, and for other relief, brought to the Superior Court in the judicial district of Waterbury and transferred to the Complex Litigation Docket, where the plaintiffs withdrew the complaint as to the named defendant; thereafter, the court, *Bellis*, *J.*, granted the motion for summary judgment filed by the defendant Bristol Hospital, Inc., and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

Jacqueline E. Fusco, with whom was *Brenden P. Leydon*, for the appellants (plaintiffs).

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

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether a hospital that purchases, stocks, and supplies a medical device, and then bills a patient for its use during surgery, is a "product seller," as defined by

* August 9, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

General Statutes § 52-572m (a),[1] for purposes of imposing strict liability under the Connecticut Product Liability Act (product liability act). See General Statutes § 52-572m et seq. The named plaintiff, Debra Normandy,[2] appeals[3] from the trial court's granting of the motion for summary judgment filed by the defendant Bristol Hospital, Inc.,[4] with respect to her complaint alleging injuries arising from the defendant's violations of, inter alia, the product liability act, the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the common law. On appeal, the plaintiff contends that the trial court incorrectly concluded that (1) the defendant was not a product seller for purposes of imposing strict liability under the product liability act, and (2) her CUTPA and common-law claims were time barred because the statutes of limitations applicable to those claims were not tolled. We conclude that the defendant, as a hospital, is not a product seller for purposes of imposing strict liability pursuant to the product liability act under the circumstances of this case, in which the defendant provided general informa-

[1] General Statutes § 52-572m (a) provides: " 'Product seller' means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term 'product seller' also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products."

[2] Mark Normandy, who is Debra Normandy's husband, is also a plaintiff in this action. The sole count of the operative complaint pertaining to Mark Normandy is the product liability count, which alleges that he suffered emotional distress and a loss of consortium, a claim that is derivative of Debra Normandy's statutory claim. For the sake of convenience, all references to the plaintiff in this opinion are to Debra Normandy.

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

[4] We note that the plaintiff's original, two count complaint was against both Bristol Hospital, Inc., and the named defendant, American Medical Systems, Inc. The plaintiff subsequently withdrew her complaint as to the named defendant on July 10, 2015. Accordingly, all references herein to the defendant are to Bristol Hospital, Inc.

tion regarding various medical procedures on its website and did not significantly participate in placing the medical device at issue into the stream of commerce. We further conclude that the statutes of limitations governing the plaintiff's CUTPA and common-law claims were not tolled. Accordingly, we affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiff, reveals the following facts and procedural history. In 2009, Amy S. Breakstone, an obstetrician and gynecologist who is a member of the CCOG Women's Health Group (practice group), diagnosed the plaintiff with stress urinary incontinence. To treat the plaintiff's condition, Breakstone recommended the surgical implantation of the Monarc Subfascial Hammock pelvic mesh sling (Monarc mesh sling), which was manufactured by American Medical Systems, Inc. See footnote 4 of this opinion. On December 2, 2009, Breakstone performed that surgery on the plaintiff at the defendant hospital. Breakstone is not an employee of the defendant, but she has privileges to practice there.

The defendant maintains a website on which it provides information about its affiliated physicians, including Breakstone, as well as various procedures that are available to patients. The practice group of which Breakstone is a member maintains its own webpage that provides information about incontinence therapies, including specific treatment devices. The practice group's webpage provides a hyperlink titled "Monarc," which is the brand of pelvic sling implanted in the plaintiff. The Monarc mesh sling implanted in the plaintiff was stocked by the defendant at the request of some its physicians; the defendant paid American Medical Systems, Inc., $900 for the Monarc mesh sling and then billed the plaintiff's health insurance carrier $4230 for it.

Although physicians have utilized pelvic mesh products containing a "monofilament polypropylene mesh,"

like the Monarc mesh sling, to treat stress incontinence surgically, "there is scientific evidence that suggests that this material is biologically incompatible with human tissue and should not be used in the pelvic region." On January 24, 2014, the plaintiff was diagnosed with a "mesh exposure" that caused her discomfort and ultimately required surgical removal of the Monarc mesh sling.

