# STATE OF CONNECTICUT *v.* PATRICIA DANIELS (SC 20376)

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

*Syllabus*

A jury found the defendant guilty of intentional manslaughter in the first degree, reckless manslaughter in the first degree, and misconduct with a motor vehicle, among other crimes. The defendant had been driving her vehicle at a high rate of speed when she struck the driver's side of the victim's vehicle. The defendant then ran her vehicle into the victim's vehicle from behind, causing the victim's vehicle to strike a tree, which resulted in the victim's death. At the defendant's sentencing hearing, the state moved to vacate the defendant's intentional manslaughter conviction, citing to *State* v. *Polanco* (308 Conn. 242) and its progeny, in which this court held that the proper remedy for a double jeopardy violation arising out of cumulative convictions is to vacate one of the convictions rather than merging them. The trial court granted the state's motion and vacated the intentional manslaughter conviction for sentencing purposes. The defendant appealed from the judgment of conviction to the Appellate Court, claiming, inter alia, that the jury's verdict of guilty of intentional manslaughter, reckless manslaughter, and misconduct with a motor vehicle, the latter of which involves the criminally negligent operation of a motor vehicle that causes the death of another person, was legally inconsistent because each of those crimes requires proof of a mutually exclusive mental state. The Appellate Court determined that neither reckless manslaughter nor misconduct with a motor vehicle was inconsistent with intentional manslaughter but agreed that the defendant's conviction of reckless manslaughter and misconduct with a motor vehicle was legally inconsistent insofar as the defendant could not have consciously disregarded the risk of the victim's death while simultaneously failing to perceive that same risk of death. The Appellate Court rejected the state's argument that the proper remedy for the legal inconsistency was to remand the case with direction to reinstate the defendant's intentional manslaughter conviction and, instead, reversed the judgment of the trial court in part, vacated the defendant's conviction of reckless manslaughter and misconduct with a motor vehicle, and ordered a new trial as to those counts and the intentional manslaughter count. The state, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court improperly ordered a new trial on the intentional manslaughter, reckless manslaughter, and misconduct with a motor vehicle counts instead of reinstating the defendant's intentional manslaughter conviction and resentencing the defendant: although the state

did not dispute that the defendant's conviction of reckless manslaughter and misconduct with a motor vehicle was inherently inconsistent and, therefore, was properly vacated by the Appellate Court, this court had clarified in *Polanco* and its progeny that the adoption of vacatur as the appropriate remedy for cumulative convictions did not preclude the reinstatement of a defendant's vacated conviction if it was vacated to avoid a double jeopardy violation and was not affected by the legal inconsistency that necessitated the reversal of the controlling offense or offenses of which the defendant had been convicted; in the present case, the defendant's intentional manslaughter conviction was vacated for the purpose of avoiding a double jeopardy violation, as a review of the record demonstrated that, at the defendant's sentencing hearing, the prosecutor specifically cited to case law concerning vacatur that was developed and applied in the context of double jeopardy violations and indicated that the vacatur request was consistent with the state's theory at trial that the two strikes to the victim's vehicle arose from a single act that was either intentional or reckless, and the prosecutor was apparently under the belief that vacating one of the manslaughter counts was necessary to avoid the imposition of cumulative punishments; moreover, the vacated intentional manslaughter conviction was not affected by the legal inconsistency that necessitated the vacating on appeal of the defendant's conviction of reckless manslaughter and misconduct with a motor vehicle, namely, the impossibility of consciously disregarding the risk of the victim's death while simultaneously failing to perceive that same risk of death, because the crime of intentional manslaughter requires the jury to find only that the defendant intended to cause serious physical injury to another person and that she caused the death of such person or of a third person, not that she had a specific mental state with respect to creating a risk of death; accordingly, because the defendant's intentional manslaughter conviction was not tainted by the inconsistency in the jury's verdict and was vacated to avoid a potential double jeopardy violation, this court reversed the judgment of the Appellate Court as to the remedy for the jury's inconsistent verdict only, upholding the Appellate Court's vacating of the defendant's conviction of reckless manslaughter and misconduct with a motor vehicle but remanding the case with direction to reinstate the defendant's intentional manslaughter conviction, to sentence the defendant on that count, and to resentence her on her conviction of two other counts unrelated to the counts of manslaughter and misconduct with a motor vehicle.

2. The defendant could not prevail on her claim that the judgment of the Appellate Court should be affirmed on the alternative ground that that court incorrectly had concluded that her intentional manslaughter conviction was not inconsistent with her conviction of reckless manslaughter and misconduct with a motor vehicle:

a. The defendant's conviction of intentional manslaughter and reckless manslaughter was not legally inconsistent: the crime of intentional manslaughter requires only that the defendant had the intent to cause serious physical injury to a person and caused the death of such person or of a third person, whereas the elements of reckless manslaughter include the requirement that the defendant recklessly engaged in conduct that created a grave risk of death to another person, and, therefore, the mental state requirements for the two offenses did not relate to the same result; accordingly, the jury reasonably could have found that the defendant simultaneously acted intentionally and recklessly with respect to different results, in that she specifically intended to cause serious physical injury to the victim and, in so doing, consciously disregarded a substantial and unjustifiable risk that her actions created a grave risk of death to the victim.

b. The defendant's conviction of intentional manslaughter and misconduct with a motor vehicle was not legally inconsistent: the mental state required for misconduct with a motor vehicle, namely, that the defendant failed to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would cause the death of another person, was not mutually exclusive with the mental state required for the crime of intentional manslaughter, namely, that the defendant had the intent to cause serious physical injury; because the defendant could have intended to cause serious physical injury to the victim, as required for intentional manslaughter, while, at the same time, have failed to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would cause the victim's death, as required for misconduct with a motor vehicle, the mental state elements of each crime did not relate to the same result.

Argued October 20, 2021—officially released March 29, 2022

*Procedural History*

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, and with one count each of the crimes of misconduct with a motor vehicle, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty; thereafter, the court vacated the conviction as to one count of manslaughter in the first degree, and the defendant appealed to the Appellate Court, *Lavine*, *Bright* and *Bear*, *Js.*, which reversed in part the trial court's judg-

ment, and the state, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

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*Laila M. G. Haswell*, senior assistant public defender, for the appellee (defendant).

*Opinion*

ECKER, J. Following a jury trial, the defendant, Patricia Daniels, was found guilty of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) (intentional manslaughter),[1] manslaughter in the first degree in violation of § 53a-55 (a) (3) (reckless manslaughter),[2] and misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a) (criminally negligent operation), among other crimes.[3] At the sentencing hearing, the trial court vacated the defendant's intentional manslaughter conviction pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), at the request of the state and rendered judgment on the remaining counts of conviction. The defendant appealed

[1] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when (1) [w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

[2] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[3] The defendant also was convicted of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a). The defendant's conviction of these crimes is not at issue in the present appeal.

on the ground that the jury's verdict was legally inconsistent because each of these three charged crimes required mutually exclusive mental states. See *State* v. *Daniels*, 191 Conn. App. 33, 38, 213 A.3d 517 (2019). The Appellate Court agreed that the defendant's conviction of reckless manslaughter and criminally negligent operation was legally inconsistent; id., 53; but also determined that neither reckless manslaughter nor criminally negligent operation was inconsistent with intentional manslaughter. Id., 49, 51. Despite these latter holdings, the Appellate Court did not remand the case with direction to reinstate the intentional manslaughter conviction but, instead, reversed the defendant's conviction of all three crimes and remanded the case for a new trial on those three charges. Id., 62–63. On appeal to this court, the state argues that the Appellate Court improperly ordered a new trial on all three charges rather than reinstating the defendant's intentional manslaughter conviction. We agree with the state and, accordingly, reverse in part the judgment of the Appellate Court.

The relevant underlying facts are set forth in the Appellate Court's opinion. "The victim, Evelyn Agyei, left her Bridgeport home at approximately 6 a.m. on December 4, 2014. Her eleven year old son accompanied her. Agyei and her son got into Agyei's Subaru Outback (Subaru), Agyei driving and her son in the back seat on the passenger's side. After traversing some back roads, they took Bond Street and arrived at the intersection of Bond Street and Boston Avenue. Agyei stopped at the red light and then proceeded to make a right turn onto Boston Avenue, staying in the right lane. As she was making the right turn, her son looked to the left and saw a white BMW sport utility vehicle (BMW) approximately two streets down, traveling at a high rate of speed in the left lane.

"After Agyei [turned] onto Boston Avenue, the driver of the BMW pulled alongside Agyei's vehicle. Agyei's

son saw the BMW logo on the hood; however, he could not see the driver or the license plate. The driver of the BMW then moved into the right lane, hitting Agyei's Subaru once on the driver's side and causing her to begin to lose control of the vehicle. The driver of the BMW then moved behind the Subaru and ran into it from behind, causing the vehicle to cross the median, proceed under a fence, and hit a tree. Tragically, Agyei died from her injuries, and her son, who also was injured, continues to have vision problems as a result of the injuries he sustained. After an investigation . . . the police, having concluded that the defendant was the driver of the BMW that hit the Subaru . . . [and] cause[d] Agyei's death and the injuries to Agyei's son, arrested the defendant." Id., 36–37.

Following a jury trial, the defendant was found guilty of intentional manslaughter, reckless manslaughter, and criminally negligent operation. See footnote 3 of this opinion. At the sentencing hearing, the state moved to vacate the defendant's intentional manslaughter conviction, explaining: "I think that [disposition] goes along with the spirit of the state's intent during the beginning of this case. The state did have the belief, when we initially filed our long form information, that we [would proceed] on both a legal theory of intentional and reckless manslaughter based on the fact that the defendant's vehicle came into contact with [Agyei's] vehicle twice. But, in light of the convictions, we'd ask that she be sentenced solely on the reckless manslaughter [conviction] and that [the court] vacate the intentional manslaughter [conviction] for sentencing purposes." In support of its request, the state cited to our double jeopardy case law, namely, *State* v. *Polanco*, supra, 308 Conn. 242, *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), and *State* v. *Wright*, 320 Conn. 781, 135 A.3d 1 (2016).[4] The trial court granted the state's request,

[4] Defense counsel objected to the state's motion to vacate the intentional manslaughter conviction, arguing that the defendant wanted to preserve her

vacated the defendant's conviction of intentional manslaughter, and sentenced the defendant to a total effective sentence of twenty years of incarceration, execution suspended after sixteen years, and five years of probation.[5]

The defendant appealed from the trial court's judgment to the Appellate Court, claiming that the jury's verdict was legally inconsistent because the crimes of intentional manslaughter, reckless manslaughter, and criminally negligent operation each require proof of a mutually exclusive mental state.[6] See *State* v. *Daniels*, supra, 191 Conn. App. 38. The Appellate Court agreed with the defendant that the jury's verdict was partially inconsistent and reversed in part the judgment of the trial court. Id., 53, 62–63. The Appellate Court determined that there was no legal inconsistency in either the defendant's conviction of intentional and reckless manslaughter or her conviction of intentional manslaughter and criminally negligent operation; id., 49, 51; but it found that the defendant's conviction of reckless manslaughter and criminally negligent operation was legally inconsistent. Id., 53. The Appellate Court reasoned that the crimes of reckless manslaughter and criminally negli-

due process claim on appeal that the state had overcharged the case by adding the intentional manslaughter count "on the eve of trial . . . ."

[5] On the reckless manslaughter count, the trial court imposed a sentence of twenty years of incarceration, execution suspended after sixteen years, and five years of probation. The defendant also was sentenced to five years of incarceration for criminally negligent operation, ten years of incarceration for risk of injury to a child, and ten years of incarceration for evasion of responsibility. All of the defendant's sentences run concurrently.

[6] The defendant also claimed that the trial court improperly failed to exclude testimonial hearsay in violation of her constitutional right to confrontation. See *State* v. *Daniels*, supra, 191 Conn. App. 53–54. The Appellate Court declined to review the defendant's unpreserved evidentiary claim on the ground that it was not of constitutional magnitude. Id., 54; see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). That issue is not before us on appeal.

gent operation were "mutually exclusive when examined under the facts and theory of the state in the present case" because they each require proof of a different mental state as to the same result—the death of Agyei. Id. Specifically, the defendant could not have been reckless as to the risk of Agyei's death by "*consciously disregard*[*ing*] a substantial and unjustifiable risk that her actions would cause . . . death, while, simultaneously, [having been negligent as to the risk of Agyei's death by] *failing to perceive* a substantial and unjustifiable risk that her actions would cause . . . death."[7] (Emphasis in original.) Id. Simply put, a person cannot consciously disregard a risk that she fails to perceive.

To remedy the legal inconsistency in the jury's verdict, the Appellate Court vacated the defendant's conviction of reckless manslaughter and criminally negligent operation and remanded the case to the trial court for a new trial on all three charges related to Agyei's death: intentional manslaughter, reckless manslaughter, and criminally negligent operation. Id., 63. In doing so, the Appellate Court rejected the state's claim that the legal inconsistency could be remedied by reinstating the defendant's intentional manslaughter conviction, pointing out that the state had "moved at sentencing to vacate the conviction on that charge partly because doing so went 'along with the spirit of the state's intent during the beginning of this case' " and, therefore, that "the

[7] During oral argument before the Appellate Court, the state conceded that, if both strikes to Agyei's vehicle are viewed as one continuous act, the mental state elements of reckless manslaughter and criminally negligent operation are mutually exclusive. See *State* v. *Daniels*, supra, 191 Conn. App. 51. The state argued, however, that the jury could have found each strike of Agyei's vehicle to be a separate and distinct act and, therefore, that the jury's verdict as to both crimes was not legally inconsistent. Id. The Appellate Court rejected the state's argument on the ground that the state consistently had argued at trial that both strikes of Agyei's vehicle were one continuous act and could not change its theory of the case on appeal. Id. The state does not challenge the Appellate Court's conclusion on this point in the present appeal.

most the state can ask for is what the defendant has requested—a retrial on all three of the charges related to Agyei's death." Id. We subsequently granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court improperly order a new trial rather than reinstate the defendant's conviction of intentional manslaughter in the first degree, which was vacated for sentencing purposes under *State* v. *Polanco*, [supra, 308 Conn. 242]?" *State* v. *Daniels*, 333 Conn. 918, 216 A.3d 651 (2019).

On appeal, the state argues that the proper remedy for the legal inconsistency in the jury's verdict is to reinstate the defendant's intentional manslaughter conviction pursuant to *Polanco* and its progeny. According to the state, there is no substantive obstacle to resurrecting the defendant's intentional manslaughter conviction because "the reason for the state's request to vacate the intentional manslaughter conviction was to avoid a potential double jeopardy problem." The state also contends that the defendant's intentional manslaughter conviction was "not undermined by the Appellate Court's rationale for [vacating] her other two convictions" and that the record reflects that the jury necessarily found, beyond a reasonable doubt, all of the essential elements necessary to convict the defendant of intentional manslaughter.

The defendant responds that the state waived its claim for reinstatement of the defendant's intentional manslaughter conviction because the state's posttrial motion to vacate was "not related to double jeopardy" but, rather, was prompted by "the state's theory that the crime was intentional or reckless, but not both." Furthermore, the defendant contends that her intentional manslaughter conviction is tainted by the legal inconsistency in the jury's verdict "because the convictions required the jury to find inconsistent narratives when it [found] the defendant [guilty] of all three charges."

Alternatively, the defendant claims that the Appellate Court incorrectly determined that the jury's guilty verdict as to the intentional manslaughter count was not legally inconsistent with its guilty verdict as to the reckless manslaughter and criminally negligent operation counts.

I

REMEDY FOR THE JURY'S INCONSISTENT VERDICT

The state claims that the Appellate Court improperly ordered a new trial on the defendant's conviction of intentional manslaughter, reckless manslaughter, and criminally negligent operation, rather than reinstating the defendant's intentional manslaughter conviction. We agree.

The resolution of a claim of an inconsistent verdict presents a question of law, over which our review is plenary. See, e.g., *State* v. *Hazel*, 106 Conn. App. 213, 223, 941 A.2d 378, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008). "When a jury has [returned] legally inconsistent verdicts, there is no way for the reviewing court to know which charge the jury found to be supported by the evidence. . . . Accordingly, the court must vacate both convictions and remand the case to the trial court for a new trial." (Citation omitted; footnote omitted.) *State* v. *Chyung*, 325 Conn. 236, 247, 157 A.3d 628 (2017); see also *State* v. *Alicea*, 339 Conn. 385, 391, 260 A.3d 1176 (2021); *People* v. *Gallagher*, 69 N.Y.2d 525, 530, 508 N.E.2d 909, 516 N.Y.S.2d 174 (1987). In other words, when a jury's verdict is tainted by a legal defect such as inconsistency, the tainted counts of conviction cannot stand.

The state, at this stage of the proceedings, does not dispute that the defendant's conviction of reckless manslaughter and criminally negligent operation is inher-

ently inconsistent and, therefore, properly was reversed by the Appellate Court. The state argues, however, that a new trial is unnecessary because the inconsistency can be remedied by the reinstatement of the defendant's intentional manslaughter conviction, which was not inconsistent with the jury's verdict on the reckless manslaughter and criminally negligent operation counts and, therefore, remains untainted by the defect.

In *State* v. *Polanco*, supra, 308 Conn. 242, we held that, "when a defendant is convicted of greater and lesser included offenses [in violation of the constitutional right to be free from double jeopardy], the trial court shall vacate the conviction for the lesser offense rather than merging it with the conviction for the greater offense." Id., 260. We clarified that our adoption of vacatur as the appropriate remedy for double jeopardy violations did not preclude the reinstatement of the defendant's vacated conviction if the defendant's "greater offense is subsequently reversed for reasons unrelated to the viability of the vacated conviction." Id., 262. We observed that this procedure already is employed by "many other courts" and that it is "a well established practice in our appellate courts to direct the trial court to render a judgment of conviction on a lesser included offense on which the jury did not even return a verdict, when the conviction for the greater offense is reversed *for reasons that do not touch the elements of the lesser offense*." (Emphasis added.) Id., 262–63.

We extended this remedy beyond greater and lesser included offenses in *State* v. *Miranda*, supra, 317 Conn. 741. In that case, the defendant claimed that his cumulative convictions and sentences for capital felony, murder, and felony murder violated double jeopardy because they arose from the killing of a single victim. Id., 744–45, 751. We explained that applying the remedy of vacatur "beyond scenarios involving greater and lesser included offenses will . . . promote inter-jurisdictional and

intra-jurisdictional harmony, and better safeguard against unconstitutional multiple punishments." Id., 753; see *State* v. *Wright*, supra, 320 Conn. 830 (vacatur is appropriate remedy for defendant's cumulative convictions in violation of double jeopardy). We rejected the state's concern that a defendant might " 'escape punishment entirely if he were to later succeed in reversing his controlling [capital felony] conviction,' " reasoning that there was "no substantive obstacle to resurrecting a cumulative conviction that was once vacated on double jeopardy grounds—provided that the reasons for overturning the controlling conviction would not also undermine the vacated conviction. . . . This holds true regardless of whether the previously vacated conviction was for a lesser included offense of the controlling conviction, or was cumulative in some other manner. In either instance, a jury necessarily found that all the elements of the cumulative offense were proven beyond a reasonable doubt. Put differently, although the cumulative conviction goes away with vacatur, the jury's verdict does not." (Citation omitted.) *State* v. *Miranda*, supra, 753–54.

Pursuant to the foregoing authorities, the defendant's intentional manslaughter conviction may be reinstated if two criteria are met: (1) the conviction was vacated to avoid a double jeopardy violation; and (2) the conviction is unaffected by the legal inconsistency that necessitated the reversal of the defendant's conviction of reckless manslaughter and criminally negligent operation. We address each of these criteria in turn.