The plaintiff brought this action on March 9, 2015, via a two count complaint, alleging, inter alia, violations of the product liability act and CUTPA. Subsequently, the plaintiff filed a request for leave to amend the complaint, seeking to add five new counts against the defendant, alleging common-law claims for negligence, breach of express warranty, breach of implied warranty, recklessness, and civil conspiracy in the third through seventh counts, respectively.[5] The defendant objected to the plaintiff's request to amend the complaint and moved for summary judgment, arguing, inter alia, that the defendant is not a product seller under the product liability act and that the plaintiff's CUTPA and common-law claims were time barred.

The trial court granted the plaintiff's request to amend the complaint, treating it as the operative complaint in considering the defendant's motion for summary judgment. In granting the defendant's motion for summary judgment, the trial court concluded that there was no genuine issue of material fact that the defendant was not a product seller as a matter of law, deeming it "clear from the evidence submitted that the essence of the relationship between [the plaintiff] and the defendant . . . was the provision of medical services, by way of surgery to implant the [Monarc mesh sling]." The trial court further concluded that "[t]he defendant did not

[5] The complaint also alleged a loss of consortium claim on behalf of her husband. See footnote 2 of this opinion.

place the [Monarc mesh sling] into the stream of commerce but, rather, was a user or consumer of [the sling], as it is of all equipment and products used to provide medical services and [to] treat patients." (Footnote omitted.) In so concluding, the court determined that the majority of Connecticut trial courts, sister state courts, and leading treatises agree that hospitals are not product sellers for purposes of strict product liability. The court also granted the defendant's motion for summary judgment as to the remaining CUTPA and common-law claims, concluding that they were time barred. In doing so, the court concluded that neither the continuing course of conduct nor the fraudulent concealment doctrine tolled the applicable statutes of limitations. Accordingly, the court rendered judgment for the defendant on all counts of the amended complaint. The court denied the plaintiff's subsequent motion for reconsideration. This appeal followed.

On appeal, the plaintiff contends, inter alia, that the trial court incorrectly concluded that (1) the defendant was not a product seller as a matter of law, and (2) the continuing course of conduct and fraudulent concealment doctrines did not toll the applicable statutes of limitations. We address each claim in turn.

Before turning to the plaintiff's specific claims, we note the well settled standard of review governing summary judgment motions. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary

foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]he scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 729, 224 A.3d 525 (2020).

I

We begin with the plaintiff's claim that the trial court incorrectly concluded that there was no genuine issue of material fact as to whether the defendant is a product seller for purposes of the product liability act. The plaintiff argues that the defendant "was engaged in the business of selling mesh slings and that the primary, if not sole, purpose of its relationship with [the plaintiff] was providing the sling to be implanted by . . . Breakstone." The plaintiff asserts that evidence of the defendant's regularly stocking pelvic mesh products, marketing the Monarc mesh sling on its website, and selling that device at a markup created a genuine issue of material fact as to whether the defendant was engaged in the business of selling the Monarc mesh sling. In response, the defendant argues that the trial court correctly concluded that it is not a product seller under the product liability act because it was "not engaged in the business" of selling the Monarc mesh sling and because the essence of the relationship between the defendant and the plaintiff "was that of medical service provider and patient." We agree with the defendant and conclude that there is no genuine issue of material fact as to whether it was a product seller of the Monarc mesh sling.

In 1965, Connecticut adopted, as a matter of state common law, § 402A of the Restatement (Second) of Torts. *Garthwait* v. *Burgio*, 153 Conn. 284, 289, 216 A.2d 189 (1965); see 2 Restatement (Second), Torts § 402A, p. 347 (1965). "Section 402A recognized an action for strict product liability in tort without the

requirement of privity between the seller and the consumer or proof of manufacturer fault." *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 184, 136 A.3d 1232 (2016). "In 1979, our legislature adopted our product liability act. . . . That liability act required all common-law theories of product liability to be brought as a statutory cause of action." (Citation omitted.) Id., 187. Thus, "all claims or actions brought for personal injury . . . caused by the . . . marketing . . . of any product" are brought under the product liability act. General Statutes § 52-572m (b). The product liability act defines "product seller" in relevant part as "any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. . . ." General Statutes § 52-572m (a). Plaintiffs "must establish and prove, inter alia, that . . . the defendant was engaged in the business of *selling* the product . . . [and] the defect existed at the time of the *sale* . . . ." (Emphasis in original, internal quotation marks omitted.) *Zichichi* v. *Middlesex Memorial Hospital*, 204 Conn. 399, 403, 528 A.2d 805 (1987). "Once a particular transaction is labeled a 'service,' as opposed to a 'sale' of a 'product,' it is outside the purview of [the] product liability [act]." Id.

Connecticut courts applying the product liability act have considered "a party . . . a product seller [when] a sale of a product is a principal part of the transaction and [when] the essence of the relationship between the buyer and seller is *not* the furnishing of professional skill or services." (Emphasis in original; internal quotation marks omitted.) *Truglio* v. *Hayes Construction Co.*, 66 Conn. App. 681, 685, 785 A.2d 1153 (2001); see *Paul* v. *McPhee Electrical Contractors*, 46 Conn. App. 18, 23, 698 A.2d 354 (1997) (electrician was not product seller because he merely installed light fixture and was not responsible for placing it in stream of commerce).

Thus, in determining whether a hospital is a product seller of a surgical device under the product liability act, which is a question of first impression for this court, we must determine whether, under the circumstances of the case, that hospital is engaged in the business of selling a product.

Although "[n]o unifying test has been devised to determine whether strict liability applies in any given [sales service] combination," the reporters' notes to the Restatement (Third) of Torts observe that hospitals provide both services and products. Restatement (Third), Torts, Products Liability § 20, reporters' note to comment (d), p. 289 (1998).[6] However, "[m]ost jurisdictions hold that hospitals and doctors provide a service—medical treatment—and immunize them from strict liability for harm from defective products used in medical treatment, whether the product is implanted in the patient, loaned to the patient, or merely used as a tool." Id.

[6] The plaintiff argues that the trial court improperly relied on § 20 of the Restatement (Third) of Torts because the "[a]doption of [the Restatement (Third) of Torts] for product liability claims has been rejected in Connecticut." The plaintiff relies on *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 408, 152 A.3d 1183 (2016), in which this court declined to adopt the Restatement (Third) or to make any substantive changes to our product liability tests, instead favoring "modest refinements" to the approach under the Restatement (Second). This court, however, has deemed the Restatement (Third) instructive and persuasive in other contexts. See *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 335–36, 107 A.3d 381 (2015) (referencing Restatement (Third) in recognizing range of reasonable foreseeability); *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 624–25, 99 A.3d 1079 (2014) (referring to Restatement (Third) when defining essential elements of product malfunction claim as example of developing theory); see also *Hayes* v. *Caspers, Ltd.*, 90 Conn. App. 781, 792–93, 881 A.2d 428 (trial court's jury instruction on proximate cause "functionally mirror[ed]" test in Restatement (Third), which "provide[d] yet another basis for sustaining the validity of the court's instructions"), cert. denied, 276 Conn. 915, 888 A.2d 84 (2005). In contrast to *Bifolck*, the issue presented in the present case does not require us to undertake a significant shift from the analysis of the Restatement (Second). Accordingly, we deem the Restatement (Third) instructive.