A

The Defendant's Conviction Was Vacated To Avoid a Potential Double Jeopardy Violation

We must first determine whether the defendant's intentional manslaughter conviction was vacated to avoid a double jeopardy violation. The state moved to vacate the defendant's intentional manslaughter convic-

tion at sentencing "under the legal theory of vacatur" articulated in "*Polanco*, *Miranda*, and *Wright* . . . ." The state explained that vacatur of the defendant's intentional manslaughter conviction "goes along with the spirit of the state's intent during the beginning of this case. The state did have the belief, when we initially filed our long form information, that we [would proceed] on both a legal theory of intentional and reckless manslaughter based on the fact that the defendant's vehicle came into contact with [Agyei's] vehicle twice. But, in light of the convictions, we'd ask that she be sentenced solely on the reckless manslaughter [conviction] and that [the court] vacate the intentional manslaughter [conviction] for sentencing purposes."

We conclude that the defendant's intentional manslaughter conviction was vacated for the purpose of avoiding a potential double jeopardy violation.[8] First,

[8] We need not decide whether the defendant's conviction of intentional manslaughter and reckless manslaughter would actually violate the double jeopardy clause because that issue is not presented on appeal. Suffice it to say that the state's concern in this regard was not unreasonable in light of our case law holding that it violates the prohibition against double jeopardy to convict the defendant of multiple homicide crimes for the death of one victim. See, e.g., *State* v. *Miranda*, supra, 317 Conn. 747 ("the imposition of cumulative punishments for the homicide offenses of capital felony and felony murder violates constitutional protections against double jeopardy if those offenses arise from the killing of a single victim"); *State* v. *Chicano*, 216 Conn. 699, 710, 584 A.2d 425 (1990) ("intentional murder, felony murder, and manslaughter in the first degree are all homicide offenses," and, therefore, defendant's conviction of felony murder and first degree manslaughter for death of single victim violates double jeopardy prohibition) (overruled on other grounds by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991); *State* v. *John*, 210 Conn. 652, 696, 557 A.2d 93 ("the legislature contemplated that only one punishment would be imposed for a single homicide, even if that homicide involved the violation of two separate statutory provisions"), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied sub nom. *Seebeck* v. *Connecticut*, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989). Thus, we credit the state's explanation regarding the reason for requesting the vacatur of the defendant's intentional manslaughter conviction.

in requesting vacatur, the state cited case law on vacatur developed and applied by this court in the specific context of double jeopardy violations. It appears that the state believed that it was necessary to vacate one of the two manslaughter convictions to avoid the imposition of cumulative punishments. Second, the state explained that its request was consistent with its theory at trial that both strikes to Agyei's vehicle arose from a single act that was either intentional or reckless, thereby invoking the first prong of the applicable double jeopardy analysis, which requires "the charges [to] arise out of the same act or transaction." (Internal quotation marks omitted.) *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 227, 244 A.3d 908 (2020); see id., 226–27 ("When the defendant is charged with the violation of two distinct statutes in a single criminal proceeding arising from a single underlying set of events, we have employed a two part analysis. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense." (Internal quotation marks omitted.)). Although the state did not use the talismanic words "double jeopardy" to explain its reasoning, the articulated basis for its vacatur request was unequivocally rooted in double jeopardy principles. See, e.g., *State* v. *Edwards*, 100 Conn. App. 565, 578 n.6, 918 A.2d 1008 ("Connecticut courts have refused to attach talismanic significance to the presence or absence of particular words or phrases" (internal quotation marks omitted)), cert. denied, 282 Conn. 928, 926 A.2d 666 (2007), and cert. denied, 282 Conn. 929, 926 A.2d 667 (2007).

The defendant contends that the state's vacatur request was not predicated on double jeopardy grounds because the state sought to vacate "the greater charge rather than the lesser charge" in violation of the well established rule that, "when a defendant is convicted of greater and lesser included offenses, the trial court

*shall vacate the conviction for the lesser offense . . . .*" (Emphasis added.) *State* v. *Polanco*, supra, 308 Conn. 260. This argument fails at the starting gate, however, because reckless manslaughter is not a lesser included offense of intentional manslaughter. "By definition, [a] lesser included offense is one that does not require proof of elements beyond those required by the greater offense." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 34, 44, 111 A.3d 447 (2015). Reckless manslaughter requires proof of essential elements that intentional manslaughter does not, specifically, the existence of "circumstances evincing an extreme indifference to human life" and the requirement that the defendant "recklessly engages in conduct which creates a grave risk of death to another person . . . ." General Statutes § 53a-55 (a) (3). Thus, it is possible to commit the crime of intentional manslaughter without committing the crime of reckless manslaughter. See, e.g., *State* v. *Tinsley*, 340 Conn. 425, 435–36, 264 A.3d 560 (2021) (one offense is not lesser included offense of another if it is possible to commit alleged greater crime without committing alleged lesser crime). Intentional manslaughter and reckless manslaughter do not stand in the position of greater and lesser included offenses. Instead, they are alternative ways of committing the same offense: manslaughter in the first degree.

B

The Inconsistency in the Jury's Verdict Did Not Affect the Defendant's Vacated Conviction

We next address whether the defendant's intentional manslaughter conviction was affected by the legal inconsistency that necessitated the reversal of the defendant's conviction of reckless manslaughter and criminally negligent operation. It is undisputed that the defendant's conviction of reckless manslaughter and criminally negligent operation convictions is legally

inconsistent because each offense requires proof of a mutually exclusive mental state with respect to the death of Agyei. More precisely, as the Appellate Court observed, the defendant could not have consciously disregarded the risk of Agyei's death while simultaneously failing to perceive that same risk of death. See *State* v. *Daniels*, supra, 191 Conn. App. 53. But this holding does not automatically compel the conclusion that the defendant's intentional manslaughter conviction is tainted by the inconsistency in the jury's verdict. We conclude, to the contrary, that the defendant's mutually exclusive mental states with respect to the risk of Agyei's death do not affect the defendant's intentional manslaughter conviction under § 53a-55 (a) (1) because that statutory provision does not require the jury to find a specific mental state as to the risk of death.

To find the defendant guilty of intentional manslaughter in violation of § 53a-55 (a) (1), the jury was required to find, beyond a reasonable doubt, that the defendant intended "to cause serious physical injury to another person" and "cause[d] the death of such person or of a third person . . . ." General Statutes § 53a-55 (a) (1). Unlike reckless manslaughter under § 53a-55 (a) (3) and criminally negligent operation under § 53a-57 (a), the crime of intentional manslaughter does not require proof of the defendant's mental state with respect to the risk of death;[9] a jury may find a defendant guilty

[9] The intent to cause "serious physical injury" is a required element under § 53a-55 (a) (1), and proof that the defendant intended to cause a "physical injury [that] creates a substantial risk of death" is one of four ways to establish that element. General Statutes § 53a-3 (4); see General Statutes § 53a-3 (4) (" '[s]erious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ"). Because of these statutory alternatives, the jury in the present case was free to find the defendant guilty of intentional manslaughter without finding that she had any particular state of mind with respect to the risk of death created by her actions.

under § 53a-55 (a) (1) whether the defendant actually intended to create a risk of death, or was reckless or negligent with respect to such risk. All that the jury was required to find was that the defendant intended to cause Agyei serious physical injury and that she caused Agyei's death. Thus, the inconsistency in the jury's verdict as to whether the defendant "*consciously disregarded* a substantial and unjustifiable risk that her actions would cause Agyei's death" or "*fail*[*ed*] *to perceive* a substantial and unjustifiable risk that her actions would cause Agyei's death"; (emphasis in original) *State* v. *Daniels*, supra, 191 Conn. App. 53; does not taint the jury's guilty verdict as to the intentional manslaughter count.

Because the defendant's intentional manslaughter conviction is not affected by the inconsistency in the jury's verdict and was vacated to avoid a potential double jeopardy violation; see part I A of this opinion; we conclude that reinstatement of that conviction is the proper remedy in the present case. See *State* v. *Polanco*, supra, 308 Conn. 262–63 (reinstatement of vacated conviction is proper remedy when cumulative conviction is vacated for double jeopardy purposes and reason for reversal does not affect vacated conviction); see also *State* v. *Miranda*, supra, 317 Conn. 755 (same). The "revival of the [vacated] manslaughter conviction would serve the interest of justice"; (internal quotation marks omitted) *State* v. *Miranda*, supra, 755; because the jury returned a guilty verdict on that count, reflecting that it had "found that all the elements of the [vacated] offense were proven beyond a reasonable doubt." Id., 754. Accordingly, we reverse the judgment of the Appellate Court as to the remedy for the jury's inconsistent verdict.[10]

[10] The defendant also claims that the state is pursuing a different legal theory on appeal than the one it pursued at trial, in violation of her right to notice of the charges against her. See, e.g., *State* v. *King*, 321 Conn. 135, 149, 136 A.3d 1210 (2016) ("[p]rinciples of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented

## II

## INCONSISTENT VERDICT

We next address the defendant's alternative grounds for affirmance. The defendant argues that the Appellate Court erred in determining that the jury's guilty verdict of intentional manslaughter is not inconsistent with the defendant's conviction of reckless manslaughter and criminally negligent operation. According to the defendant, because each conviction required a mutually exclusive mental state and it is impossible to ascertain which of the three inconsistent states of mind the jury attributed to the defendant, the verdict is legally inconsistent with respect to all three counts.

The following legal principles guide our analysis. "A claim of legally inconsistent convictions, also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential ele-

at trial"). Specifically, the defendant claims that the state's legal "theory of the case at trial was that the defendant could be found guilty of . . . only one of the three" crimes predicated on Agyei's death, whereas, on appeal, the state now argues that the defendant can be convicted "of all three charges . . . ." The defendant misunderstands the state's legal theory on appeal. The state does not challenge the Appellate Court's conclusion that the defendant's conviction of reckless manslaughter and criminally negligent operation is inherently inconsistent and, therefore, must be reversed. The state challenges only the remedy ordered by the Appellate Court to cure the inconsistency, arguing that reinstatement of the defendant's intentional manslaughter conviction is appropriate because the defendant's intentional manslaughter conviction is unaffected by the inconsistency in the jury's verdict, and the jury expressly found that the state had proven the essential elements of intentional manslaughter beyond a reasonable doubt. Because it is undisputed that the defendant was on notice that she could be convicted of intentional manslaughter, we conclude that the defendant's due process claim lacks merit.

ments for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Alicea*, supra, 339 Conn. 390–91.

A

Intentional Manslaughter and Reckless Manslaughter

The defendant contends that the crimes of intentional manslaughter in the first degree in violation of § 53a-55 (a) (1) and reckless manslaughter in the first degree in violation of § 53a-55 (a) (3) are legally inconsistent pursuant to *State* v. *King*, 216 Conn. 585, 592–94, 583 A.2d 896 (1990) (*King 1990*), and *State* v. *Chyung*, supra, 325 Conn. 247–48. The defendant argues that, similar to *King 1990* and *Chyung*, the defendant's conduct in the present case constituted a single act with one result, namely, death, and, therefore, that "multiple states of mind cannot be attributed to the defendant." We disagree.

Our recent decision in *State* v. *Alicea*, supra, 339 Conn. 385, provides an instructive survey and analysis of our case law regarding the legal consistency of multiple verdicts. As we explained in *Alicea*, "the statutory definitions of intentionally and recklessly are mutually exclusive and inconsistent." (Internal quotation marks omitted.) Id., 391–92, quoting *State* v. *King*, supra, 216 Conn. 593–94. "Intentional conduct requires the defendant to possess a '*conscious objective . . . to cause*' the result described in the statute defining the offense. . . . General Statutes § 53a-3 (11). By contrast, reckless conduct requires that the defendant 'is aware of and *consciously disregards* a substantial and unjustifiable risk' that the result described in the statute will occur. . . . General Statutes § 53a-3 (13). Thus, a reckless

mental state is inconsistent with an intentional mental state because 'one who acts recklessly does not have a conscious objective to cause a particular result.' " (Emphasis in original.) *State* v. *Alicea*, supra, 392.

Nonetheless, convictions involving both intentional and reckless mental states may be legally consistent "in certain circumstances. For example, when each mental state pertains to a different act, a different victim, or a different injury, then the convictions are consistent. . . . Significantly, we have also explained that convictions involving both intentional and reckless mental states may be legally consistent when each mental state pertains to a different *result*." (Citations omitted; emphasis in original.) Id. Because "[m]ental states . . . exist only with reference to particular results . . . it is necessary to examine the mental state element as it arises in each particular statute defining an offense to determine whether actual inconsistency exists." (Internal quotation marks omitted.) *State* v. *Nash*, 316 Conn. 651, 668, 114 A.3d 128 (2015).

Similar to the defendant in the present case, the defendant in *Alicea* claimed that the verdict finding him guilty of both intentional assault and reckless assault was legally inconsistent "because [the] requisite mental states—intentional and reckless—are mutually exclusive," and "it was impossible for the jury to find both mutually exclusive mental states with respect to only one act, one victim, and one injury." *State* v. *Alicea*, supra, 339 Conn. 390. We rejected the defendant's claim, explaining that " '[t]he relevant inquiry . . . is whether the opposing mental states relate to the same result, not whether both convictions relate to the same injury.' . . . The word 'result' in this context referred to the result *of the requisite mental state*, or, in other words, the statutory objective associated with the respective mental state." (Citation omitted; emphasis in original.) Id., 396. Thus, the relevant inquiry is not "whether the

statutes at issue require findings that the defendant caused the same injury to the victim. Rather . . . [the convictions] are legally inconsistent only if they require that the defendant possess the opposing mental states with respect to the same *objective* . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 396–97.

We held in *Alicea* that the defendant's conviction of intentional assault and reckless assault was not legally inconsistent because the objective associated with the different mental state elements of the two statutory provisions were not mutually exclusive. We explained that "[t]he jury reasonably could have found that the defendant simultaneously possessed both [intentional and reckless] mental states pertaining to his singular action of cutting [the victim's] throat. In other words, the jury reasonably could have found that the defendant intended to cause [the victim] serious physical injury and simultaneously disregarded the risk that his conduct would cause [the victim's] death." Id., 394; see *State* v. *Nash*, supra, 316 Conn. 666 (defendant's conviction of intentional and reckless assault in first degree was not legally inconsistent because jury reasonably could have found that defendant intended to injure another person and recklessly created risk of that person's death).

To resolve the defendant's claim in the present case, we must analyze whether the crimes of intentional manslaughter and reckless manslaughter require the defendant to possess opposing mental states with respect to the same statutory objective. Section 53a-55 (a) (1) provides in relevant part that a person is guilty of intentional manslaughter in the first degree when, "[*w*]*ith intent to cause serious physical injury to another person*, he causes the death of such person or of a third person . . . ." (Emphasis added.) Thus, to find the defendant guilty of intentional manslaughter, the jury was required to find that the defendant (1) had the

intent to cause serious physical injury to a person, and (2) caused the death of such person or a third person.

Section 53a-55 (a) (3) provides in relevant part that a person is guilty of reckless manslaughter in the first degree when, "*under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death* to another person, and thereby causes the death of another person." (Emphasis added.) Thus, to find the defendant guilty of reckless manslaughter, the jury was required to find that the defendant (1) acted under circumstances evincing an extreme indifference to human life, (2) recklessly engaged in conduct that created a grave risk of death to another person, and (3) caused the death of another person.

We agree with the Appellate Court that "the mens rea elements in the two provisions, namely, the 'intent to cause serious physical injury' and 'recklessly engag-[ing] in conduct which creates a grave risk of death'; General Statutes § 53a-55 (a) [(1) and (3)]; do not relate to the same result." *State* v. *Daniels*, supra, 191 Conn. App. 48–49. As we explained in part I B of this opinion, subdivision (1) of § 53a-55 (a) does not require the jury to find a specific mental state as to the risk of death—it requires only that the jury find a particular mental state as to the element of serious physical injury. See footnote 9 of this opinion and accompanying text. Subdivision (3), by contrast, specifies a particular mental state as to the risk of death—it requires the jury to find that the defendant was reckless with respect to the grave risk of death resulting from her conduct. Accordingly, as the Appellate Court correctly concluded, the jury consistently could have found that the defendant "*specifically intended to cause serious physical injury to Agyei* and that, in doing so, she *consciously disregarded* a substantial and unjustifiable risk *that her actions created a grave risk of death to Agyei.*" (Empha-

sis in original.) *State* v. *Daniels*, supra, 49. Because the jury reasonably could have found that the defendant possessed both mental states simultaneously, we agree with the Appellate Court that the defendant's conviction of intentional manslaughter and reckless manslaughter was not legally inconsistent.[11]

B

Intentional Manslaughter and Criminally Negligent Operation

The defendant also claims that her conviction of intentional manslaughter and criminally negligent operation is inconsistent because the "[d]efendant could not have intended to cause serious physical injury while simultaneously failing to perceive a risk of death." We again disagree.

We have already explained that § 53a-55 (a) (1) provides that a person is guilty of intentional manslaughter in the first degree when, "[*w*]*ith intent to cause serious physical injury* to another person, he causes the death of such person or of a third person . . . ." (Emphasis added.) In order to find the defendant guilty of intentional manslaughter, we repeat, the jury was required to find that the defendant (1) had the intent to cause serious physical injury to a person, and (2) caused the

[11] The defendant also contends that this case is distinguishable from *Nash*, supra, 316 Conn. 651, and *State* v. *King*, 321 Conn. 135, 136 A.3d 1210 (2016) (*King 2016*), insofar as those cases involved two different results to the victim, whereas the present case involves only one result. Our holding in *Alicea* is dispositive of this claim. As we reasoned in *Alicea*, the outcomes of *Nash* and *King 2016* "actually hinged on the *objective* associated with each statutory, mental state element, not the acts performed by the defendants or the injuries suffered by the victims." (Emphasis in original.) *State* v. *Alicea*, supra, 339 Conn. 397. Similar to both *Nash* and *King 2016*, the defendant's actions in the present case related to two different results—serious physical injury and the risk of death—and the jury reasonably could have found that the defendant possessed a distinct mental state with respect to each of these results.

death of such person or of a third person. Section 53a-57 (a), which established the offense of criminally negligent operation, provides that "[a] person is guilty of misconduct with a motor vehicle when, with *criminal negligence* in the operation of a motor vehicle, he causes the death of another person." (Emphasis added.) "Criminal negligence" is defined in relevant part as "fail[ing] to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . ." General Statutes § 53a-3 (14). To find the defendant guilty of criminally negligent operation, the jury was required to find that (1) she failed to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would (2) cause the death of another person.

We agree with the Appellate Court that the mental state requirements for these two statutes are not mutually exclusive. As the Appellate Court cogently explained, "[o]ne can intend to cause serious physical injury to another, while, at the same time, [fail] to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would cause the victim's death. The mental state elements in the two provisions—*failing to perceive a substantial and unjustifiable risk that your manner of operation would cause death* and an *intent to cause serious physical injury*—do not relate to the same result. Because the defendant's [conviction] of intentional manslaughter and criminally negligent operation required the jury to find that the defendant acted intentionally and criminally negligent with respect to different results *(failing to perceive a substantial and unjustifiable risk of death* and *intending to cause serious physical injury*), the defendant cannot prevail on her claim that the mental states

required for those crimes are mutually exclusive and, therefore, that the [verdict was] legally inconsistent." (Emphasis altered.) *State* v. *Daniels*, supra, 191 Conn. App. 50–51.

The defendant claims that the Appellate Court's analysis relied on "an overly technical application of the test of legal inconsistency" and that, realistically speaking, it is impossible to intend to cause serious physical injury while simultaneously failing to perceive a risk of death. Not so. As we explained in *Alicea*, "§ 53a-3 (4) does not limit its definition of 'serious physical injury' to an injury that creates a substantial risk of death; rather, it continues, '*or* which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .' " (Emphasis in original.) *State* v. *Alicea*, supra, 339 Conn. 397–98 n.4, quoting General Statutes § 53a-3 (4). The statute therefore encompasses injuries that do not necessarily create a risk of death. See, e.g., *State* v. *Ovechka*, 292 Conn. 533, 547, 975 A.2d 1 (2009) (person sprayed with pepper spray suffered "serious physical injury," as defined by § 53a-3 (4)); *State* v. *Irizarry*, 190 Conn. App. 40, 48, 209 A.3d 679 (fractured jaw, "contusions, abrasions, and bleeding from [the victim's] ear" constitute " 'serious physical injury' "), cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019). It is possible to intend to cause "serious physical injury," as defined by § 53a-3 (4), while, at the same time, fail to perceive a risk of death. For this reason, we conclude that the jury's verdict of guilty as to the crimes of reckless manslaughter and criminally negligent operation was not legally inconsistent.