A review of sister state decisions demonstrates that hospitals are predominantly held to be service providers rather than product sellers for purposes of strict liability because the essence of the transaction between a hospital and a patient is for medical services rather than the sale of goods.[7] See, e.g., *Hector* v. *Cedars-Sinai Medical Center*, 180 Cal. App. 3d 493, 507–508, 225 Cal. Rptr. 595 (1986) (hospital was not product seller of pacemaker but provider of medical services); *Ayyash* v. *Henry Ford Health Systems*, 210 Mich. App. 142, 144–47, 533 N.W.2d 353 (1995) (hospital provided service for implant procedure and was not product seller), appeal denied, 450 Mich. 992, 549 N.W.2d 561 (1996); *Royer* v. *Catholic Medical Center*, 144 N.H. 330, 335, 741 A.2d 74 (1999) (hospital was not engaged in business of selling prosthetic devices as matter of law); *Johnson* v. *Mountainside Hospital*, 239 N.J. Super. 312, 321, 571 A.2d 318 (App. Div.) (hospital was not strictly liable for defective respirator leased to patient), cert. denied, 122 N.J. 188, 584 A.2d 248 (1990); *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 104, 123 N.E.2d 792 (1954) (it was apparent that essence of relationship between hospital and patient was for services because "the patient bargains for, and the hospital agrees to make available, the human skill and physical material of medical science to the end that the patient's heath be restored"); *Cafazzo* v. *Central Medical Health Services, Inc.*, 542 Pa. 526, 533–34, 668 A.2d 521 (1995) (hospital was not seller of defective prosthetic device that was incidental to provision of services as matter of law); see also *Farrell*

[7] In a situation that is distinguishable from the present case, we note that hospitals have been deemed product sellers when the product at issue is not "integrally associated with the medical treatment." Restatement (Third), supra, § 20, reporter's note to comment (d), p. 290; see *Johnson* v. *Sears, Roebuck & Co.*, 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (hospital may be strictly liable for "mechanical and administrative services"); *Thomas* v. *St. Joseph Hospital*, 618 S.W.2d 791, 796–97 (Tex. Civ. App. 1981, writ ref'd n.r.e.) (hospital may be strictly liable for patient's gown that caught on fire).

v. *Johnson & Johnson*, 335 Conn. 398, 420–21, 238 A.3d 698 (2020) (upholding directed verdict on innocent misrepresentation claim because "[the plaintiff's] purchase of [the pelvic] mesh was *secondary* to the main purpose of the transaction, namely, to seek surgical assistance for her pelvic organ prolapse" (emphasis added)); *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 294, 880 A.2d 999 (upholding grant of summary judgment because hospital was not product seller of device implanted during surgery when essence of transaction was for services, not goods), cert. denied, 276 Conn. 910, 886 A.2d 424 (2005).

We find particularly illustrative a decision of the Texas Court of Appeals, *Easterly* v. *HSP of Texas*, *Inc.*, 772 S.W.2d 211, 212–13 (Tex. App. 1989), which concluded that the defendant hospital was not the product seller of an epidural kit. The Texas court considered the distinction between a product seller and service provider and inquired whether "the hospital introduced into the stream of commerce a defective product unrelated to the essential professional relationship" so as to render the hospital a product seller or, instead, whether the epidural kit "was intimately and inseparably connected to the professional service of providing [the plaintiff] with anesthesia . . . ." Id., 213. The court concluded that the hospital was "not in the business of selling epidural kits separate from the medical relationship between doctor and patient involving the furnishing of medical services." Id. Therefore, the court held that "[t]he 'sale' of the epidural kit was integrally related to the medical procedure—the kit was not a separate good sold in a commercial transaction." Id.