The judgment of the Appellate Court is reversed as to the remedy for the jury's inconsistent verdict only and the case is remanded to that court with direction to remand the case to the trial court with direction to reinstate the defendant's intentional manslaughter con-

viction, to sentence the defendant on that count, and to resentence the defendant on the remaining counts of conviction; the judgment of the Appellate Court, including the vacating of the defendant's conviction of reckless manslaughter and criminally negligent operation, is otherwise affirmed.[12]

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* KERLYN M. TAVERAS (SC 20496)

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

*Syllabus*

The defendant appealed from the judgments of the trial court revoking his probation. The defendant previously had pleaded guilty to various crimes and received a sentence of imprisonment followed by a term of probation. The conditions of the defendant's probation prohibited him from violating any state or federal criminal law. While the defendant was serving his term of probation, he precipitated an incident at his son's preschool. On the day of the incident, B, the preschool's director, received a call from her staff informing her that the defendant was late in picking up his son. B's staff members reported that the defendant arrived in an escalated emotional state and began arguing with them. C, one of the staff members, said something to the defendant as he was exiting the preschool with his son, and, according to an affidavit from the defendant's probation officer, the defendant said to C, "you better watch your back." The defendant tried to get back in the door but was unable to, and then left the preschool. After the state charged the defendant with violating the terms of his probation, the trial court held

[12] In accordance with the aggregate package theory, we vacate the defendant's sentence in its entirety and remand not only for sentencing on the intentional manslaughter conviction, but also for resentencing on the convictions that were not vacated by the Appellate Court, namely, risk of injury to a child and evasion of responsibility in the operation of a motor vehicle. See, e.g., *State* v. *LaFleur*, 307 Conn. 115, 164, 51 A.3d 1048 (2012) ("Pursuant to [the aggregate package] theory, we must vacate a sentence in its entirety when we invalidate any part of the total sentence. On remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact." (Internal quotation marks omitted.)).

an evidentiary hearing. The court found, by a preponderance of the evidence, that the state met its burden of proving that the defendant had violated the terms of his probation by committing breach of the peace in the second degree. The court specifically found that the defendant had exhibited a threatening nature and demeanor, and that his conduct caused B to call the police. Accordingly, the court rendered judgments revoking the defendant's probation. On appeal to the Appellate Court, the defendant claimed that his remarks were protected by the first amendment to the United States constitution. The Appellate Court agreed with the defendant and reversed the judgments of the trial court, reasoning that the defendant's remarks had not conveyed an explicit threat and that the state had failed to provide sufficient context to resolve the resulting ambiguity. The state, on the granting of certification, appealed to this court. *Held* that the Appellate Court incorrectly determined that the defendant's remarks warranted first amendment protection, as the defendant's statements and demeanor, as well as the surrounding context, were sufficient to support a finding that the defendant's remarks constituted true threats: although the phrase "you better watch your back" can be used to caution an addressee of an external threat, it can also be used as a veiled or conditional threat of violence, the record did not suggest that the defendant's remarks were intended to convey the former sentiment, and the defendant's history at the preschool, his demeanor during the incident in question, and the subsequent reactions of the preschool staff appeared objectively to indicate the threat of the possibility of violence; moreover, B stated that the defendant had previously caused escalated interactions at the preschool and that she previously had seen the defendant act in a threatening manner, and the fact that preschool employees notified B of the defendant's late arrival before it occurred and that B immediately returned to the preschool because she knew things would escalate indicated that the defendant had made his remarks in the context of an existing hostile relationship; furthermore, B testified that, when she arrived at the preschool shortly after the incident, the staff was shaken up and concerned by what had transpired, B immediately contacted the police, formally prohibited the defendant from reentering the preschool, began to pursue a restraining order, and hired a police office for additional security the following day, all of which reasonably suggested a specific fear of physical violence; accordingly, this court reversed the judgment of the Appellate Court and remanded the case for the Appellate Court to consider the defendant's remaining appellate claims.

(*Three justices concurring separately in two opinions*)

Argued November 16, 2021—officially released March 29, 2022

*Procedural History*

Three substitute informations charging the defendant with violation of probation, brought to the Superior

Court in the judicial district of Danbury, geographical area number three, where the cases were consolidated and tried to the court, *Russo*, *J.*; judgments revoking the defendant's probation, from which the defendant appealed to the Appellate Court, *Sheldon* and *Eveleigh*, *Js.*, with *Elgo*, *J.*, dissenting, which reversed the trial court's judgments and remanded the cases with direction to render judgments for the defendant, and the state, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III* and *Sharmese L. Walcott*, state's attorneys, for the appellant (state).

*James B. Streeto*, senior assistant public defender, for the appellee (defendant).

*Opinion*

KAHN, J. The principal issue in this case is whether the first amendment to the United States constitution protects certain allegedly threatening remarks made by the defendant, Kerlyn M. Taveras, to the employees of his son's preschool in Danbury. In this certified appeal, the state claims that the Appellate Court incorrectly concluded that the evidence contained in the record precluded application of the true threats exception and, as a result, improperly reversed the judgments of the trial court revoking the defendant's probation pursuant to General Statutes § 53a-32 on the basis of that evidence. The defendant, in response, argues that the Appellate Court's analysis on the point was sound, and that his conduct on the day of the incident in question warrants first amendment protection. For the reasons that follow, we agree with the state and, accordingly, reverse the judgment of the Appellate Court.

The following evidence, adduced at the defendant's probation revocation hearing, and procedural history are relevant to our consideration of this appeal. The record establishes that the defendant had been previously charged with, and pleaded guilty to, the following offenses in three separate criminal cases: (1) threatening in the second degree in violation of General Statutes § 53a-62 (a) (3) in connection with an incident that occurred on or about September 17, 2009; (2) assault in the third degree in violation of General Statutes § 53a-61 (a) (1) in connection with an incident that occurred on or about June 30, 2011; and (3) threatening in the second degree in violation of § 53a-62 (a) (3) in connection with an incident that occurred on or about July 28, 2011. The trial court accepted those pleas and, on August 22, 2012, imposed a total effective sentence on those charges of three years of incarceration, execution suspended after twelve months, followed by three years of probation.[1] The defendant's term of probation on these charges began on July 1, 2013. On August 28, 2012, and then again on April 25, 2013, the defendant agreed to the standard conditions of probation set forth on Judicial Branch Form JD-AP-110. Those conditions expressly prohibited the defendant from, among other things, "violat[ing] any criminal law of the United States, this state or any other state or territory."

On March 11, 2014, approximately eight months into his term of probation, the defendant precipitated an incident at his son's preschool in Danbury. The evidence contained in the record about that event comes almost exclusively from two distinct sources: (1) testimony from the preschool's director, Monica Bevilaqua; and

[1] We note that, because the sentences of incarceration imposed on each of these convictions were to run consecutively, rather than concurrently, the Appellate Court's recitation of the defendant's total effective sentence was technically inaccurate. See *State* v. *Taveras*, 183 Conn. App. 354, 359, 193 A.3d 561 (2018).

(2) an affidavit from the defendant's probation officer, Christopher Kelly, dated April 17, 2014, requesting the issuance of a warrant for a violation of the defendant's probation.[2] We review these two accounts in turn.

First, Bevilaqua testified that the defendant's son was one of about four hundred students enrolled at the preschool and that his child's scheduled hours were 8:30 a.m. to 4 p.m. Shortly after 4 p.m. on March 11, 2014, Bevilaqua, who was not then physically present at the preschool, received a call from her staff informing her that the defendant was late for pickup. Pursuant to standard policy, preschool staff had reached out to the defendant by phone to ask where he was. Bevilaqua testified that the defendant was "not happy" about this call but that he had, nonetheless, told staff that he was on his way.

According to reports from Bevilaqua's staff, the defendant eventually arrived at the preschool at approximately 4:40 p.m. in an "already escalated" emotional state, went down to his child's classroom, and then began arguing with staff on his way out. Sondra Cherney, the preschool's assistant education manager, then said something to the defendant as he was exiting the preschool through a set of locked doors. Bevilaqua testi-

[2] Kelly's affidavit was admitted as a full exhibit without objection. Although defense counsel objected to portions of Bevilaqua's testimony on hearsay grounds, the trial court overruled that objection. In a subsequent articulation, the trial court expressed its view that, although Bevilaqua's testimony constituted hearsay, it was nonetheless admissible for the purpose of proving the defendant's violation of probation because it was "relevant, reliable, and probative." See, e.g., *State* v. *Gumbs*, 94 Conn. App. 747, 751, 894 A.2d 396, cert. denied, 278 Conn. 917, 899 A.2d 622 (2006). The defendant assigned error to the admission of this testimony in his initial appeal, but the Appellate Court declined to reach that issue in its decision. See *State* v. *Taveras*, supra, 183 Conn. App. 357 n.2. In briefing the present appeal, the defendant has argued only that the whole of the state's evidence, including Bevilaqua's testimony, is insufficient to support the trial court's judgments. Questions related to the admissibility of Bevilaqua's testimony were neither briefed nor argued before this court.

fied that, in response to Cherney's comment, the defendant turned around and said, "you better watch yourself, you better be careful . . . ." Bevilaqua indicated that the defendant then "tried to get back in the door and couldn't, and then he left."

Other portions of Bevilaqua's testimony provide the following additional factual context. Bevilaqua indicated that this situation was not the staff's first "escalated interaction" with the defendant. Although the details of these previous interactions were not expressly drawn out at the hearing, Bevilaqua clearly testified that she herself had previously witnessed the defendant acting in a threatening manner. Indeed, Bevilaqua stated that she made the decision to return to the preschool as soon as she heard that the defendant was going to be late because she "knew it would get escalated." When she got to the preschool, she found that members of her staff were "shaken up" and "concerned" by what had transpired. Bevilaqua also stated that, in order to protect those at the preschool, she immediately contacted the police, formally prohibited the defendant from reentering the preschool, began pursuing a restraining order, and hired a police officer for additional security the following day.

Kelly's affidavit provides the following similar account of events: "[On March 11, 2014, police officers were] dispatched to [a preschool for] a dispute involving [the defendant]. [The defendant] was forty minutes late picking up his child . . . and [was] . . . reminded . . . that he needed to pick his child up on time. [The defendant] became extremely agitated and began to argue with staff. Staff told [the defendant] that he had to leave because he was arguing with staff in the front lobby in front of other children and their parents. [The defendant] then yelled to the staff 'you better watch your back.' Staff reported . . . that [the defendant] was so enraged and intimidating that the school hired a police

officer for security the next morning in the event [the defendant] came back. [The defendant] agreed to meet [police officers] the next morning and was arrested for breach of [the] peace. [The defendant] was advised not to return to the school again, otherwise he would be arrested for criminal [t]respass."

The state subsequently sought revocation of the defendant's probation as a result of the defendant's conduct on March 11, 2014.[3] During the hearing that followed, the state proceeded on the theory that the foregoing testimony and evidence were sufficient to prove that the defendant had violated the terms of his probation by committing breach of the peace in the second degree, in violation of General Statutes § 53a-181 (a).[4]

On the basis of this testimony, the trial court found that the state had met its burden of proving, by a preponderance of the evidence, that the defendant had violated the standard terms of his probation by violating § 53a-

[3] The state also charged the defendant with violating the terms of his probation during a completely separate incident on April 16, 2014, but presented no evidence with respect to that alleged violation at the defendant's hearing. See *State* v. *Taveras*, supra, 183 Conn. App. 361 n.10.

[4] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or . . . (3) threatens to commit any crime against another person or such other person's property . . . . For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

Although portions of the prosecutor's arguments before the trial court appear to track the language of § 53a-181 (a) (1), the state subsequently relied on § 53a-181 (a) (3) as an alternative ground for affirmance when arguing the case before the Appellate Court. The Appellate Court subsequently examined the sufficiency of the state's evidence under both subdivisions of § 53a-181 (a). *State* v. *Taveras*, supra, 183 Conn. App. 373–74. The defendant raises no objection to that approach in the present appeal and, instead, argues only that the Appellate Court correctly concluded that the state's evidence fell short under either statutory provision.

181 (a). In ruling in favor of the state on the adjudicatory phase of the proceeding, the trial court explicitly found that the defendant had exhibited a "threatening nature and demeanor" and that his conduct had caused Bevilaqua to contact the police. In its ruling, the trial court acknowledged, and implicitly rejected, defense counsel's argument that the facts of the present case demonstrated nothing more than that "[a person] being upset with the way [a] daycare . . . handles [his] child . . . ." After the dispositional phase of the hearing, the trial court rendered judgments revoking the defendant's various terms of probation and sentenced him to a total effective term of eighteen months of incarceration.

The defendant then appealed from the trial court's judgments to the Appellate Court, claiming, inter alia, that the evidence presented at his probation revocation hearing was insufficient to support a finding that he had violated the terms of his probation. *State* v. *Taveras*, 183 Conn. App. 354, 357, 193 A.3d 561 (2018). Specifically, the defendant argued that the state's evidence was insufficient to establish that his remarks constituted a true threat and, therefore, that they warranted first amendment protection. Id., 357–58. The Appellate Court, in a split decision, agreed with the defendant and reversed the judgments of the trial court, reasoning that the defendant's remarks did not convey an explicit threat and that the state had failed to provide sufficient context to resolve the resulting ambiguity. See id., 380–81. Judge Elgo authored a dissent in which she concluded that, in light of the lower standard of proof applicable to probation proceedings, there was sufficient evidence to support the trial court's revocation of the defendant's probation. Id., 387–88. This certified appeal followed.[5]

[5] During oral argument before this court, the state abandoned any challenge to the Appellate Court's conclusion that the defendant's speech did not rise to the level of fighting words. See, e.g., *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

The standard of review and constitutional principles governing our review of the Appellate Court's true threats analysis are well established. "The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence . . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

"The first amendment permits states to restrict true threats, which encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . .

"Thus, we must distinguish between true threats, which, because of their lack of communicative value,

are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . . In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. . . .

"[T]o ensure that only *serious* expressions of an intention to commit an act of unlawful violence are punished, as the first amendment requires, the state . . . must do more than demonstrate that a statement *could* be interpreted as a threat. When . . . a statement is susceptible of varying interpretations, at least one of which is nonthreatening, the proper standard to apply is whether an objective listener would readily interpret the statement as a real or true threat; nothing less is sufficient to safeguard the constitutional guarantee of freedom of expression. To meet this standard [the state is] required to present evidence demonstrating that a reasonable listener, familiar with the entire factual context of the defendant's statements, would be *highly likely* to interpret them as communicating a genuine threat of violence rather than protected expression, however offensive or repugnant." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Haughwout* v. *Tordenti*, 332 Conn. 559, 570–72, 211 A.3d 1 (2019); see also *State* v. *Taupier*, 330 Conn. 149, 193–94, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

"In determining whether the trial court properly found that the defendant's statements and gestures were true

threats, we recognize that, although we ordinarily review findings of fact for clear error, [i]n certain first amendment contexts . . . appellate courts are bound to apply a de novo standard of review. . . . [In such cases] the inquiry into the protected status of . . . speech is one of law, not fact. . . . As such, an appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect. . . . [I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression. . . . This rule of independent review was forged in recognition that a [reviewing] [c]ourt's duty is not limited to the elaboration of constitutional principles . . . . [Rather, an appellate court] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . Therefore, even though, ordinarily . . . [f]indings of fact . . . shall not be set aside unless clearly erroneous, [appellate courts] are obliged to [perform] a fresh examination of crucial facts under the rule of independent review. . . . We emphasize, however, that the heightened scrutiny that this court applies in first amendment cases does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted a true threat, we accept all subsidiary credibility determinations and findings that are not clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Haughwout* v. *Tordenti*, supra, 332 Conn. 572–73. The defendant concedes that,

because he is charged with a violation of probation, a preponderance of the evidence standard governed the trial court's findings of historical fact. See, e.g., *State* v. *Davis*, 229 Conn. 285, 290–91, 641 A.2d 370 (1994); see also *Haughwout* v. *Tordenti*, supra, 586 n.20 (conducting true threats analysis within context of "record as reflected by the lower burden of proof in civil cases").

Our independent examination of the present case is guided, in particular, by this court's decision in *State* v. *Krijger*, 313 Conn. 434, 97 A.3d 946 (2014). The defendant in that case had been engaged in a long-standing zoning dispute with the town of Waterford. Id., 436, 438. Although the defendant had been "pleasant and cooperative" with the town's attorney on dozens of previous occasions, he became upset after a particular court hearing, followed the town's attorney out of the courthouse, and began yelling. (Internal quotation marks omitted.) Id., 438–40. The defendant told the attorney that "[m]ore of what happened to your son is going to happen to you" and that he was "going to be there to watch it happen." (Internal quotation marks omitted.) Id., 440. The attorney, whose son had been injured in a highly publicized car accident, responded by calling the defendant "a piece of shit" and eventually walked away. (Internal quotation marks omitted.) Id., 440–41 and n.6. Before the attorney reached his car, he was approached once again by the defendant, who then apologized for his outburst. Id., 442. Although the attorney did not initially perceive the defendant's comments as a threat, he eventually filed a complaint with the police department two days later. Id. The defendant was later charged with threatening in the second degree. Id.

We began our examination of the first amendment issue in *Krijger* by recognizing that the "absence of explicitly threatening language [did] not preclude the finding of a threat . . . ." (Internal quotation marks omitted.) Id., 453; see *Planned Parenthood of the*

*Columbia/Willamette, Inc.* v. *American Coalition of Life Activists*, 290 F.3d 1058, 1078–79 (9th Cir. 2002) ("context is critical in a true threats case . . . because without context, a burning cross or dead rat mean nothing" (citation omitted; footnotes omitted)), cert. denied, 539 U.S. 958, 123 S. Ct. 2637, 156 L. Ed. 2d 655 (2003); *United States* v. *Malik*, 16 F.3d 45, 50 (2d Cir.) ("rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render [statutes proscribing true threats] powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat"), cert. denied, 513 U.S. 968, 115 S. Ct. 435, 130 L. Ed. 2d 347 (1994); see also *Haughwout* v. *Tordenti*, supra, 332 Conn. 575 ("[p]ut differently, even veiled statements may be true threats").

To discern the true nature of the defendant's expression in *Krijger*, we looked to the context provided by both the prior relationship between the parties and the particular circumstances surrounding the alleged threat itself. *State* v. *Krijger*, supra, 313 Conn. 454. First, we observed that the case was "not [one] in which one's prior hostile acts or menacing behavior provided a clarifying lens through which to view an ambiguous threat" because the defendant and the town attorney had an established relationship that, despite its adversarial nature, had always been "cordial and professional." Id. Second, we noted that the alleged threats followed a surprisingly contentious court hearing, that the attorney did not initially view the defendant's remarks as a threat, and that the defendant had apologized shortly after making the remarks in question. Id., 454–55. On the basis of the facts presented, we concluded that a reasonable person would have viewed the defendant's remarks as a crude, but ultimately benign, way of simply

saying " 'what goes around comes around' " and reversed the defendant's conviction. Id., 456, 461.