In the present case, the plaintiff claims there is a genuine issue of material fact as to whether the defendant was engaged in the business of selling the Monarc

mesh sling.[8] The plaintiff argues that, because the defendant stocked the Monarc mesh sling, advertised it on the hospital website, and billed her insurance for it at a significant upcharge, the essence of the relationship between the defendant and the plaintiff was the sale of the product, rendering the defendant a product seller under the product liability act.[9]

We begin our analysis of the record with the plaintiff's argument that the defendant acted as a product seller when it advertised and marketed medical devices, such as the Monarc mesh sling, on its hospital website and when it advertised Breakstone as an associated physician. This argument is not supported by the record. The defendant's website provides information regarding "different types of surgical procedures for incontinence," as well as information regarding its physicians, including Breakstone. Nowhere on the defendant's website does it describe or mention the Monarc mesh sling. The content on the defendant's website is purely educational or informational in nature, as it describes in general terms the options available to patients to treat

[8] The plaintiff relies on the observation of the United States District Court for the District of Connecticut that there is no "broad categorical rule" that hospitals cannot be product sellers of medical devices they sell to patients. *Mihok* v. *Medtronic, Inc.*, 119 F. Supp. 3d 22, 37 (D. Conn. 2015). The defendant, however, does not argue that hospitals can *never* be product sellers under the product liability act. It simply argues that, *on the facts of this case*, it is not a product seller because of its relationship with the plaintiff and the nature of the transaction centering on surgical services rather than the sale of the product itself.

[9] The plaintiff also argues that the trial court improperly failed to find that "a fiduciary duty existed such that the defendant was required to inform the plaintiff of the dangers of the [Monarc] mesh sling about which it had actual knowledge and . . . the opportunity to mitigate." This court, however, has already concluded that the nonemployee treating physician, rather than the hospital, owes a fiduciary duty to a patient to warn them of the risks of a procedure. See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 185–86, 196, 896 A.2d 777 (2006). Thus, the defendant did not owe an independent fiduciary duty to the plaintiff to warn her of any risks associated with her surgical procedure.

incontinence, along with the risks that may accompany such procedures. In fact, the only mention of the Monarc mesh sling on any website in the record is on that of the practice group. There is no evidence that the defendant has any control over the content of the practice group's webpage, meaning that any mention of the Monarc mesh sling can hardly be said to be advertising by the defendant. Indeed, the plaintiff herself testified at her deposition that she did not receive any literature or marketing information regarding the Monarc mesh sling from the defendant.[10] Thus, if the defendant's website constitutes advertising at all, it is advertising the hospital as a service provider.

The plaintiff further argues that there is a genuine issue of material fact as to whether the defendant advertises the Monarc mesh sling because the deposition testimony of Korrine A. Roth, the defendant's Systems Director of Quality Improvement, seemingly contradicted her affidavit, which stated that the defendant "does not market, advertise, or solicit the sale of medical or surgical products." We disagree. Instead, we agree with the defendant that Roth's deposition testimony is wholly consistent with the statement in her affidavit that the defendant advertises its services and not particular products. Roth testified that, "[i]n general, [the defendant's] marketing or advertising [was for] promoting our service for the hospital, promoting our services. . . . So we market and advertise what we do." Roth unambiguously replied in the negative

[10] At her deposition, the plaintiff was asked: "Have you ever seen any advertising from [the defendant]?" The plaintiff replied, "I have." She then responded in the negative when asked whether any of the defendant's advertisements "mention[ed] the sling that [she] had received during [her] surgery . . . ." Finally, she was asked: "Did you ever see any advertisements at all for the sling that you received during your surgery, from anybody?" The plaintiff responded: "Just the brochure that . . . Breakstone had given me. . . . There wasn't much information though. I mean, they were just promoting their product."

when asked: "And you believe that you don't market or advertise medical or surgical products?"[11]

The plaintiff next argues that the essence of her relationship with the defendant was for the procurement of the Monarc mesh sling because the defendant obtained and stocked the mesh sling, any services provided were dependent on its sale, and the defendant billed the plaintiff at a significant upcharge. We disagree. It is undisputed that the defendant paid $900 for the Monarc mesh sling and subsequently billed the plaintiff's health insurance carrier $4230. The mere fact that the defendant billed for the Monarc mesh sling does not conclusively establish that its sale was the main purpose of the plaintiff's relationship with the defendant. See *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Products Liability Litigation*, 692 F. Supp. 2d 1012, 1023 (S.D. Ill. 2010) ("the sale of pharmaceuticals is just one aspect of the transaction between patient and pharmacist"), aff'd sub nom. *Walton* v. *Bayer Corp.*, 643 F.3d 994 (7th Cir. 2011); *Brandt* v. *Boston Scientific Corp.*, 204 Ill. 2d 640, 648, 792 N.E.2d 296 (2003) ("it is not reasonable to infer that [the plaintiff] simply went to the hospital, bought