The facts underlyng the present case differ significantly from those considered in *Krijger*. Although the phrase "you better watch your back"[6] can, in some contexts, be used to sincerely caution an addressee of an impending threat from some external source, it can also be used as a veiled or conditional threat of violence. See, e.g., *State* v. *Lewis*, Docket No. 96-P-0272 (DRF), 1997 WL 589914, *3 (Ohio App. August 22, 1997) ("A statement such as 'you better watch your back' is what is known in law as a conditional threat. . . . Even in the absence of a reference to a specific action, the logical import of such a statement is that the person is being threatened with potential physical harm." (Citations omitted.)).[7] The record is bereft of any suggestion that the defendant's decision to yell these words at Cherney was intended to convey the former sentiment. See *State* v. *Taveras*, supra, 183 Conn. App. 390 (*Elgo*, *J.*, dissenting.) ("[t]his is not a case of a bystander alerting a pedestrian to an errant vehicle"). The defendant's history at the preschool, his general demeanor during the course of this particular incident itself, and the subsequent reactions of the preschool's staff, on balance, appear objectively to indicate the threat of the possibility of violence.

First, Bevilaqua's testimony suggests the defendant had a hostile relationship with preschool staff. Bevila-

[6] Although Bevilaqua and Kelly provided slightly different accounts of the defendant's actual words, given the surrounding context, "you better watch yourself" and "you better watch your back" can both be reasonably construed as a threat of physical violence.

[7] The fact that the defendant was locked out of the preschool at the time and, therefore, was unable to immediately carry out his threat is not determinative. See, e.g., *State* v. *Carter*, 141 Conn. App. 377, 401, 61 A.3d 1103 (2013) (threats while defendant was handcuffed), aff'd, 317 Conn. 845, 120 A.3d 1229 (2015); see also *United States* v. *Voneida*, 337 Fed. Appx. 246, 249 (3d Cir. 2009) (threats while defendant was incarcerated).

qua not only stated that the defendant had previously caused several "escalated interaction[s]" at the preschool but also specifically testified that she had previously seen the defendant act in a threatening manner. See *State* v. *Krijger*, supra, 313 Conn. 454 ("[w]hen the alleged threat is made in the context of an existing or increasingly hostile relationship, courts are more apt to conclude that an objectively reasonable speaker would expect that the statement would be perceived by the listener as a genuine threat"). The fact that employees of the preschool notified Bevilaqua of the defendant's late arrival even before it occurred, together with the fact that Bevilaqua immediately decided to return to the preschool because she "knew things would get escalated," indicates at the very least that this history fell far short of the "cordial and professional" relationship evinced by the record in *Krijger*.[8]

Although we agree with the defendant that evidence adduced by the state does not detail his precise physical movements during the incident in question, we cannot concur with his blanket assertion that there was "no evidence" of his conduct on that day. The evidence recounted previously in this opinion indicates that the defendant was irritated by the call he had initially received, that he became argumentative with staff after

[8] The Appellate Court based its own true threats analysis in the present case, in part, on the assumption that "there is . . . no evidence that Cherney had previously witnessed [the defendant's] prior behavior . . . ." *State* v. *Taveras*, supra, 183 Conn. App. 381. There is, however, testimony in the record indicating that the school's staff was generally aware of previous incidents involving the defendant. Specifically, in describing the reaction of her staff to the incident at issue in the present case, Bevilaqua testified as follows: "I think . . . people were concerned. It wasn't our first interaction with [the defendant], [i]t certainly wasn't our first escalated interaction, and people were concerned, [m]y staff were concerned . . . ." Bevilaqua also indicated that her staff had originally called to tell her about the defendant's late arrival "because this was not the first incident . . . ." In our view, it is more than reasonable to infer that Cherney, as manager at the preschool, would have been aware of those same incidents herself.

he arrived, and that his conduct eventually escalated to the point that he was asked to leave. After exiting through a set of locked doors, the defendant turned around, yelled at Cherney, and then unsuccessfully attempted to reenter the building. While neither Bevilaqua nor Kelly was able to describe the exact manner in which the defendant had attempted to open those doors, the evidence suggests that he was acting in an "enraged" and "intimidating" manner at that particular moment in time. We agree with Judge Elgo's conclusion that, in light of the foregoing, the trial court could have reasonably found by a preponderance of the evidence that the defendant's attempt to reenter the preschool was, at least more likely than not, "aggressive in nature." *State* v. *Taveras*, supra, 183 Conn. App. 386 (*Elgo*, *J.*, dissenting).

Another important factor in our independent analysis is the reactions of the preschool's staff. Unlike the attorney in *Krijger*, who waited two days to contact the police, staff members in the present case immediately contacted their supervisor, Bevilaqua, to tell her what had occurred. Bevilaqua testified that, when she arrived at the preschool shortly thereafter, she found that her staff was "shaken up" and "concerned" by what had transpired. Bevilaqua then immediately contacted the police,[9] formally prohibited the defendant from reentering the preschool, began pursuing a restraining order, and hired a police officer for additional security the

[9] As Judge Elgo's dissent aptly observes: "Bevilaqua explained that the preschool's 'internal policy' was to contact [the] police 'when something escalates' to the point of '[s]taff being threatened.' Consistent with that policy, Bevilaqua testified that she contacted the Danbury Police Department, whose officers took statements from staff members. Questioned as to how she differentiates between 'a small threat, like . . . I hate this place,' and something 'larger' and more substantial, Bevilaqua testified that she was 'trained to know the difference.' " *State* v. *Taveras*, supra, 183 Conn. App. 386.

following day.[10] The immediate pursuit of these particular preventative measures reasonably suggests a specific fear of physical violence. The record now before us contains no suggestion that these measures were viewed, either contemporaneously or in hindsight, as an overreaction to the defendant's remarks.

Ultimately, the state's decision to present its case against the defendant through Bevilaqua and Kelly, neither of whom actually witnessed the defendant's conduct at the preschool on that particular day, makes this case a harder one. Prosecutors, in deciding to accuse individuals of committing breach of the peace in the second degree in violation of § 53a-181, and, then, judges and juries in making findings of fact, are required to separate incidents that reflect the normal agitations of life from those that are truly injurious to our society. In the absence of any direct evidence of the defendant's conduct, the trial court was left with only secondhand accounts to decide whether the defendant had crossed that line. Nevertheless, we agree with Judge Elgo's conclusion that, particularly in light of the lower standard of proof attendant to violations of probation, the evidence of the defendant's conduct and demeanor, together with the reactions that followed, is sufficient to support the trial court's implicit findings in that regard.

As an appellate tribunal, our constitutional obligation to independently examine the evidentiary record requires us to determine only whether a reasonable person in

[10] We note that the true threats exception is specifically designed to guard against the deadweight losses to our society that are unique to threats of physical violence. See *Haughwout* v. *Tordenti*, supra, 332 Conn. 559, 571 (true threats exception "protect[s] individuals from the fear of violence *and from the disruption that fear engenders*" (emphasis added; internal quotation marks omitted)); *State* v. *Pelella*, 327 Conn. 1, 17, 170 A.3d 647 (2017) ("[t]hreatening speech . . . works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed" (internal quotation marks omitted)).

the defendant's position would have known that the use of the phrase "you better watch your back," combined with his demeanor and other surrounding context, would be perceived as a serious threat of physical violence. See, e.g., *State* v. *Taupier*, supra, 330 Conn. 190–94. The state has shown through the evidence presented that those remarks were, in fact, viewed as a threat of violence by Bevilaqua and her staff. The defendant's choice of words, his previous interactions with preschool staff, the descriptions of his demeanor, and his attempt to reenter the preschool at the height of the altercation, collectively, point toward the conclusion that their perception was, if nothing more, objectively reasonable. As a result, we disagree with the Appellate Court's conclusion that the defendant's remarks warrant first amendment protection[11] and remand the case for consideration of the defendant's claims with respect to the admission of Bevilaqua's testimony. See footnote 2 of this opinion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the defendant's remaining claims on appeal.

In this opinion ROBINSON, C. J., and MULLINS, ECKER and KELLER, Js., concurred.

ROBINSON, C. J., concurring. I join the majority's well reasoned opinion in this case. I write separately only to highlight the importance of factual context in considering whether a statement, which facially may be susceptible to varying interpretations, rises to the level of a true threat, rendering it unprotected by the first amendment to the United States constitution. See, e.g., *Haughwout* v. *Tordenti*, 332 Conn. 559, 570–72,

[11] In light of this conclusion, we need not consider the state's claim that the defendant's conduct, as opposed to his speech, constituted a breach of the peace in the second degree.

211 A.3d 1 (2019); *State* v. *Taupier*, 330 Conn. 149, 193–94, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019); *State* v. *Krijger*, 313 Conn. 434, 454–55, 97 A.3d 946 (2014). The thoughtful analysis in the majority opinion aptly highlights how a defendant's conduct may provide the necessary context for a reasonable understanding of the meaning of his or her words. In my view, the majority opinion furnishes a cogent example of the searching and independent appellate review necessary to ensure that not every public expression of anger or frustration may be deemed to constitute criminal conduct, namely, a breach of the peace in the second degree in violation of General Statutes § 53a-181 (a).[1] See also General Statutes § 53a-181a (creating public disturbance is infraction).[2] I therefore join the majority's reversal of the judgment of the Appellate Court.

D'AURIA, J., with whom McDONALD, J., joins, concurring. Although I agree with much of the analysis and reasoning of the majority's opinion, I would eschew a true threats analysis in this case. Instead, I am convinced by the approach of Judge Elgo's dissenting opinion in the Appellate Court. See *State* v. *Taveras*, 183 Conn. App. 354, 382–92, 193 A.3d 561 (2018) (*Elgo*, *J.*,

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or . . . (3) threatens to commit any crime against another person or such other person's property . . . . For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

[2] General Statutes § 53a-181a (a) provides: "A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise."

dissenting). For the same reasons contained in her cogent dissenting opinion, I would reverse the Appellate Court's judgment and remand the case to that court, as the majority does. Accordingly, I respectfully concur.

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## TAMARA DORFMAN *v.* JOSCELYN M. SMITH (SC 20556)

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

*Syllabus*

The plaintiff appealed from that part of the trial court's judgment dismissing her claims against the defendant insurance company for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) based on a violation of the Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.). The plaintiff had been involved in a motor vehicle collision with J, one of the defendant's insureds. The plaintiff thereafter filed a claim with the defendant under the underinsured motorist provision of her policy. The defendant investigated the claim, concluded that J was 100 percent at fault and made notations of its findings in the claim file. The defendant then notified the plaintiff that her right to pursue her claim was conditioned on her provision of an affidavit of no excess insurance. The plaintiff subsequently brought the present action. The defendant hired attorneys to represent it in connection with the plaintiff's action but deliberately withheld from them its file notes, which included the recorded statement and identity of a witness to the collision, even though the defendant knew that information was necessary for its attorneys to prepare accurate responses to the plaintiff's complaint and discovery requests. The defendant pleaded in its answer to the plaintiff's complaint that it denied or did not have sufficient information to admit the plaintiff's allegations regarding the cause of the collision and her injuries, and asserted a special defense of contributory negligence, even though it knew that it was without a basis in fact. The defendant also provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of the witness to the collision or whether any recorded statements of witnesses existed. In the plaintiff's deposition of the defendant, the defendant's designee admitted that the defendant had been aware of the witness to the collision and his recorded statement but failed to disclose that information in its interrogatory responses. The designee also indicated that the defendant did not single out the plaintiff for special or unique treatment when it conditioned her receipt

of underinsured motorist benefits on the provision of an affidavit of no excess insurance and when it provided false responses to her discovery requests. The defendant admitted liability with respect to the plaintiff's breach of contract claim, and the plaintiff was awarded damages in connection therewith. In dismissing the plaintiff's claims of breach of the implied covenant of good faith and fair dealing and negligent inflection of emotional distress, however, the trial court concluded that those claims were barred by the litigation privilege because they were predicated on communications and statements made in the course of and related to a judicial proceeding. The court also concluded that the litigation privilege applied to the plaintiff's allegations regarding the defendant's purported business practice of responding falsely to discovery requests and dismissed that portion of the plaintiff's CUTPA claim. The court nevertheless determined that the litigation privilege did not bar the plaintiff's CUTPA claim to the extent that the plaintiff alleged that the defendant maintained an improper business practice of conditioning the receipt of underinsured motorist benefits on the provision of an affidavit of no excess insurance, which purportedly was in violation of statute (§ 38a-336c (c)). The Appellate Court dismissed the plaintiff's initial appeal for lack of a final judgment. The plaintiff then amended her complaint to remove all allegations regarding the defendant's purported violation of § 38a-336c (c), and the trial court rendered judgment for the plaintiff on her breach of contract claim and for the defendant on the plaintiff's extracontractual claims, from which the plaintiff appealed. *Held*:

1. The trial court correctly determined that the litigation privilege barred the plaintiff's claim of breach of the implied covenant of good faith and fair dealing: the plaintiff's claim that the defendant systemically abused the judicial process challenged the defendant's conduct in defending against her underinsured motorist claim, rather than the purpose of the underlying judicial proceedings, and her claim was similar to a defamation claim, to which the litigation privilege generally applies, insofar as it was premised on the communication of false statements in pleadings and other documents related to litigation; moreover, the fact that the defendant made the allegedly false communications to its attorneys rather than in court or directly to the court or to an opposing party did not limit the application of the litigation privilege, as the defendant's communications to its attorneys led to misrepresentations and deceptive answers in pleadings and documents that had been filed during the course of litigation; furthermore, although the plaintiff asserted that the bad faith element of a claim of breach of the implied covenant of good faith and fair dealing was equivalent to the malicious intent element of a vexatious litigation claim, to which the litigation privilege generally does not apply, a complete definition of bad faith demonstrated that the plaintiff's good faith and fair dealing claim was more akin to a claim of fraud, to which courts have applied the litigation

privilege, the fact that the plaintiff's claim involved dishonesty did not make it akin to a claim of vexatious litigation, and the fact that the plaintiff alleged facts that may have been sufficient to support a vexatious litigation claim did not prevent the litigation privilege from applying to the claim she actually alleged; in addition, to the extent that the plaintiff claimed that the common-law immunity afforded to knowingly false communications made during judicial proceedings was abrogated by statute (§ 52-99) or that public policy disfavored immunity under these circumstances, those claims were unavailing, and there existed safeguards other than civil liability to deter or preclude misconduct or to provide relief from the defendant's alleged misconduct.

2. The trial court properly applied the litigation privilege to the plaintiff's claim of negligent infliction of emotional distress, and, accordingly, that claim was properly dismissed; the plaintiff's allegations in support of that claim incorporated the same allegations she made in support of her claim of breach of the implied covenant of good faith and fair dealing and also were premised on communications that the defendant made during and relevant to the underlying judicial proceeding.

3. The plaintiff's claim that the defendant violated CUTPA based on a violation of CUIPA was barred by the litigation privilege: the litigation privilege bars CUTPA claims, like the claim at issue, premised solely on general allegations of intentionally false discovery responses made by an insurer during and relevant to a judicial proceeding because those claims merely challenge the making of false statements; moreover, there were no allegations in the plaintiff's complaint that the defendant's misconduct occurred with such frequency as to constitute a statutorily (§ 38a-816 (6)) prohibited general business practice, as her allegations regarding that conduct were limited to the defendant's conduct in the present case; furthermore, although the business practice of misrepresenting facts relating to insurance coverage issues is prohibited by § 38a-816 (6), CUIPA did not abrogate absolute immunity for conduct allegedly in violation of that statute, as CUIPA does not impose liability for such conduct by imposing a private right of action but, instead, limits the remedy under that act to administrative action by the Commissioner of Insurance, that remedy was available to the plaintiff, and the legislature could have explicitly abrogated the immunity afforded by the litigation privilege for violations of that statute but did not.

(*One justice concurring in part and dissenting in part*)

Argued April 28, 2021—officially released March 29, 2022

*Procedural History*

Action to recover damages for injuries sustained as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court,

*Robaina*, *J.*, granted the plaintiff's motion to add Liberty Mutual Fire Insurance Company as a defendant; thereafter, the action was withdrawn as against the named defendant; subsequently, the court, *Noble*, *J.*, granted the motion filed by the defendant Liberty Mutual Fire Insurance Company to bifurcate the trial as to the second count of the operative complaint; thereafter, the second count was tried to the jury before *Noble*, *J.*; verdict for the plaintiff; subsequently, the court, *Noble*, *J.*, granted in part the motion to dismiss the remaining counts filed by the defendant Liberty Mutual Fire Insurance Company; thereafter, the plaintiff withdrew the amended complaint in part, and the court, *Noble*, *J.*, rendered judgment in part for the plaintiff and in part for the defendant Liberty Mutual Fire Insurance Company, from which the plaintiff appealed. *Affirmed.*

*Proloy K. Das*, with whom were *Leonard M. Isaac*, *James J. Nugent*, *Marilyn B. Fagelson* and, on the brief, *Brian Parrott*, for the appellant (plaintiff).

*Philip T. Newbury*, *Jr.*, for the appellee (defendant Liberty Mutual Fire Insurance Company).

*Opinion*

D'AURIA, J. This appeal requires that we examine the scope of the litigation privilege, which provides absolute immunity from suit, in relation to alleged misconduct by an insurance company. The plaintiff, Tamara Dorfman, appeals from that part of the trial court's judgment dismissing her claims against the defendant Liberty Mutual Fire Insurance Company for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of the Connecticut Unfair Trade Practices Act (CUTPA); General Statutes § 42-110a et seq.; based on a violation of the Connecticut Unfair Insurance Practices Act (CUIPA),General Statutes § 38a-815 et seq. The trial court dismissed these claims on the ground that the litigation

privilege deprived the court of subject matter jurisdiction over these claims. The plaintiff argues that, because these claims were the functional equivalent of claims for vexatious litigation, the litigation privilege did not apply. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, as alleged in the complaint, construed in the light most favorable to the plaintiff, and contained in the record, are relevant to our review of these claims. In 2014, the plaintiff was injured when her motor vehicle collided with a vehicle operated by Joscelyn M. Smith, who failed to stop his vehicle at a stop sign. At the time of the collision, the defendant insured the plaintiff under a contract of motor vehicle insurance, which contained a provision for uninsured-underinsured motorist coverage as required by General Statutes § 38a-336. At the time of the collision, Smith was underinsured, and the plaintiff filed a claim with the defendant under the underinsured motorist provision of her insurance contract.

As part of its general business practices, the defendant investigated the collision to determine the cause and legal responsibility. In investigating the plaintiff's claim, the defendant acquired the police report regarding the collision, the plaintiff's recorded statement, and the recorded statement of Birbahadu Guman, a witness to the collision who was not listed in the police report. The report and the statements all noted Smith's failure to stop at the stop sign. Based on this information, two claims specialists employed by the defendant both concluded that Smith was 100 percent liable for the collision and noted their findings in the claim file. The defendant notified the plaintiff that her right to pursue her claim was conditioned on her providing an affidavit of no excess insurance.

To compel payment of the underinsured motorist benefits, the plaintiff brought suit against the defendant,

alleging breach of contract.[1] The defendant hired attorneys to represent it in connection with the plaintiff's claim but deliberately withheld from them its file notes regarding the claim, Guman's name and existence, and Guman's recorded statement, even though it knew this information was necessary for its attorneys to prepare accurate responses to the plaintiff's complaint and discovery requests. In answering the complaint, the defendant pleaded that either it denied or did not have sufficient information to admit the allegations that Smith had failed to stop at a stop sign, causing the collision and the plaintiff's resulting injuries. The defendant also asserted a special defense of contributory negligence, even though it knew this to be false. As a result, the plaintiff alleges that the defendant's answer "falsely responded to . . . [the] allegation[s]" in the complaint, in violation of General Statutes § 52-99.

The plaintiff's attorney then noticed the defendant's deposition to address, in part, the factual basis behind its answer and special defense. The defendant moved for a protective order. Additionally, the defendant provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of any witnesses not listed in the police report and whether any recorded statements existed. In further response to the deposition notice, the defendant's corporate designee testified under oath, admitting that "[t]here was no basis in fact for [the defendant's] accusation that [the plaintiff] was in any way responsible for causing the accident" and that the defendant "had known that

[1] In the original complaint, the plaintiff also raised a claim of negligence against Smith but later withdrew it after she settled with Smith for his policy limits. Thus, Liberty Mutual Fire Insurance Company was the only remaining defendant at the time it moved to dismiss the claims at issue—breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of CUTPA based on a violation of CUIPA. Therefore, we refer to Liberty Mutual Fire Insurance Company as the defendant.

there was nothing [the plaintiff] could have done to avoid the accident . . . .'' The defendant's designee also admitted that the defendant was aware that Guman had witnessed the accident and made a recorded statement but failed to disclose this information in its interrogatory responses. On the basis of this conduct, the plaintiff alleges that the defendant ''used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and violated established rules of conduct in litigation,'' and ''knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support'' to try to prevent the plaintiff from receiving the benefits owed to her under the contract.

The defendant's designee also testified under oath that, in addition to this misconduct, ''[the defendant] did not single out [the plaintiff] for special or unique treatment when it conditioned [her] receipt of [underinsured motorist] benefits [on] the provision of an affidavit of no excess insurance but was instead pursuing conduct that Liberty Mutual Corporation routinely takes in its handling of claims from other policyholders as well.'' Similarly, the defendant's designee ''testified under oath that [the defendant] did not single out [the plaintiff] for special or unique treatment when it responded falsely to [her] discovery requests.''

Following this deposition, the trial court granted the plaintiff permission to amend her complaint to include claims for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of CUTPA based on a violation of CUIPA. The defendant moved to bifurcate the breach of contract claim from the extracontractual claims, which the trial court granted. Prior to trial on the breach of contract claim, the defendant withdrew its special defense of contributory negligence. At trial on the

breach of contract claim, the defendant admitted liability, and a jury awarded the plaintiff $169,928.

After the verdict, the defendant moved to dismiss the remaining claims for lack of subject matter jurisdiction on the ground that the litigation privilege barred those claims. The trial court granted the motion in part and denied it in part. Specifically, as to the plaintiff's claims for breach of the implied covenant of good faith and fair dealing and negligent inflection of emotional distress, the trial court held that, because the claims were predicated on communications and statements filed in the course of and related to a judicial proceeding, the litigation privilege applied. For the same reason, as to the plaintiff's claim for violation of CUTPA based on a violation of CUIPA, the trial court determined that the allegations regarding a business practice of responding falsely to discovery requests also were privileged. The trial court determined, however, that, to the extent the plaintiff's CUTPA claim alleged that the defendant maintained an improper business practice of conditioning receipt of underinsured motorist benefits on the provision of an affidavit of no excess insurance, in violation of General Statutes § 38a-336c (c), the litigation privilege did not bar such a claim because this practice did not occur during the judicial proceedings but occurred before the action commenced. Thus, the trial court granted the motion to dismiss except as to the plaintiff's CUTPA claim to the extent it was premised on a violation of § 38a-336c (c).

The plaintiff appealed from the trial court's decision on the defendant's motion to dismiss, but the Appellate Court dismissed the appeal for lack of a final judgment in light of the continued viability of the CUTPA claim. The plaintiff subsequently requested and received permission to amend her complaint to remove all allegations regarding the alleged violation of § 38a-336c (c). Because the alleged violation of § 38a-336c (c) was the

only claim to have survived the motion to dismiss, the trial court determined that the withdrawal of these allegations effectively withdrew this theory of liability. Accordingly, the court rendered judgment in favor of the defendant on all of the plaintiff's extracontractual claims. The plaintiff then appealed to the Appellate Court. The appeal was then transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

I

Before addressing the applicability of the litigation privilege, "[w]e begin our analysis with a review of [this] doctrine . . . as set forth in *Simms* v. *Seaman*, 308 Conn. 523, 531–40, 69 A.3d 880 (2013). In *Simms*, we noted that the doctrine of absolute immunity originated in response to the need to bar persons accused of crimes from suing their accusers for defamation. . . . The doctrine then developed to encompass and bar defamation claims against all participants in judicial proceedings, including judges, attorneys, *parties*, and witnesses. . . . We further noted that, [l]ike other jurisdictions, Connecticut has long recognized the litigation privilege, and that [t]he general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 627, 79 A.3d 60 (2013).

Recently, in *Scholz* v. *Epstein*, 341 Conn. 1, 10, 266 A.3d 127 (2021), we recognized the policy rationales underlying this privilege.[2] Although we articulated these

[2] In *Scholz*, we explained that "[t]hree rationales have been articulated in support of the absolute privilege. [*Simms* v. *Seaman*, supra, 308 Conn.] 535. The most important is that the privilege protects the rights of clients who should not be imperiled by subjecting their legal advisors to the constant fear of lawsuits arising out of their conduct in the course of legal representa-

rationales in relation to a claim brought against an attorney for communications made during a judicial proceeding, we also have relied on these rationales to apply immunity to claims brought against party opponents and witnesses: "[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of absolute immunity] was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 627–28.

tion. . . . Id. [Second, by] affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings [we have recognized] that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Id., 539. Additionally, the privilege protects access to the courts inasmuch as retaliatory lawsuits [that might] cause the removal of [an] adversary's counsel would compromise the judicial process, and there exist other remedies, such as the court's contempt powers . . . . Id., 535–36." (Internal quotation marks omitted.) *Scholz* v. *Epstein*, supra, 341 Conn. 10.

We since have recognized that absolute immunity extends to an array of retaliatory civil actions beyond claims of defamation, including intentional interference with contractual or beneficial relations arising from statements made during a civil action, intentional infliction of emotional distress arising from statements made during judicial proceedings, and fraud against attorneys or party opponents for their actions during litigation. See id., 628; *Tyler* v. *Tatoian*, 164 Conn. App. 82, 92, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). This expansion is premised on the rationale that, "because the privilege protects the communication, the nature of the theory [on which the challenge is based] is irrelevant." (Emphasis omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 628.

This court in *Simms*, however, explained that there are limits to the application of the litigation privilege. See *Simms* v. *Seaman*, supra, 308 Conn. 540–41. Specifically, the litigation privilege does not bar claims for abuse of process, vexatious litigation, and malicious prosecution. Id., 540–42. This is because "whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests . . . ." (Citation omitted; internal quotation marks omitted.) Id., 541–42.

Specifically, *Simms* identified the following factors as relevant to any determination of whether policy considerations support applying absolute immunity to any particular cause of action:[3] (1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding in a similar way to how conduct constituting abuse of process and vexatious litigation subverts that

[3] These factors, to the extent relevant, apply regardless of whether the action is against an attorney, party opponent, or witness. See *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 630–31.

underlying purpose; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as the privilege bars a defamation action; and (3) whether the alleged conduct may be adequately addressed by other available remedies. Id., 545. Assisting in our evaluation of these factors, to the extent applicable, we have considered as persuasive whether federal courts have protected the alleged conduct pursuant to the litigation privilege. See id., 545–46. These factors and considerations, however, are "simply instructive," and courts must focus on "the issues relevant to the competing interests in each case" in light of the "particular context" of the case.[4] (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 630–31. We are not required to rely exclusively or entirely on these factors, but, instead, they are useful when undertaking a careful balancing of all competing public policies implicated by the specific claim at issue and determining whether affording parties this com-

[4] For example, in *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 630–31, this court held that absolute immunity did not bar a claim of employer retaliation. In *MacDermid, Inc.*, the plaintiff employer filed an underlying action for civil theft, fraud, unjust enrichment, and conversion, premised on the defendant employee's conduct in relation to the employee's workers' compensation claim. See id., 622. The defendant employee then filed a counterclaim, alleging that the plaintiff employer violated General Statutes § 31-290a by initiating the underlying action solely in retaliation for his exercise of his rights under the Workers' Compensation Act, General Statutes § 31-275 et seq. Id. The plaintiff subsequently moved to dismiss the defendant's counterclaim, arguing that the court lacked subject matter jurisdiction over that claim because the doctrine of absolute immunity protects the act of filing an action. Id. In holding that the litigation privilege did not apply to a claim alleging a violation of § 31-290a, we noted that the claim did not include the same stringent requirements and balancing of interests as does a claim of vexatious litigation. Id., 632–33. Nevertheless, we determined that the public policy underlying § 31-290a was similar to the public policy underlying a claim of vexatious litigation. See id., 631, 635; see also part II A of this opinion. Additionally, we relied heavily on the fact that, not only would barring immunity not open the floodgates to retaliatory claims against employers, but providing immunity actually would deter employees from exercising their rights under the act. See id., 625 n.7, 635–36.

mon-law immunity from this common-law action is warranted.

The plaintiff does not address these factors as to each count the trial court dismissed but, rather, argues generally that counts three, four, and five are not barred by absolute immunity because all three counts are premised on the defendant's improper use of the courts, all three counts are the functional equivalent of a claim for vexatious litigation, to which absolute immunity does not apply, and statutes and case law establish a public policy against applying the litigation privilege to the alleged conduct.

The applicability of absolute immunity implicates the court's subject matter jurisdiction.[5] E.g., *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 723, 161 A.3d 630 (2017); cf. *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (like colorable claim of sovereign immunity, to protect against threat of lawsuit, colorable claim of absolute immunity based on participation in judicial and quasi-judicial proceedings gives rise to immediately appealable final judgment). "When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss . . . a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 626. Whether absolute immunity applies to the causes of action at issue is a question of law subject to de novo review.

[5] The parties do not dispute that the doctrine of absolute immunity implicates the trial court's subject matter jurisdiction. The plaintiff, however, argues that, even if absolute immunity applies in the present case, the court retained jurisdiction because it had statutory authority pursuant to § 52-99 and inherent authority to sanction parties for litigation misconduct. See *Maris* v. *McGrath*, 269 Conn. 834, 848, 850 A.2d 133 (2004). We discuss this argument in part II C of this opinion.

See, e.g., *Simms* v. *Seaman*, supra, 308 Conn. 530. This is consistent with our de novo review of a trial court's ultimate legal conclusion and resulting determination of a motion to dismiss. See, e.g., *MacDermid, Inc.* v. *Leonetti*, supra, 626.

We address in turn each of the plaintiff's arguments as to each dismissed count.

II

The plaintiff's claim for breach of the implied covenant of good faith and fair dealing appears in count three of her complaint. The plaintiff alleged that the defendant falsely responded to the complaint, including by asserting a special defense the defendant knew had no basis in fact, as well as falsely responding to interrogatories and discovery requests. As a result, the defendant "used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and violated established rules of conduct in litigation," and "knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support in order to further frustrate [the plaintiff's] ability to receive benefits due [to her] under her contract." According to the plaintiff, through this conduct, the defendant (1) engaged in unfair, deceptive, and self-serving conduct, (2) deceitfully and maliciously attributed responsibility for the car crash to the plaintiff, (3) compelled the plaintiff to resort to litigation to obtain her benefits, and (4) filed false and misleading answers in pleadings and discovery responses it knew had no basis in fact to prolong litigation and to attempt to reduce the plaintiff's insurance benefits.

No appellate authority from this state addresses whether absolute immunity protects against this kind of claim. As a result, we must examine our case law, and the policies underpinning it, to determine whether the plaintiff's good faith and fair dealing claim is more

akin to claims of vexatious litigation and abuse of process, to which this court has not afforded absolute immunity, or to claims of fraud and defamation, to which this court has afforded absolute immunity. We conclude that all factors—those considered in *Simms* and those unique to this case—weigh in favor of applying the litigation privilege to bar the plaintiff's claim in the present case.

A

The plaintiff argues that her claim for breach of the implied covenant of good faith and fair dealing alleges conduct showing that the defendant systemically abused the judicial process and thereby improperly used the courts. "We have . . . recognized a distinction between attempting to impose liability [on] a participant in a judicial proceeding for the words used therein and attempting to impose liability [on] a litigant for his improper use of the judicial system itself." *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 629. "[W]e have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system" but have applied immunity to claims premised on factual allegations that challenge the defendant's conduct in a properly brought judicial proceeding when the cause of action does not require the plaintiff to challenge either the purpose of the underlying litigation or the purpose of a particular judicial procedure. Id. The former involves the improper use of the courts "to accomplish a purpose for which [they were] not designed" and is not protected by the litigation privilege. (Internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 546. The latter does not involve consideration of whether the purpose underlying the litigation was improper and, thus, is entitled to absolute immunity, even if the plaintiff alleges that the defendant's conduct constituted an improper use of the courts. Id., 546–47. That is to say, it is not enough for the plaintiff to allege that the misconduct at issue constituted an improper use of the judicial

system, but, rather, the cause of action itself must challenge the *purpose* of the underlying litigation or litigation conduct. See *Tyler* v. *Tatoian*, supra, 164 Conn. App. 93. Additionally, even if the allegations in the complaint are sufficient to support a claim for vexatious litigation or abuse of process but such claims are not raised, these allegations do not remove immunity from a claim that falls within the scope of the litigation privilege. See *Perugini* v. *Giuliano*, 148 Conn. App. 861, 873–74, 89 A.3d 358 (2014).

Thus, in determining whether the plaintiff's claim challenges the purpose of an underlying judicial proceeding, we look at the elements of the claim itself. See *Simms* v. *Seaman*, supra, 308 Conn. 546; see also *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 629, 631. "To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 399, 142 A.3d 227 (2016).

The plaintiff's claim does not challenge the purpose of any underlying litigation. Rather, her claim challenges the defendant's conduct in defending against her underinsured motorist claim.[6] A claim of breach of the covenant of good faith and fair dealing in general does not challenge the purpose of an underlying judicial pro-

[6] The litigation privilege does not apply to conduct not made in the course of a judicial proceeding. See, e.g., *Fiondella* v. *Meriden*, 186 Conn. App. 552, 563, 200 A.3d 196 (2018), cert. denied, 330 Conn. 961, 199 A.3d 20 (2019). As the master of her complaint, the plaintiff never argued to the trial court—and has not argued before this court—that she premised any of her claims on conduct that occurred outside the course of a judicial proceeding. Rather, she consistently has argued that, during the underlying litigation, the defendant made recovery as difficult as possible and improperly used the courts to avoid paying her the full amount of benefits owed.

ceeding, like a claim of vexatious litigation or abuse of process. Additionally, claims regarding good faith and fair dealing are distinguishable from other claims that the litigation privilege does not bar. Specifically, in *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 631, we held that the litigation privilege does not apply to claims alleging a violation of General Statutes § 31-290a, which prohibits retaliation against employees for exercising their rights under the Workers' Compensation Act (act), General Statutes § 31-275 et seq. We emphasized in *MacDermid, Inc.*, that, like claims for vexatious litigation and abuse of process, which explicitly hold an individual liable for the use of the judicial process for an illegitimate purpose, "§ 31-290a is designed to prevent, or hold the employer liable for, the improper use of the judicial process for the illegitimate purpose of retaliating against an employee for his exercise of his rights under the act. The illegitimate use of litigation in such a retaliatory manner subverts the purpose of the judicial system and, as a matter of public policy, we will not encourage such conduct by affording it the protection of absolute immunity." Id. The plaintiff's claim in the present case for breach of the covenant of good faith and fair dealing is distinguishable from the claim raised in *MacDermid, Inc.*, in that it is not designed to hold an individual liable for the improper use of the judicial system but, rather, is designed to hold an individual liable for improper conduct in fulfilling contractual obligations.

The fact that the misconduct at issue allegedly affected the underlying judicial proceeding does not alter our analysis. Although the plaintiff's complaint contains allegations that the defendant, through its litigation conduct, improperly used and abused the judicial process, unless the plaintiff's cause of action challenges the purpose of the litigation or litigation procedure, these allegations do not suffice to establish an improper use of the judicial system. A claim of abuse of process

may be premised on the improper use of a particular judicial procedure. But allegations of the improper use of judicial procedure do not satisfy the requirement that the plaintiff's cause of action must itself challenge the purpose of the underlying litigation or litigation procedure. If the concurrence and dissent were correct that the plaintiff's factual allegations were sufficient in the present case to challenge the defendant's use of the courts, any plaintiff could pierce the litigation privilege with any cause of action by merely including allegations that a defendant's conduct constituted an abuse of the judicial system.

As a result, although these allegations do implicate the underlying judicial proceedings, they do not challenge their purpose. Rather than subverting the purpose of the proceedings, the alleged conduct would have rendered the proceeding unfair. As with claims of fraud, although we do not condone such conduct, such unfairness does not bar absolute immunity but, instead, makes clear the importance of the availability of other remedies. See also part II C of this opinion. Thus, the plaintiff's claim for breach of the covenant of good faith and fair dealing does not challenge the purpose of an underlying judicial proceeding.

B

The plaintiff argues that this claim is not only similar to, but is actually the functional equivalent of, a vexatious litigation claim. In considering the plaintiff's arguments, it is helpful to examine how we analyzed a similar argument in *Simms* in relation to a claim of fraud. In *Simms*, this court compared the elements of fraud against the elements of defamation[7] and vexatious

[7] "To establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement." (Internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 547–48.

litigation.[8] In doing so, we looked at whether the plaintiff's fraud claim was premised on communication of a false statement, like a defamation claim; see *Simms* v. *Seaman*, supra, 308 Conn. 548; whether embedded in a fraud claim is a balancing test with stringent safeguards that protect against inappropriate retaliatory litigation while incentivizing the reporting of wrongdoing, like a vexatious litigation claim; id., 549; whether, like a defamation claim, the fraud claim in *Simms* was easy to allege but difficult to prove; id.; and whether, like defamation claims, not recognizing the litigation privilege for such actions would open the floodgates to a wave of litigation. Id., 568. In *Simms*, after considering these arguments, we came down firmly on the side of applying the litigation privilege to a fraud claim against an attorney. See id., 568–69. We conclude similarly in the present case that the plaintiff's claim for breach of the implied covenant of good faith and fair dealing has more in common with a defamation claim than with an abuse of process, vexatious litigation, or malicious prosecution claim, therefore militating in favor of applying the privilege.

The plaintiff's claim for breach of the implied covenant of good faith and fair dealing, like a defamation claim, is premised on the communication of false statements during litigation. See footnote 6 of this opinion. Although the elements of the plaintiff's claim do not specifically mention communications; see part I A of this opinion; we must consider not only the elements of the cause of action but also whether the complaint contains "allegations that a party suffered harm because of a falsehood communicated by the opponent's attor-

[8] "Vexatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." *Rioux* v. *Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007).

ney."[9] *Simms* v. *Seaman*, supra, 308 Conn. 548; see also *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 728. The allegations in the plaintiff's complaint make clear that she is challenging the defendant's conduct in defending against the underlying underinsured motorist claim. Specifically, her claim is premised on allegations that the defendant used "intentional misstatements, intentional misrepresentations, [and] intentionally deceptive answers" to "knowingly and intentionally [engage] in dishonest and sinister litigation practices by taking legal positions that were without factual support . . . ." The plaintiff clearly premises her claim in this action on false statements made in pleadings and other documents filed in relation to the breach of contract claim in the underlying action.

This court consistently has held that communications made during and relevant to a judicial proceeding are afforded immunity because "[w]itnesses and parties to judicial proceedings must be permitted to speak freely, without subjecting their statements and intentions to later scrutiny by an indignant jury, if the judicial process is to function." *DeLaurentis* v. *New Haven*, 220 Conn. 225, 264, 597 A.2d 807 (1991). It is well established that "[t]he privilege extends to pleadings and other papers made a part of a judicial or quasi-judicial proceeding," as long as the statements relate sufficiently to issues involved in a proposed or ongoing judicial proceeding; (internal quotation marks omitted) *Hopkins* v. *O'Connor*, 282 Conn. 821, 833, 925 A.2d 1030 (2007); with the test for relevancy described as "generous . . . ." Id., 839. This is true even if the communications are false,

[9] As discussed in part II A of this opinion, the fact that the plaintiff alleged that the conduct at issue constituted an abuse of the judicial system does not make the claim at issue akin to a claim for abuse of process. Rather, we look to the plaintiff's factual allegations to determine whether the plaintiff's claim is premised on the communication of false statements. See *Simms* v. *Seaman*, supra, 308 Conn. 548; see also *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 728.

extreme, outrageous, or malicious. See id., 838–39; *Petyan* v. *Ellis*, 200 Conn. 243, 254–55, 510 A.2d 1337 (1986).