[11] The plaintiff also argues that, because the United States Food and Drug Administration (FDA) defines both "device user facility" and "distributor" to include hospitals, the defendant should be considered a product seller in the context of strict product liability. 21 C.F.R. § 803.3 (d) and (e) (2020). The plaintiff fails to provide any authority to support her argument that hospitals are considered "distributors" by the FDA and that such a conclusion would be persuasive in the product liability context. The plain language of the federal regulations includes hospital in the definition of "device user facility." See id., § 803.3 (d). "Distributor" is defined in relevant part as "any person (other than the manufacturer or importer) *who furthers the marketing of a device from the original place of manufacture to the person who makes final delivery or sale to the ultimate user*, but who does not repackage or otherwise change the container, wrapper, or labeling of the device or device package. . . ." (Emphasis added.) Id., § 803.3 (e). Because we conclude that there is no genuine issue of material fact that the defendant did not market the Monarc mesh sling to the plaintiff, the defendant is not a "distributor" under the plain language of the federal regulations.

the sling, and left"). Furthermore, the fact that the defendant billed the plaintiff far more than it paid for the Monarc mesh sling, and potentially may have profited from providing the product, does not by itself render the defendant a product seller under the product liability act.[12] See *Hector* v. *Cedars-Sinai Medical Center*, supra, 180 Cal. App. 3d 505 ("[t]he 85 percent surcharge in and of itself does not place the hospital in the business of selling pacemakers"). Indeed, given the nature of the services provided by hospitals, often in emergency situations, that a hospital keeps medical supplies on its shelves ready for use does not, without more, render it a product seller.

Finally, we consider other indicia that the essence of the transaction in the present case was for services rather than the sale of a product. First, we observe that the defendant did not bill the plaintiff's health insurance carrier for the cost of the Monarc mesh sling alone. Instead, the defendant billed for the total amount associated with the surgical procedure, including $4230 for the mesh sling and more than $10,000 for various supplies and recovery and operating room services.[13] Although not dispositive, the fact that the majority of the bill was for services, rather than products, strongly indicates that the essence of the transaction was for the provision of services. See *Brandt* v. *Boston Scientific Corp.*, supra, 204 Ill. 2d 652 (noting that, because "[o]nly a small fraction of the total charge was for the sling," predominant purpose of transaction was for services, not goods). Second, the plaintiff testified at her deposi-

[12] The defendant points out that the record does not indicate how much ultimately was paid by the plaintiff's health insurance carrier.

[13] The record indicates that the defendant billed $1757.93 for other supplies, such as pharmaceuticals and surgical supplies, $2110 for recovery room services, $5890.50 for operating room services, and $335 for various laboratory testing and treatment. As we noted, there is no evidence in the record of the amount the plaintiff's health insurance carrier actually paid to the defendant. See footnote 12 of this opinion.

tion that the reason she went to the defendant for the surgery, as opposed to another hospital, was because Breakstone, as her physician, scheduled the surgery there.[14]

Because the defendant did not actively advertise the Monarc mesh sling for sale to patients, and because the particular transaction between the plaintiff and the defendant was primarily for services rather than the sale of the medical product, we conclude that the trial court correctly determined that the defendant was not a product seller as a matter of law. Accordingly, the trial court properly granted the defendant's motion for summary judgment on the product liability count.