To the extent the plaintiff's claim is premised on false statements contained in pleadings and documents related to the litigation—such as the allegedly false statements contained in the defendant's answer, special defense, and discovery responses—the privilege clearly applies. The plaintiff makes no argument that these statements were not related to or made in the course of the litigation of her underinsured motorist insurance claim. This is logical given that a defendant's answer, special defense, and discovery responses clearly are relevant to and made during the underlying litigation.

The plaintiff argues, however, that her claim is not premised on false communications but on misconduct—specifically, that the defendant intentionally withheld information from its attorneys and thus knew that the answer, special defense, and discovery responses were false and had no basis in fact. We are not persuaded. The crux of the plaintiff's claim remains false communications, regardless of how the defendant went about making those false communications. For example, immunity would apply if either (1) the defendant's attorneys had made these statements but knew them to be false, or (2) the defendant, in the underlying litigation, had made these same misrepresentations in the pleadings and discovery responses. See *DeLaurentis* v. *New Haven*, supra, 220 Conn. 264 ("a party . . . is not liable for the words used in the pleadings and documents used to prosecute the suit"); *Petyan* v. *Ellis*, supra, 200 Conn. 251–52 ("it applies to statements made in pleadings or other documents prepared in connection with a court proceeding"); *Alexandru* v. *Strong*, 81 Conn. App. 68, 83, 837 A.2d 875 ("The privilege applies . . . to statements made in pleadings or other documents prepared in connection with a court proceeding. . . . That absolute privilege applies regardless of whether the repre-

sentations at issue could be characterized as false, extreme or outrageous." (Citations omitted; internal quotation marks omitted.)), cert. denied, 268 Conn. 906, 845 A.2d 406 (2004). The fact that the defendant made these misrepresentations to its own attorneys with the intent that the attorneys would then file false pleadings and discovery responses does not change the outcome. The only factual difference in the present case is that the defendant's attorneys served as intermediaries. The fact that the defendant did not makes these false communications in court, or directly to the trial court or an opposing party, does not limit the application of the privilege. See, e.g., *Hopkins* v. *O'Connor*, supra, 282 Conn. 826 ("the absolute privilege that is granted to statements made in furtherance of a judicial proceeding extends to every step of the proceeding until final disposition"); id., 832 ("[t]he scope of privileged communication extends not merely to those made directly to a tribunal, but also to those preparatory communications that may be directed to the goal of the proceeding"); *Kenneson* v. *Eggert*, 196 Conn. App. 773, 783, 230 A.3d 795 (2020) ("[t]here is no requirement under Connecticut jurisprudence that to be considered part of a judicial proceeding, statements must be made in a courtroom or under oath or be contained in a pleading or other documents submitted to the court"). The plaintiff's claim therefore remains premised on the defendant's communications during and relevant to a judicial proceeding.

Our Appellate Court has relied on a similar rationale in applying the litigation privilege to a claim for negligent infliction of emotional distress premised on the withholding of information. In *Stone* v. *Pattis*, 144 Conn. App. 79, 96, 72 A.3d 1138 (2013), the plaintiffs alleged that the defendants conspired to unduly subpoena witnesses, to conceal from the court the reasons for not calling certain witnesses, and not to disclose certain

information. The plaintiffs argued that their claim was premised on deceptive and unfair conduct, not false communications. See id. The Appellate Court disagreed, concluding that the alleged conduct constituted "communications made within the context of a judicial proceeding," even though the false communications were the result of an alleged conspiracy to withhold information. Id., 99.

The present case is similar to *Stone*.[10] The plaintiff's claim of breach of the implied covenant of good faith and fair dealing is premised on the defendant's false communication of information to its attorneys, leading to misrepresentations and deceptive answers filed in pleadings and documents during the course of litigation. That the defendant knew these communications were false and did not take steps to notify its attorneys of the truth does not preclude application of the litigation

[10] By contrast, the plaintiff argues that her claim is more analogous to the claim raised in *Fiondella* v. *Meriden*, 186 Conn. App. 552, 555, 200 A.3d 196 (2018), cert. denied, 330 Conn. 961, 199 A.3d 20 (2019), because both alleged intentional concealment and deceitful conduct. We disagree. In *Fiondella*, the defendants successfully brought an action seeking a declaratory judgment that they were the legal owners of a portion of land by operation of the doctrine of adverse possession. Id. The plaintiffs in *Fiondella*, who were not parties in the underlying declaratory judgment action, subsequently brought claims of fraud, slander of title, and civil conspiracy against the defendants, alleging that the defendants intentionally concealed the declaratory judgment action from them, contrary to their property rights and interests. Id., 559–60. The defendants filed a motion to dismiss on the ground of absolute privilege, which the trial court granted. Id., 556. The Appellate Court reversed the trial court's judgment, holding that absolute immunity did not apply to bar the plaintiffs' claims. In so holding, the Appellate Court relied on the following facts: (1) the plaintiffs were not parties to or involved in the underlying declaratory judgment action; (2) the claims were solely premised on conduct, not communications; and (3) the alleged fraud did not occur during the pendency of a judicial proceeding between these parties. See id., 561–62. The Appellate Court emphasized that " '[the privilege] extends to bar claims of fraud against a party opponent.' " Id., 562. The present case clearly involves alleged dishonesty of a party opponent. Additionally, as discussed, the plaintiff's claim is not premised solely on conduct but on false communications.

privilege. The accuracy of a statement is irrelevant to the application of the privilege, even if the defendant knows the statement is false. See *Simms* v. *Seaman*, supra, 308 Conn. 548 (" 'because the privilege protects the communication, the nature of the theory [on which the challenge is based] is irrelevant' " (emphasis omitted)); *Hopkins* v. *O'Connor*, supra, 282 Conn. 838 (if "the communications are uttered or published in the course of judicial proceedings, even if they are published falsely and maliciously, they nevertheless are absolutely privileged provided they are pertinent to the subject of the controversy"). Thus, the plaintiff's claim is premised on false communications like a claim for defamation or fraud.

Additionally, unlike the elements of a claim for vexatious litigation,[11] the elements of a claim for breach of the implied covenant of good faith and fair dealing lack any safeguards that balance the need to protect against inappropriate retaliatory litigation while incentivizing the reporting of wrongdoing. See footnote 9 of this opinion. The elements of the good faith and fair dealing claim at issue require the plaintiff to allege only that the defendant impeded the plaintiff's right to receive benefits that she reasonably expected to receive under the contract and did so in bad faith. See, e.g., *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399.

[11] We note that a lack of stringent policy balancing safeguards is not detrimental to a plaintiff's claim that the litigation privilege does not apply. See footnote 5 of this opinion. For example, claims of employer retaliation under § 31-290a and abuse of process do not have these safeguards, but this court has barred the application of the litigation privilege to those claims because of other policy considerations. See, e.g., *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 633 ("the elements of abuse of process, a tort which also falls outside the scope of absolute immunity, are less stringent than the elements of vexatious litigation"). The plaintiff's claim is distinguishable from claims of abuse of process and employer retaliation, however, because the plaintiff has not suggested any policy considerations that weigh in favor of barring the litigation privilege.

The plaintiff nevertheless argues that this bad faith element is equivalent to the malicious intent element of a vexatious litigation claim, requiring that the defendant acted "primarily for a purpose other than that of bringing an offender to justice"; *Rioux* v. *Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007); because bad faith is defined as "more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) This argument misses the mark because the plaintiff does not fully define "bad faith" in the context of a breach of the implied covenant of good faith and fair dealing claim. This court has explained that, in relation to such a claim, "[b]ad faith in general implies . . . actual or constructive *fraud*, or a design to *mislead or deceive* another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Emphasis added; internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399–400.

This more complete definition of bad faith demonstrates that this claim is more akin to a claim of fraud, to which our appellate courts have applied the litigation privilege. See *Simms* v. *Seaman*, supra, 308 Conn. 568–69; *Tyler* v. *Tatoian*, supra, 164 Conn. App. 91–92. If a claim of breach of the implied covenant of good faith and fair dealing may be premised on fraud in relation to a contract, and claims of fraud are afforded absolute immunity, it is logical that the immunity likewise extends to claims of breach of the implied covenant of good faith and fair dealing. As to the other ways to establish the element of bad faith—misleading, deceiving, or acting with a sinister or interested motive—such conduct is similar to the requirement of a fraud claim that the defendant knowingly made an

untrue statement. See *Simms* v. *Seaman*, supra, 548. Additionally, the fact that the plaintiff's claim involves dishonesty does not make it akin to a claim of vexatious litigation. As we explained, the nature of the communications, even if dishonest, false, or malicious, does not affect the applicability of the privilege.

Additionally, the elements of the plaintiff's claim do not include safeguards such as those found in a vexatious litigation claim: for example, that the prior action was brought without probable cause or that it terminated in the plaintiff's favor. The plaintiff does not dispute this. Rather, she argues that she alleged sufficient facts to satisfy the stringent vexatious litigation elements, and, thus, as alleged, her claim is equivalent to a claim for vexatious litigation, including all of its safeguards. Specifically, she argues that her allegation that the defendant knew it had no factual basis to allege the special defense of contributory negligence was the equivalent of alleging a lack of probable cause under a vexatious litigation claim. She also argues that the fact that the underlying claim for breach of contract resulted in a verdict in her favor is the equivalent of an underlying proceeding terminating in her favor.

The question, however, is not whether her factual allegations are similar to the allegations necessary to raise a claim for vexatious litigation but whether the elements of the claim she has alleged provide similar safeguards to balance the competing interests at stake. See *Simms* v. *Seaman*, supra, 308 Conn. 545. The fact that the plaintiff alleged facts that may have been sufficient to support a claim for vexatious litigation does not prevent the litigation privilege from applying to the claim alleged. See *Perugini* v. *Giuliano*, supra, 148 Conn. App. 874–75 (holding that absolute immunity barred claim alleging that defendant attorney engaged in misconduct for purpose of personal financial gain but noting that plaintiff may have been able to, but did

not, bring abuse of process action). The plaintiff could have, but did not, advance a claim for vexatious litigation.[12]

The plaintiff further argues that her claim is similar to a claim of vexatious litigation because protection of allegedly dishonest conduct does not further the public policy of candor in judicial proceedings but, rather, violates the state's public policy against untrue allegations or denials in the course of litigation, as evidenced by § 52-99 and case law granting courts the inherent power to sanction parties for litigation misconduct. It is not clear whether the plaintiff is arguing that § 52-99 and our existing case law abrogate the litigation privilege in relation to knowingly false communications or that § 52-99 and our existing case law manifest a public policy against immunity under these circumstances.

To the extent the plaintiff is attempting to argue that § 52-99 abrogates the common-law absolute immunity afforded for knowingly false communications made during and relevant to judicial proceedings, we disagree. Section 52-99 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ."

[12] By arguing that her claim is equivalent to a claim of vexatious litigation, the plaintiff appears also to be arguing that she did in fact sufficiently allege a vexatious litigation claim and that this court should not be bound by how she labeled the counts in her complaint. We are not persuaded. Although it is true that, for purposes of a motion to strike, our trial courts consistently have relied on the factual allegations of a count, and not the label placed on the count, in determining whether a claim has been sufficiently alleged; see, e.g., *Penney* v. *Holley*, Docket No. CV-14-6010281-S, 2015 WL 1587981, *2 (Conn. Super. March 13, 2015); the plaintiff's complaint cannot reasonably be interpreted as raising a vexatious litigation claim, especially as, during argument on the motion to dismiss, the plaintiff never argued that she was raising a vexatious litigation claim but, rather, argued only that the claims were similar to a vexatious litigation claim.

"In determining whether . . . a statute abrogates or modifies a [common-law] rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope. . . . Although the legislature may eliminate a [common-law] right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 843. Section 52-99 contains no such clear and plain expression.

To the extent the plaintiff is arguing that public policy disfavors immunity under these circumstances, we disagree. If anything, as discussed more in part II C of this opinion, § 52-99 demonstrates that other remedies exist for addressing and disincentivizing the alleged conduct. Additionally, our case law does not support a public policy disfavoring immunity for false pleadings but, to the contrary, manifests, as discussed, a policy in favor of immunizing communications made during and relevant to litigation, even if they are intentionally false and malicious. The cases the plaintiff cites in support of her public policy argument either are vexatious litigation and abuse of process cases—causes of action that were not alleged in the present case—or do not involve the litigation privilege.

Our conclusion does not, as the plaintiff argues, render § 52-99 useless because parties may seek sanctions for litigation misconduct under this statute. Our holding means only that this statute does not support the plaintiff's bringing of a private right of action premised on this conduct. For this reason, there is no merit to the plaintiff's argument that, because § 52-99 and the court's inherent authority authorize the court to sanction parties for litigation misconduct, the court retains subject matter jurisdiction over these claims despite the litiga-

tion privilege. The lack of jurisdiction over the present claim did not prevent the parties from pursuing sanctions under § 52-99 or the court's inherent authority.

The plaintiff also fails to recognize that, unlike § 52-99, the purpose of the litigation privilege is not to prohibit dishonesty but to protect against retaliatory claims that are easily alleged but difficult to prove, like claims premised on dishonesty. See, e.g., *Simms* v. *Seaman*, supra, 308 Conn. 539–40, 549. Like a claim of fraud or defamation, which, likewise, involves dishonesty and false communications, it is easy to allege, but more difficult to prove, that a defendant intentionally made misrepresentations and advanced false allegations in pleadings. Although there is some evidence in the present case that the defendant had no basis to assert the special defense of contributory negligence, this kind of evidence—what a party knew and when—is difficult to prove. Withholding immunity as to the claim at issue has the potential to open the floodgates to retaliatory actions every time a plaintiff prevails in an underlying action in which the defendant raised an unsuccessful special defense or made an allegation in a pleading that was at odds with the verdict.

This possibility of retaliatory litigation is made clear by the plaintiff's own argument before the trial court. There, the plaintiff suggested that, in regard to such claims, a hearing is required to determine jurisdiction because these claims are actionable only if there was no basis in fact for the defendant's special defense. Although no hearing was in fact held in the present case, and the plaintiff argues on appeal that the record is sufficient to establish that the defendant had no basis in fact for its special defense based on the deposition of its representative, the plaintiff's argument shows the weakness of her position before this court. If a claim for breach of the implied covenant of good faith and fair dealing is exempt from immunity only if there was

evidentiary support for the allegation that the defendant knew its statement had no basis in fact, and a "jurisdictional" hearing would have to be held to determine this preliminary issue, then individuals will be forced to defend themselves in these hearings against retaliatory claims. Such a procedure is in direct conflict with the purpose of the litigation privilege—to ensure "the proper and efficient administration of justice"; *Hopkins* v. *O'Connor*, supra, 282 Conn. 839; and to protect individuals from "incurring the costs and inconvenience associated with defending a [retaliatory] suit . . . ." (Internal quotation marks omitted.) *Simms* v. *Seaman*, supra, 308 Conn. 539.

Accordingly, the plaintiff's claim for breach of the implied covenant of good faith and fair dealing is more akin to a claim of defamation or fraud.

C

Finally,[13] we consider whether safeguards other than civil liability deter or preclude misconduct or provide relief from the alleged misconduct. See id., 552. This factor is answered by the plaintiff's own arguments, which highlight other such safeguards. First, § 52-99 allows parties to seek monetary sanctions from the trial court for allegations and denials within parties' pleadings made without reasonable cause and found to be untrue. Second, the trial court has the inherent authority to sanction parties for litigation misconduct. See, e.g., *Maris* v. *McGrath*, 269 Conn. 834, 846–48, 850 A.2d 133 (2004); see also *DeLaurentis* v. *New Haven*, supra, 220 Conn. 264 ("[w]hile no civil remedies can guard against lies . . . [p]arties or their counsel who behave outrageously are subject to punishment for contempt of the court" (footnote omitted)); *Jaconski* v. *AMF, Inc.*, 208 Conn. 230, 233, 543 A.2d 728 (1988) ("[a]

[13] The parties have not cited any case law from federal or state courts concerning the application of the litigation privilege to a similar claim.

trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules"). Further, as we noted in *Simms*, a party may file a motion to open a judgment on the ground that the judgment was obtained by fraud or intentional, material misrepresentation. See *Simms* v. *Seaman*, supra, 308 Conn. 552. In addition, as we noted in *DeLaurentis*, "[p]arties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process." *DeLaurentis* v. *New Haven*, supra, 264. Importantly, in the present case, upon a prior action terminating in her favor, the plaintiff could have brought a lawsuit for vexatious litigation. In fact, that is what she did. These other remedies belie the plaintiff's argument that, if immunity is granted, this court will open the floodgates to insurance companies using the litigation privilege as a loophole to engage in misconduct and deprive insureds of their contractual benefits.

In sum, because the plaintiff's claim for breach of the implied covenant of good faith and fair dealing is premised on false communications, does not challenge the purpose underlying a judicial proceeding, is more akin to a claim for defamation or fraud, and may be addressed by other remedies, we conclude that the trial court properly applied the litigation privilege.

III

For the same reasons, we conclude that the trial court properly applied the litigation privilege to the plaintiff's claim of negligent infliction of emotional distress. Connecticut appellate courts consistently have held that claims of negligent infliction of emotional distress[14]

[14] The elements of the tort of negligent infliction of emotional distress are: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 444, 815 A.2d 119 (2003).

premised on communications made during and relevant to an underlying judicial proceeding are afforded absolute immunity. See, e.g., *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 719, 727; *Perugini* v. *Giuliano*, supra, 148 Conn. App. 873–74; *Stone* v. *Pattis*, supra, 144 Conn. App. 99–100; see also *Simms* v. *Seaman*, supra, 308 Conn. 569–70 (applying litigation privilege to claim of intentional infliction of emotional distress premised on communication made during and relevant to underlying judicial proceeding).

In the present case, the plaintiff's allegations in support of this claim incorporate the same allegations she made in her claim for breach of the implied covenant of good faith and fair dealing. In light of our holding in *Simms* that that claim is premised on communications made during and relevant to an underlying judicial proceeding, the same analysis and holding apply here. See *Simms* v. *Seaman*, supra, 308 Conn. 570. Accordingly, the trial court properly applied the litigation privilege to the plaintiff's claim for negligent infliction of emotional distress.

## IV

The plaintiff's final count, asserting a violation of CUTPA based on a violation of CUIPA, presents a more difficult issue. To address this issue, it is important first to specify the allegations advanced in support of this count. The plaintiff incorporated by reference the allegations she made in support of her claim for breach of the implied covenant of good faith and fair dealing. Additionally, she alleged that the defendant's designee "testified under oath that [the defendant] did not single out [the plaintiff] for special or unique treatment when it responded falsely to [her] discovery requests."[15]

[15] At the time of the defendant's motion to dismiss, the complaint also alleged that the defendant's representative "testified under oath that [the defendant] did not single out [the plaintiff] for special or unique treatment when it conditioned [her] receipt of [underinsured motorist] benefits [on] the provision of an affidavit of no excess insurance . . . ." The trial court

According to the plaintiff, this business practice violates CUIPA in that the defendant (1) misrepresented facts, (2) failed to adopt and implement reasonable standards for the prompt investigation of claims, (3) refused to pay claims without conducting reasonable investigation, (4) did not attempt in good faith to effectuate prompt, fair, and equitable settlement of claims, and (5) compelled insureds to institute litigation to recover amounts due under an insurance policy.

"CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes] § 42-110g (a) of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . . CUIPA, which specifically prohibits unfair business practices in the insurance industry and defines what constitutes such practices in that industry; see General Statutes § 38a-816; does not authorize a private right of action but, instead, empowers the [insurance] commissioner to enforce its provisions through administrative action. See General Statutes §§ 38a-817 and 38a-818. . . . [T]his court [however, has] determined that individuals may bring an action under CUTPA for violations of CUIPA. In order to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA." (Citation omitted; internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623–24, 119 A.3d 1139 (2015).

held that absolute immunity did not bar this portion of the plaintiff's CUTPA claim. Because the plaintiff has since withdrawn this portion of the claim, we do not consider it in our analysis.

Relevant to the present claim, CUIPA prohibits unfair claim settlement practices, which the legislature has defined as "[c]ommitting or performing with such *frequency* as to indicate a general business practice any of the following: (A) [m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue . . . (C) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (D) refusing to pay claims without conducting a reasonable investigation based [on] all available information . . . (F) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (G) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds . . . ." (Emphasis added.) General Statutes § 38a-816 (6). To establish that the improper conduct occurred with "such *frequency* as to indicate a general business practice"; (emphasis added) General Statutes § 38a-816 (6); the plaintiff must allege and establish more than a single act of insurance misconduct. See, e.g., *State* v. *Acordia, Inc.*, 310 Conn. 1, 28, 73 A.3d 711 (2013) ("CUIPA requires 'a showing of more than a single act of insurance misconduct' ").

At oral argument before this court, the plaintiff's appellate counsel, in response to a question, represented that the plaintiff's complaint contained an allegation that the defendant has a business practice of withholding information from its attorneys to ensure false pleadings, as well as a business practice of alleging contributory negligence as a special defense in response to every claim, even if it knows the allegation is false. The plaintiff argued that this alleged conduct was not premised on false communications during and related to judicial proceedings but constituted unfair conduct that CUIPA and CUTPA were specifically designed to protect against.

If the plaintiff's complaint actually contained such allegations of a general business practice, perhaps this might have been a closer case. But we have scoured the plaintiff's complaint in search of these allegations about the defendant's business practices to no avail. Although there are allegations that, in the plaintiff's particular case, the defendant intentionally concealed information and evidence from its attorneys and alleged the special defense of contributory negligence despite knowing this allegation to be false, there are no allegations in the plaintiff's complaint that this conduct occurred with such frequency as to constitute a general business practice, despite the trial court's having permitted the plaintiff to amend her complaint to include a claimed violation of CUTPA after she learned of the defendant's conduct through discovery. Rather, the plaintiff's allegations regarding this conduct are limited to the defendant's conduct in this case alone.

The plaintiff alleged only that the defendant "did not single [her] out . . . for special or unique treatment when it responded falsely to [her] discovery requests."[16] The plaintiff then alleged that such conduct constituted a general business practice. Even if we assume that these allegations are sufficient to allege that this conduct occurred with such frequency as to indicate a general business practice,[17] the plaintiff's CUTPA claim, as alleged, is barred by the doctrine of absolute immunity under the litigation privilege.

[16] By contrast, in her second amended complaint, the plaintiff set forth more detailed allegations regarding how the defendant had a business practice of conditioning receipt of underinsured motorist benefits on the provision of an affidavit of no excess insurance. Specifically, in addition to alleging that the defendant "did not single out [her] for special or unique treatment," the plaintiff alleged that, in not doing so, the defendant was "pursuing conduct that [the defendant] routinely takes in its handling of claims from other policyholders as well."

[17] The defendant never filed a motion to strike or argued in the alternative that the plaintiff alleged insufficient frequency to establish a business practice in regard to her allegation that the defendant "did not single [her] out . . . for special or unique treatment when it responded falsely to [her] discovery requests." Accordingly, we do not address this issue.

A business practice of responding falsely to discovery requests, to the extent it involves "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue," is prohibited under CUIPA. General Statutes § 38a-816 (6) (A). The parties have not cited any case law—from this court, the federal courts, or sister state courts—that has addressed whether the litigation privilege applies to claims for violating statutes prohibiting unfair insurance practices. In our own research, we have found only one case addressing this issue. The United States District Court for the Eastern District of Pennsylvania, in *Harrison* v. *Nationwide Mutual Fire Ins. Co.*, 580 F. Supp. 133, 136 (E.D. Pa. 1983), and its progeny, held that, when an unfair insurance practices claim is premised on pleadings or documents filed in and relevant to an underlying judicial proceeding, the conduct is absolutely privileged, even if the statements were made falsely or maliciously.

The plaintiff argues, however, that absolute immunity would undermine the legislative intent of CUIPA, which is to hold insurers accountable for misrepresenting facts relating to coverage issues. In essence, the plaintiff argues that CUIPA abrogates absolute immunity as to the conduct alleged under § 38a-816 (6). Contrary to the plaintiff's argument, CUIPA does not explicitly abrogate absolute immunity. Although § 38a-816 (6) in fact prohibits the business practice of misrepresenting facts relating to coverage issues, CUIPA does not impose liability for this conduct by authorizing a private right of action but, instead, limits the remedy under that act to administrative action by the Commissioner of Insurance. Rather than establishing that immunity should be abrogated, § 38a-816 shows that the legislature prescribed remedies other than civil liability for deterring and curing the alleged conduct, and such remedies are available to the plaintiff in the present case. Additionally, the legislature is aware of both this court's

precedent regarding the applicability of the litigation privilege to litigation conduct, as well as the various other tools available to the court to regulate and police litigation misconduct. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, supra, 272 Conn. 793 n.21 ("the legislature is presumed to be aware of prior judicial decisions involving common-law rules"). If the legislature thought that the particular litigation conduct at issue—filing false discovery responses—had become such a systemic problem that neither the judiciary nor the Commissioner of Insurance has been able to police it, the legislature would have been explicit in abrogating the immunity afforded by the litigation privilege.

Nevertheless, our case law makes clear that an insurer may be held liable under CUTPA for conduct proscribed by § 38a-816 (6). See *Mead* v. *Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986) ("it is possible to state a cause of action under CUTPA for a violation of CUIPA"). That does not necessarily mean that the legislature intended to abrogate a party's absolute immunity from CUTPA claims based on a business practice of filing false discovery responses. Although there is minimal case law regarding CUIPA and the litigation privilege, there is a wealth of case law regarding CUTPA and the litigation privilege. Courts consistently have applied the litigation privilege to CUTPA claims premised on false communications made during and relevant to an underlying judicial proceeding. See, e.g., *Simms* v. *Seaman*, supra, 308 Conn. 561–62 (discussing federal case law that consistently has held that CUTPA claims premised on false communications made during and relevant to underlying judicial proceeding are barred by litigation privilege); *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 722, 727–29 (CUTPA claim against insurance companies was barred by litigation privilege); *Tyler* v. *Tatoian*, supra, 164 Conn. App. 86–87, 93–94 (CUTPA claim against attorney for communications made in course of prior judicial proceeding was barred by litigation privilege).

These holdings are in line with case law from other jurisdictions, the majority of which have applied the litigation privilege to both common-law and statutory causes of action, including claims for unfair trade practices brought pursuant to the jurisdiction's analogue to CUTPA. See, e.g., *Graham* v. *U.S. Bank, National Assn.*, Docket No. 3:15-cv-0990-AC, 2015 WL 10322087, *16 (D. Or. December 2, 2015) ("Statutory torts are subject to the litigation privilege. Where the Oregon legislature explicitly or implicitly creates a cause of action for violating state law, such a cause of action is a statutory tort [including state law claims for trespass to chattels and under the Oregon Unlawful Trade Practices Act]."); *Trent* v. *Mortgage Electronic Registration Systems, Inc.*, 618 F. Supp. 2d 1356, 1360 (M.D. Fla. 2007) (holding that litigation privilege "precludes communications attached to or made part of a foreclosure complaint from forming the basis of [an unfair trade practices claim]" but does not preclude such a claim premised on presuit communications), aff'd, 288 Fed. Appx. 571 (11th Cir. 2008); *PSN Illinois, Inc.* v. *Ivoclar Vivadent, Inc.*, Docket No. 04 C 7232, 2005 WL 2347209, *6 (N.D. Ill. September 21, 2005) ("the litigation privilege also precludes [the defendant's] deceptive trade practices claim based on statements made in the course of litigation"). But see *Barefield* v. *DPIC Cos.*, 215 W. Va. 544, 554, 600 S.E.2d 256 (2004) ("insurance company's prosecution of a meritless appeal could be used to support a claim for unfair trade practices" (internal quotation marks omitted)).

Under this precedent, the litigation privilege bars CUTPA claims, like the claim at issue, premised solely on general allegations of intentionally false discovery responses because these claims merely challenge the making of false statements. Additionally, there are other remedies available to deter the alleged conduct.[18] See

[18] The concurrence and dissent argues that these other remedies are insufficient, especially in light of the unique nature of insurance companies,

*Tyler* v. *Tatoian*, supra, 164 Conn. App. 93–94. This does not mean, however, that a defendant enjoys absolute immunity from all CUTPA claims under the litigation privilege, even those premised on a violation of CUIPA. Rather, we merely hold that this specific claim—a business practice of filing false discovery responses—is afforded absolute immunity. We recognize that the legislature intended to prohibit certain unfair and deceptive business practices by enacting CUTPA and CUIPA, but the plaintiff has not cited, and we have not discovered, any provision of these statutes that explicitly abrogates the common-law litigation privilege, which, historically, has been applied to false and malicious statements made during and relevant to judicial proceedings. Our holding leaves open the possibility that other CUTPA claims may not be barred by absolute immunity under the litigation privilege. Thus, we conclude that the litigation privilege bars the plaintiff's CUTPA-CUIPA claim.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD and KELLER, Js., concurred.

ECKER, J., concurring in part and dissenting in part. The majority concludes that the common-law litigation privilege bars the claims of the plaintiff, Tamara Dorfman, against the defendant Liberty Mutual Fire Insur-

which "are effectively in the business of litigation." First, it is worth noting that this court consistently has applied the litigation privilege to attorneys, who, without a doubt, are in the business of litigation. See *Simms* v. *Seaman*, supra, 308 Conn. 540–45; see also *Imbler* v. *Pachtman*, 424 U.S. 409, 424–29, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). Moreover, by enacting CUIPA, the legislature has taken explicit action to regulate insurance companies, including by authorizing the Commissioner of Insurance to take administrative action in response to the conduct alleged while not explicitly creating a private right of action. Thus, we are hard-pressed to conclude that the unique status of insurance companies requires, as a matter of public policy, exempting them from the litigation privilege under these circumstances.

ance Company[1] for breach of the implied covenant of good faith, negligent infliction of emotional distress, and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq. My disagreement stems from the unique features of the present case that distinguish it—starkly, in my view—from any other case yet decided by this court regarding the privilege. The litigation privilege exists to create a protected space for parties to engage in the rough-and-tumble of litigation, uninhibited by fears that their adversary will later file a second generation lawsuit claiming damages for harm caused by the adversary's (or his lawyer's) alleged misconduct in the first case.[2] Except for a narrow category of claims involving misconduct comparable to vexatious litigation or abuse of process, the litigation privilege prevents an aggrieved party from bringing a damages lawsuit for harm caused by litigation misconduct and limits the party's recourse to whatever relief may be obtained from the judge presiding over the litigation or the administrative authority with jurisdiction over the party or lawyer responsible for the misconduct. This judge made policy makes good sense in the ordinary case.

The present lawsuit is nothing like the ordinary case, however, because it arises in a unique context implicating substantially different policy considerations than those that shaped the litigation privilege. The defendant sells automobile liability insurance. It consequently owes its insureds a direct contractual and statutory duty to

[1] I refer to Liberty Mutual Fire Insurance Company as the defendant. See footnote 1 of the majority opinion.

[2] The privilege has its origins in the law of defamation and, as such, is concerned with misconduct by spoken or written word. See, e.g., *Simms* v. *Seaman*, 308 Conn. 523, 531–35, 69 A.3d 880 (2013). This qualification does not much limit the scope of the privilege because almost all litigation activity is verbal in nature.

not act abusively in litigation. Litigation is not an unusual or occasional activity external to the defendant's business operations but, instead, is an integral and intrinsic part of its commercial activity—automobile liability claims by their very nature are adjusted, contested and/or paid either in the shadow of litigation or in actual litigation. This fact distinguishes the defendant from nearly all other litigants who might claim protection under the litigation privilege. Indeed, Connecticut statutory law recognizes that insurance companies are fundamentally different from other parties when it comes to litigation with their insureds. See General Statutes § 38a-816 (6) (G) (listing as prohibited unfair claim settlement practice "compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds") So, too, our common law recognizes that an insurer owes its insured a duty of good faith that would prohibit litigation misconduct in a first-party action seeking payment under a policy.[3]

Allowing a liability insurer like the defendant to invoke the privilege in the present case effectively confers an entire class of commercial enterprises doing business in Connecticut with immunity from suit by consumers seeking damages for wrongful and illegal acts under-

[3] See 3 L. Russ & T. Segalla, Couch on Insurance (3d Ed. 2011) § 40:7, pp. 40-11 through 40-12 ("The insurer has a duty of good faith and fair dealing toward the insured. This duty arises out of the special relationship that exists between the parties because of their unequal bargaining power and the potential for an insurer to take advantage of an insured's hardships when negotiating to settle or resolve a claim. . . . When determining whether to settle a claim, the insurer must give at least as much consideration to the well-being of the insured as it does to its own interests." (Footnotes omitted.)); see also *Grand Sheet Metal Products Co.* v. *Protection Mutual Ins. Co.*, 34 Conn. Supp. 46, 51, 375 A.2d 428 (1977) (concluding that tort action by insured against insurer for bad faith is justified in light of "the unequal bargaining power of the parties, the special nature of the insurance business, and the disastrous economic effects that a [bad faith] refusal to pay may cause the insured"). I discuss this point in part II A of this opinion.

taken *as part of their day-to-day business practices*.[4] It could be argued that such a broad immunity is wise policy in light of the competing considerations at play. But, in my view, that conclusion is hardly self-evident, and it certainly is not compelled or even suggested by either our existing precedent or the few statutory tea leaves currently available for guidance.

There are alternatives. One is to defer to the legislature regarding this complex issue of public policy; if a broad immunity is to be extended to insurance companies in this context, it should be conferred by an affirmative act of the legislature upon consideration of all relevant policy implications, not by this court under the rubric of the common-law litigation privilege. Another option, developed at some length in this opinion, is to fashion a more nuanced privilege adapted to cases involving parties, like the defendant in the present case, whose commercial activities involve frequent use of the courts as an integral aspect of their business operations and who are alleged to have breached a contractual, common-law, or statutory duty owed to the plaintiff by engaging in, among other things, litigation misconduct. Indeed, our existing litigation privilege doctrine, properly applied, is well suited to the task. See parts II C and III B of this opinion.

To summarize, the present context is miles away from that in which the litigation privilege was originally formulated, and lies equally distant from the cases in which we have found the privilege applicable to date. The plaintiff is not simply the defendant's adversary; she is its insured. Her lawsuit alleges that the defendant purposely engaged in bad faith insurance claim settlement practices involving both prelitigation and litiga-

[4] I am not sure that this is the effect intended by the majority, which seems open to the idea that another case with different facts involving litigation misconduct by an insurance company may fall outside the scope of the privilege. See footnote 17 of this opinion and accompanying text.

tion misconduct, in violation of its statutory and common-law duties. The pleadings do not allege merely that the defendant has violated the rules of fair litigation owed to one another by all parties to litigation. Rather, the pleadings allege that the defendant insurer has violated a direct, independent contractual and statutory duty owed specifically to the plaintiff-insured. For reasons that I will elaborate on, such allegations, if sufficiently pleaded, should be deemed to fall outside of the litigation privilege under Connecticut law.

I

My concerns focus primarily on two counts of the plaintiff's operative complaint. With respect to the claim for breach of the implied covenant of good faith and fair dealing, I would hold, contrary to the majority's conclusion, that the operative complaint sufficiently alleges conduct outside of litigation that would support a bad faith claim. Specifically, the operative complaint alleges that the defendant insurer was contractually obligated to pay the plaintiff sums that she was legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle for damages resulting from bodily injury, that the defendant knew that it had no valid defense to her claim, and that the defendant nonetheless compelled its insured to resort to litigation and to endure litigation misconduct to obtain payment. To the extent that the plaintiff also alleges bad faith *litigation* conduct, I would conclude that the majority's suggestion that the litigation privilege bars all such claims fails to adequately address the complexity of the law governing such claims, especially as the law applies to first-party claims by an insured against his or her insurer. Particularly in light of the special considerations that arise in the insurance context—most notably, the asymmetry between the insured and the insurer with respect to bargaining power and litigation experience, and the special vulnerabilities of an insured who has suffered a covered loss—I would conclude that this

claim more closely resembles an abuse of process claim than claims to which we have applied the litigation privilege, such as defamation and fraud, and is sufficient to survive a motion to dismiss. Accordingly, I dissent from part II of the majority opinion.[5]

With respect to the plaintiff's CUTPA claim, I agree that her particular allegations fail to plead a general business practice triggering a CUIPA violation. I therefore concur in part IV of the majority opinion. I write separately to emphasize my view that this limited holding, based on insufficient pleading, in no way requires a similar conclusion were a plaintiff to make more robust allegations of litigation misconduct occurring as part of an insurance company's unfair claim settlement practices under § 38a-816 (6).[6] The majority accurately describes

[5] Because the plaintiff's claim of negligent infliction of emotional distress is premised on the conduct that forms the basis of her bad faith claim, I also would conclude that the negligent infliction claim is sufficient to withstand a motion to dismiss. I therefore dissent from part III of the majority opinion, as well.

[6] General Statutes § 38a-816 (6) defines "unfair claim settlement practices" as follows: "Committing or performing with such frequency as to indicate a general business practice any of the following: (A) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; (B) failing to acknowledge and act with reasonable promptness upon communications with respect to claims arising under insurance policies; (C) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (D) refusing to pay claims without conducting a reasonable investigation based upon all available information; (E) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (F) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (G) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds; (H) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application; (I) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured; (J) making claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made; (K) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose

the exceedingly weak nature of the plaintiff's CUIPA based allegations in the present case, acknowledging that this could be a "closer case" if the plaintiff had alleged a different CUIPA claim. Part IV of the majority opinion. I believe that a well pleaded CUIPA/CUTPA claim alleging unfair claim settlement practices encompassing litigation misconduct would present a very different case indeed. Whatever the ultimate outcome may be when such a case presents itself, I feel compelled to explain why we should exercise care to make sure that our narrow holding in the present case does not impinge on our ability to conduct the necessary analysis at that time.

## II

### A

I first address part II of the majority opinion, in which the majority concluded that the litigation privilege bars the plaintiff's claim for breach of the implied covenant of good faith and fair dealing. I begin with a review of the governing legal principles. Numerous courts have recognized that, generally speaking, an insurer has an obligation to its insureds that goes beyond an ordinary contractual obligation. See, e.g., *Best Place, Inc.* v. *Penn America Ins. Co.*, 82 Haw. 120, 128, 920 P.2d 334 (1996) ("some courts have emphasized the special relationship

of compelling them to accept settlements or compromises less than the amount awarded in arbitration; (L) delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information; (M) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; (N) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; (O) using as a basis for cash settlement with a first party automobile insurance claimant an amount which is less than the amount which the insurer would pay if repairs were made unless such amount is agreed to by the insured or provided for by the insurance policy."

between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility" (internal quotation marks omitted)); id. (citing cases). This "special relationship" arises because "[a]n insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity. [Moreover] [i]n securing the reasonable expectations of the insured under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company. . . . [Finally] the insured is [often] in an especially vulnerable economic position when such a casualty loss occurs." (Internal quotation marks omitted.) Id.; see *Reynolds* v. *American Hardware Mutual Ins. Co.*, 115 Idaho 362, 365, 766 P.2d 1243 (1988) (citing cases from other jurisdictions); *Arnold* v. *National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) ("[i]n the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims"); see also footnote 3 of this opinion.