II

We turn now to the plaintiff's claim that the trial court incorrectly concluded that the plaintiff's CUTPA and common-law claims were time barred because the statutes of limitations applicable to those claims were not tolled under the doctrines of continuing course of conduct or fraudulent concealment. "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the [limitation] period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

[14] When asked at her deposition why she went to "Bristol Hospital on December 1, 2009," the plaintiff stated, "Breakstone scheduled it. . . . The sling surgery."

It is undisputed that, because the plaintiff's surgery took place on December 1, 2009, and she did not commence this action until February 19, 2015, her claims are time barred by the applicable statutes of limitations and repose period in the absence of tolling.[15] The burden, therefore, shifts to the plaintiff to establish that there is a genuine issue of material fact as to whether the statutes of limitations and repose period were tolled under either the continuing course of conduct or fraudulent concealment doctrine. See id.

A

The plaintiff first argues that the statute of limitations for the CUTPA claim and statute of limitations and repose period for the common-law claims are subject to tolling under the continuing course of conduct doctrine because "the defendant continued to market and promote mesh slings" after the plaintiff's surgery, while concealing the risk of sling implant procedures until at least 2016.[16] The plaintiff further argues that the continu-

[15] The plaintiff's various claims are governed by three year statutes of limitations and a three year period of repose. See General Statutes § 42-110g (f) ("[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter"); General Statutes § 52-577 ("[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of"); General Statutes § 52-584 ("[n]o action to recover damages for injury to the person, or to real or personal property . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of").

"As this court previously has observed, [w]hile statutes of limitation[s] are sometimes called statutes of repose, the former bars [a] right of action unless it is filed within a specified period of time after [an] injury occurs, [whereas] statute[s] of repose [terminate] any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 416 n.2, 54 A.3d 1005 (2012); see also *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 341, 644 A.2d 1297 (1994).

[16] We note that the period of repose under General Statues § 52-584 may be tolled by the doctrines of continuing course of conduct and fraudulent

ing course of conduct doctrine tolls the statute of limitations and repose period applicable to her common-law claims because the defendant owed her a continuing duty to inform her of the risks associated with a mesh sling implant procedure, even after the procedure was completed, as well as a fiduciary duty to do so. In response, the defendant argues that the trial court correctly concluded that the statute of limitations for the CUTPA claim and statute of limitations and period of repose for the common-law claims were not tolled. The defendant asserts that the plaintiff failed to present evidence that the defendant advertised or marketed the Monarc mesh sling that was implanted in the plaintiff. The defendant also argues that hospitals do not have a general or fiduciary duty to inform a patient of the risks associated with surgical procedures. We agree with the defendant and conclude that, under the circumstances of this case, the statute of limitations for the CUTPA claim and statute of limitations and period of repose for the common-law claims were not tolled by the continuing course of conduct doctrine.

On a motion for summary judgment, when deciding whether a statute of limitations or repose is tolled by the continuing of conduct doctrine, the court "must determine whether there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Martinelli* v. *Fusi*, 290 Conn. 347, 357, 963 A.2d 640 (2009).

Having reviewed the record, we conclude that the plaintiff has failed to establish a genuine issue of mate-

concealment. See *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 201, 905 A.2d 1135 (2006) (continuing course of conduct doctrine may toll period of repose in § 52-584); *Connell* v. *Colwell*, 214 Conn. 242, 246 n.4, 571 A.2d 116 (1990) (fraudulent concealment doctrine may toll period of repose under § 52-584).

rial fact with respect to whether the defendant ever advertised the Monarc mesh sling on its hospital website. Although the *practice group's* website provided a single mention and hyperlink to the Monarc mesh sling, the plaintiff has not demonstrated that the defendant had any control over the contents of that webpage.[17] Moreover, even if we were to assume that the generic mentions of mesh slings on the defendant's website constituted advertising, the record clearly indicates that the plaintiff herself never saw or received any such marketing by the defendant. See footnote 10 of this opinion. Because there is no evidence that the defendant committed the initial wrong of marketing the product in a way *that contributed to the plaintiff's injury*, the continuing course of conduct doctrine does not toll the statute of limitations applicable to the plaintiff's CUTPA claim.[18] See, e.g., *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 94, 202 A.3d 262 ("standing to bring a CUTPA claim will lie only when the purportedly unfair trade practice is alleged to have directly and proximately caused the plaintiff's injur-

[17] The plaintiff relies on *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 94, 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), to support her argument that her claim under CUTPA is not time barred. This case is distinguishable from *Soto*, however, because there is no evidence that the defendant itself marketed the Monarc mesh sling.

[18] The parties dispute whether the CUTPA statute of limitations may be tolled by the continuing course of conduct doctrine. The plaintiff argues that the doctrine does apply, citing a decision of the United States Bankruptcy Court for the District of Connecticut. See *In re Kellogg*, 166 B.R. 504, 507 (Bankr. D. Conn. 1994). In response, the defendant cites to our decision in *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 286, to support its argument that the continuing course of conduct doctrine does not toll the statute of limitations under CUTPA. In *Flannery*, we determined that, "[b]ecause the plaintiff's tolling claim is entirely nonviable, we need not address his second claim regarding the applicability of tolling to save an untimely CUTPA action." Id., 298. Here, we again do not need to reach the issue of whether the CUTPA limitation period may be tolled by the continuing course of conduct doctrine because we conclude that there is no factual predicate for the application of that doctrine.

ies"), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

We further conclude that the defendant did not have an independent duty to inform the plaintiff of the risks associated with a mesh sling implant procedure, even after the procedure had been completed, as well as a fiduciary duty. As the defendant argues, a hospital generally does not have an independent responsibility to inform a patient of risks associated with a medical procedure. See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 196, 896 A.2d 777 (2006). "[I]t is solely the responsibility of the nonemployee treating physician, and not the duty of the hospital, to inform the patient of the risks and benefits of, and alternatives to, a proposed medical procedure . . . ." Id., 185–86. Therefore, because the defendant hospital had no independent duty to inform the plaintiff of the risks associated with the mesh sling implant procedure, there is no genuine issue of material fact as to whether the continuing course of conduct doctrine tolls the statute of limitations and period of repose applicable to the plaintiff's common-law claims.

B

Finally, the plaintiff argues that the statute of limitations and period of repose applicable to her common-law claims are tolled under the doctrine of fraudulent concealment, as codified in General Statutes § 52-595.[19] The plaintiff seems to claim that the defendant fraudulently concealed the risks associated with the mesh sling implant procedure because the defendant had

[19] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

actual knowledge of the dangers and intentionally concealed that information from the plaintiff. In response, the defendant argues that it warned of the risks associated with mesh sling implantation surgery on its website and that the plaintiff failed to submit evidence to demonstrate any concealment on the part of the defendant.

"[T]o toll a statute of limitations by way of [the] fraudulent concealment statute [§ 52-595], a plaintiff must present evidence that a defendant: (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799–800, 99 A.3d 1145 (2014).

Having reviewed the record, we conclude that the plaintiff has failed to establish a genuine issue of material fact with respect to whether the defendant concealed any information regarding the risks of the mesh sling implant procedure generally or the Monarc mesh sling specifically. First, the defendant's website indicates there are risks associated with the procedure, stating: "Postoperative urinary problems, such as voiding problems, urinary tract infections, and urge incontinence may occur. The [United States Food and Drug Administration] has reported complications associated with some synthetic mesh slings." Second, the record contains no direct or circumstantial evidence that any alleged concealment by the defendant was for the specific purpose of delaying the plaintiff's filing of the complaint. We conclude, therefore, that the trial court correctly determined that the plaintiff's claims are time barred, as the statutes of limitations and period of repose were not tolled by the doctrines of fraudulent concealment or continuing course of conduct. Accord-

ingly, the trial court properly granted the defendant's motion for summary judgment with respect to the plaintiff's CUTPA and common-law claims.

The judgment is affirmed.

In this opinion the other justices concurred.