Although this court has yet to speak on the precise nature of the duty in the context of first-party (insured versus insurer) claims,[7] there can be no doubt that insurance contracts impose a duty of good faith and fair dealing on the insurer that will support an independent cause of action. See *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 170, 530 A.2d 596 (1987) ("[a]n implied covenant of good faith and fair dealing has been applied by this court in a variety of contractual relationships, including . . . insurance contracts" (internal quota-

[7] We have observed in dictum that "an insurer generally has a fiduciary relationship with its insured." *State* v. *Acordia, Inc.*, 310 Conn. 1, 37, 73 A.3d 711 (2013). But see *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 641, 804 A.2d 180 (2002) ("[j]urisdictions are split on the issue of whether an insurer owes a fiduciary duty to its insured; our case law is silent on this issue").

tion marks omitted)). *Buckman* explained: "[T]his court recognizes an independent cause of action in tort arising from an insurer's [common-law] duty of good faith. This cause of action is separate and distinct from the plaintiff's statutory claims. See *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 566, 479 A.2d 781 (1984); *Burgess* v. *Vanguard Ins. Co.*, 192 Conn. 124, 127, 470 A.2d 244 (1984); *Bibeault* v. *Hanover Ins. Co.*, 417 A.2d 313 (R.I. 1980). An 'implied covenant of good faith and fair dealing has been applied by this court in a variety of contractual relationships, including . . . insurance contracts; *Hoyt* v. *Factory Mutual Liberty Ins. Co.*, 120 Conn. 156, 159, 179 A. 842 (1935); *Bartlett* v. *Travelers Ins. Co.*, 117 Conn. 147, 155, 167 A. 180 (1933); cf. *Grand Sheet Metal Products Co.* v. *Protection Mutual Ins. Co.*, 34 Conn. [Supp.] 46, 375 A.2d 428 (1977) . . . .' *Magnan* v. *Anaconda Industries, Inc.*, supra [566]; see also 2 Restatement (Second), Contracts § 205 [p. 99 (1981)]; 43 Am. Jur. 2d [224–28], Insurance §§ 141, 142 [1982]; 3 [M. Rhodes, Couch on Insurance (2d Ed. 1984)] § 25.32 [pp. 327–31]." *Buckman* v. *People Express, Inc.*, supra, 170–71.

More recently, we have summarized the elements of such a claim, again in the insurance context: "[I]t is axiomatic that . . . every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed [on] by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . .

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith.

. . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794–95, 67 A.3d 961 (2013). "[V]iolations of express duties are necessary to maintain a bad faith cause of action." Id., 797.

In the present case, the majority concludes that, because the plaintiff's bad faith claim is based on alleged misconduct during the litigation, it is barred by the litigation privilege. See part II of the majority opinion. In part II B of this opinion, I explain why I disagree with the majority's conclusion that the plaintiff's bad faith claim is based exclusively on litigation conduct and why the prelitigation misconduct at issue is actionable in a bad faith claim under Connecticut law. In part II C, I explain why, to the extent that the claim is based on litigation conduct, the majority's analysis fails to adequately grapple with the relevant legal principles.

B

In the operative complaint, the plaintiff alleges that the defendant "agreed to pay [her] all sums [that she] was legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle for damages resulting from bodily injury sustained by [her] in an accident involving the maintenance or use of the uninsured or underinsured motor vehicle, up to the limits of its contract." Although the operative complaint is not a model of clarity, it fairly can be read as also alleging that all of the conditions for the performance of the defendant's obligation to pay her for her bodily

injuries were met at the time this action was initiated, the defendant knew at that time that it was obligated to pay the plaintiff, and it nevertheless refused to pay the claim but, instead, "compelled [the plaintiff] to resort to litigation to obtain what was due to her" under the insurance policy.[8] As I noted previously in this opin-

[8] The majority states that, "[a]s the master of her complaint, the plaintiff never argued to the trial court—and has not argued before this court—that she premised any of her claims on conduct that occurred outside the course of a judicial proceeding." Footnote 6 of the majority opinion. I agree that the plaintiff has not framed her argument in terms of prelitigation/postlitigation conduct. But this court is addressing an important legal issue, and we are not bound by the precise rubric and line drawing employed by the parties in arguing their respective positions. See, e.g., *Meribear Productions, Inc.* v. *Frank*, 340 Conn. 711, 732, 265 A.3d 870 (2021) ("it is well established that [w]e may . . . review legal arguments that differ from those raised by the parties if they are subsumed within or intertwined with arguments related to the legal claim before the court" (internal quotation marks omitted)). This is especially true when, as here, the scope of a court's subject matter jurisdiction is being adjudicated. Cf. *Fort Bend County* v. *Davis*, U.S. , 139 S. Ct. 1843, 1849, 204 L. Ed. 2d 116 (2019) ("Characterizing a rule as a limit on [subject matter] jurisdiction renders it unique in our adversarial system. . . . Unlike most arguments, challenges to [subject matter] jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them sua sponte." (Citation omitted; internal quotation marks omitted.)). Indeed, if, in light of the novelty and complexity of the issues presented, the briefing of both parties in this appeal leaves something to be desired and provides insufficient guidance for the proper adjudication of those issues, it is fair to say that the majority itself has not relied exclusively on arguments that are found in the defendant's brief. In my estimation, this is a good thing, because, otherwise, its opinion would fail to serve its public function.

To the extent that the majority is making a different point—by suggesting that, "[a]s the master of her complaint," the plaintiff has failed to *allege* prelitigation misconduct as a basis for her claim—I simply disagree, particularly when reading the complaint liberally, as we must. The plaintiff's complaint alleged, among other things, that, prior to the commencement of litigation, the defendant knew that the plaintiff (1) was not at fault in the underlying automobile accident, (2) had complied with all of her duties as a covered person under the insurance policy issued by the defendant, and (3) was legally entitled to recover underinsured motorist benefits from the defendant under the policy. The complaint then expressly alleged that, by engaging in the conduct alleged therein, the defendant violated its duty of good faith and fair dealing by "*compel*[*ing*] [*the plaintiff*] *to resort to litigation to obtain what was due to her from* [*the defendant*] *under the* . . .

ion, CUIPA expressly identifies such conduct as an unfair claim settlement practice if it is part of a general business practice. See General Statutes § 38a-816 (6) (G) ("compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds" is unfair claim settlement practice). Although a single instance of such conduct does not give rise to a CUIPA violation in the absence of a general business practice, an insurer's refusal to honor a contractual obligation to pay a claim for no good reason does constitute bad faith conduct sufficient to state a claim for breach under our common law. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 795 (refusal to perform express contractual obligation not prompted by honest mistake constitutes bad faith). I would therefore conclude that these allegations—which do not implicate the litigation privilege because they do not involve any litigation conduct by the defendant—are sufficient to withstand a motion to dismiss.

The majority, in my view, fails to acknowledge that the contractual obligations of liability insurance companies to their insureds are treated differently under Connecticut law than the obligations of most other contracting parties. Many parties may risk nothing more than contractual liability if they choose to meet a legitimate contractual demand with the time-honored response, "so sue me." An insurance company defending a first-party claim is different because it is subject to a higher duty under our common law and can incur liability if it compels its insured to resort to litigation to obtain payment due

*insurance policy* . . . ." (Emphasis added.) I take these allegations, liberally but fairly construed, to state a claim that the plaintiff was contractually entitled to obtain payment of her claim without resorting to litigation but was left no choice by the defendant's prelitigation conduct to commence litigation to obtain what was rightfully hers.

under its insurance policy. See part II A of this opinion (discussing common law); cf. General Statutes § 38a-816 (6) (G). The litigation privilege does not bar such a claim.

C

To the extent that the plaintiff's bad faith claim is based in part on her allegations of litigation misconduct, it is far from clear to me that it is barred by the litigation privilege, and I am unpersuaded by the majority's application of the privilege under these circumstances. There is good reason to develop a more nuanced doctrine adapted to cases involving parties whose commercial activities involve frequent use of the courts as an intrinsic component of their business activities, and who are alleged to have breached a duty owed to the plaintiff in part by engaging in litigation misconduct. Our existing litigation privilege doctrine, properly applied to the present circumstances, readily accommodates this approach.

As the majority recognizes, when confronted with the question of whether the litigation privilege bars a claim, the inquiry is whether, viewed in its factual context, the plaintiff's claim—be it for fraud, tortious interference, or a statutory violation—is more like a claim for defamation or fraud, on the one hand, or a claim for vexatious litigation or abuse of process, on the other. See *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 631, 79 A.3d 60 (2013) (considering whether "the allegations in the counterclaim [for retaliation] are more akin to an abuse of process claim [than] a defamation or tortious interference claim" (internal quotation marks omitted)); *Simms* v. *Seaman*, 308 Conn. 523, 547–51, 69 A.3d 880 (2013) (analyzing whether fraud is similar to defamation for purposes of litigation privilege). Applying this analysis to the plaintiff's claims of bad faith, and even assuming that the claim relies necessarily on allegations of

litigation misconduct, I would find that the complaint is not barred by the privilege.

The majority acknowledges that the litigation privilege does not bar abuse of process type claims but concludes that the plaintiff's bad faith claim is barred because it more closely resembles the type of claims to which the privilege applies, such as defamation and fraud. Specifically, the majority concludes that the bad faith claim is barred because, like defamation and fraud claims, (1) the claim was based exclusively on false statements made by the defendant in court filings; part II B of the majority opinion; (2) the plaintiff does not "challenge the purpose of any underlying litigation"; part II A of the majority opinion; and (3) other remedies exist for the complained of conduct. Part III C of the majority opinion. I disagree and would conclude that the bad faith claim fits comfortably within the framework of an abuse of process claim because it adequately alleges that the defendant acted with an improper purpose within the meaning of the common-law abuse of process doctrine.[9]

[9] Regarding the majority's conclusion that the plaintiff's bad faith claim is barred because it is based on false statements, I agree that the allegation relating to the defendant's filing of false discovery responses could be accurately characterized as an allegation of making false statements but offer two observations in response. First, as explained in part II B of this opinion, the bad faith count is not based *solely* on improper conduct in the litigation itself; it also expressly alleges a claim based on the defendant's prelitigation misconduct, namely, the conduct "compel[ing] [the plaintiff] to resort to litigation to obtain what was due to her from [the defendant] under the . . . insurance policy . . . ." The litigation misconduct is a continuation of the prelitigation misconduct. Second, to the extent that the allegations regarding false discovery responses are necessary to sustain the claim, that fact itself does not trigger the privilege. False statements in litigation will fall outside of the privilege if those statements are made in service of a misuse of the litigation process itself. Indeed, verbal statements in litigation are the means by which a party carries out the torts of vexatious litigation and abuse of process. The statements at issue in the present case are hardly gratuitous or peripheral in an underinsured motorist case; discovery responses identifying witnesses are mandatory, they are signed under oath, and they are meant to be relied on by the opposing party. See Practice Book

A careful examination of the common-law tort of abuse of process demonstrates why, contrary to the majority's conclusion, the plaintiff's bad faith claim in the present case—based not only on allegations that the defendant improperly compelled the plaintiff to resort to litigation to obtain payment, but that the defendant then misused litigation procedures in an attempt to avoid or delay the performance of its contractual obligation to pay the plaintiff's valid claim—is far more similar to an abuse of process claim, to which the litigation privilege does not apply, than to a claim of defamation or fraud, to which the privilege does apply.

This court previously has held that, "[b]ecause the tort [of abuse of process] arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, [§ 682 of the Restatement (Second) of Torts] emphasizes that the gravamen of the action . . . is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . . Comment [b] to § 682 explains that the addition of primarily is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Emphasis in original; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987); see 3 Restatement (Second), Torts § 682, p. 474 (1977); 3 Restatement (Second), Torts,

Form 213 (plaintiff's interrogatories for uninsured/underinsured motorists cases). If the defendant's pleadings and response to these interrogatories were false, and if intended to weaken her resolve to pursue the litigation and to compel her to abandon her claim or to accept substantially less than the amount to which she is entitled, the false statements were part and parcel of the defendant's abuse of process. In other words, unlike a fraud claim, in which the essence of the claim is that the falseness of a communication *itself* injured the opposing party, the claim here is that the false litigation communications were a tactic intended to prolong the litigation and to wear down the plaintiff, in violation of the common-law and statutory duties the defendant owed to the plaintiff.

supra, § 682, comment (b), p. 475. Comment (a) to § 682 further provides that "it is immaterial that the process was properly issued, *that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose*, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this [s]ection." (Emphasis added.) 3 Restatement (Second), Torts, supra, § 682, comment (a), p. 474. Thus, *Mozzochi* and § 682 of the Restatement (Second) of Torts clearly indicate that the fact that the underlying proceedings had a proper overall purpose does not immunize a party from a claim for abuse of process when the claim alleges that the defendant has used a particular judicial procedure for an improper purpose, as, indeed, the majority concedes. See part II A of the majority opinion ("the plaintiff's cause of action must itself challenge the purpose of the underlying litigation or litigation procedure").[10]

[10] In *Simms* v. *Seaman*, supra, 308 Conn. 523, we analyzed whether fraud claims are sufficiently similar to abuse of process claims and vexatious litigation claims to be exempt from the litigation privilege. We stated that, to avoid the litigation privilege, "abuse of process claims must allege the improper use of litigation to accomplish a purpose for which it was not designed. . . . Likewise, vexatious litigation claims must allege, inter alia, that the defendant acted primarily for a purpose other than that of bringing an offender to justice and without probable cause." (Citation omitted; internal quotation marks omitted.) Id., 546. The majority in *Simms* concluded that fraud claims based on litigation conduct are barred by the privilege because, unlike abuse of process claims, they "[do] not require consideration of whether the underlying purpose of the litigation was improper but, rather, whether an attorney's conduct while representing or advocating for a client during a judicial proceeding that was brought for a proper purpose is entitled to absolute immunity." Id., 546–47.

I have no quarrel with *Simms*, but it would be a serious mistake to view that case as holding that any claim of litigation misconduct involving false speech is always covered by the litigation privilege, so long as the "underlying purpose of the litigation" itself is legitimate. That conclusion would, in one stroke, largely eviscerate the tort of abuse of process as explicated in § 682 of the Restatement (Second) of Torts, *Mozzochi* v. *Beck*, supra, 204 Conn.

The tort of abuse of process is not well defined.[11] See *Italian Star Line, Inc.* v. *United States Shipping Board*

494, and other leading authorities. We know that *Simms* could not have intended such a result, moreover, because our case law, including *Simms* itself, acknowledges that such claims are outside the privilege.

[11] I note, for example, that there is little clarity regarding the scope and meaning of the term "process." This court has recognized that "most courts that have considered the issue have construed the term process broadly." *Larobina* v. *McDonald*, 274 Conn. 394, 406, 876 A.2d 522 (2005); see, e.g., *Nienstedt* v. *Wetzel*, 133 Ariz. 348, 352, 651 P.2d 876 (1982) (process "has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process"); *Nienstedt* v. *Wetzel*, supra, 352–53 ("we . . . consider as 'processes' of the court for abuse of process purposes, the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances"); *Barquis* v. *Merchants Collection Assn. of Oakland, Inc.*, 7 Cal. 3d 94, 104 n.4, 496 P.2d 817, 101 Cal. Rptr. 745 (1972) ("[p]rocess, as used in the tort of abuse of process, has never been limited to the strict sense of the term, but instead has been interpreted broadly to encompass the entire range of procedures incident to litigation" (internal quotation marks omitted)); *Hough* v. *Stockbridge*, 152 Wn. App. 328, 346, 216 P.3d 1077 (2009) ("Depositions, motions, interrogatories, and other requests for discovery or legal maneuverings to compel or prohibit action by an opponent all invoke the authority of the court. They are, therefore, the type of process that will support an abuse of process claim."), review denied, 168 Wn. 2d 1043, 234 P.3d 1173 (2010). As we stated in *Larobina*, "[t]his broad reach of the abuse of process tort can be explained historically, since the tort evolved as a [catchall] category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (Internal quotation marks omitted.) *Larobina* v. *McDonald*, supra, 406. A number of courts have held, however, that not *all* litigation procedures constitute "process." See *California Physicians' Service* v. *Superior Court*, 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95 (1992) (Although an insurance company's "ridiculously low" settlement offer could be introduced as evidence of bad faith, "[d]efensive pleading, including the assertion of affirmative defenses, is communication protected by the absolute litigation privilege. Such pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith. No complaint can be grounded [on] such pleading."); *Ritter* v. *Ritter*, 381 Ill. 549, 555, 46 N.E.2d 41 (1943) ("Under [Illinois] jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is [wilful], intentional, malicious or

*Emergency Fleet Corp.*, 53 F.2d 359, 361 (2d Cir. 1931) ("the elements vital to an action for abuse of process are not clearly defined, either by the cases or by writers on the subject"); *Mozzochi* v. *Beck*, supra, 204 Conn. 496 ("[c]ourts have struggled to determine under what circumstances . . . a complaint states a cause of action for abuse of process"); *Board of Education of Farmingdale Union Free School District* v. *Farmingdale Classroom Teachers Assn., Inc., Local 1889, AFT AFL-CIO*, 38 N.Y.2d 397, 400, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975) ("this tort is an obscure one . . . one which is rarely brought to the attention of the courts . . . and the vital elements of which are not clearly defined" (citations omitted)). There appears to be general agreement, however, that "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a

fraudulent."); W. Barker et al., "Litigating About Litigation: Can Insurers Be Liable for Too Vigorously Defending Their Insureds?," 42 Tort Trial & Ins. Prac. L.J. 827, 854 (2007) ("[t]he cases almost uniformly reject plaintiffs' attempts to impose liability based on allegedly frivolous defenses, supposedly asserted only to delay an inevitable recovery"); cf. *Dean* v. *Kirkland*, 301 Ill. App. 495, 509–10, 23 N.E.2d 180 (1939) (filing of false pleadings, falseness of which would be determined during course of underlying proceeding, was not abuse of process). But see *Aranson* v. *Schroeder*, 140 N.H. 359, 366–67, 671 A.2d 1023 (1995) (adopting tort of malicious defense if defendant raises defense without probable cause for purpose of harassing opponent or delaying litigation, and proceeding is terminated in favor of plaintiff). Other authorities have limited the tort to process of a type that compels "the performance or forbearance of some prescribed act." (Internal quotation marks omitted.) *Long* v. *Long*, 136 N.H. 25, 31, 611 A.2d 620 (1992); see *Board of Education of Farmingdale Union Free School District* v. *Farmingdale Classroom Teachers Assn., Inc., Local 1889, AFT AFL-CIO*, 38 N.Y.2d 397, 400–404, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975); see also 1 Am. Jur. 2d 492, Abuse of Process § 2 (2016) (" 'process,' the abuse of which may support an abuse of process claim, is not limited to the original pleadings; depositions, motions, interrogatories and other requests for discovery, or legal maneuverings *to compel or prohibit action by an opponent* all invoke the authority of the court and are, therefore, the type of process that will support an abuse of process claim" (emphasis added)).

club." W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 121, p. 898; accord *Preferred Properties, Inc.* v. *Indian River Estates, Inc.* 276 F.3d 790, 801–802 (6th Cir.), cert. denied, 536 U.S. 959, 122 S. Ct. 2663, 153 L. Ed. 2d 838 (2002); see also *Board of Education of Farmingdale Union Free School District* v. *Farmingdale Classroom Teachers Assn., Inc., Local 1889, AFT AFL-CIO*, supra, 404 ("[L]egal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. [When] process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party."). A number of courts have held that this definition is capacious enough to include an attempt by an insurance company to use legal procedures to bully the opposing party into abandoning litigation or settling it favorably. See *General Refractories Co.* v. *Fireman's Fund Ins. Co.*, 337 F.3d 297, 308 (3d Cir. 2003) (if severe enough, using litigation process to harass, drain resources, delay payment and delay litigation can constitute abuse of process); *Crackel* v. *Allstate Ins. Co.*, 208 Ariz. 252, 260, 92 P.3d 882 (App. 2004) ("[The plaintiffs] maintain that [the defendant insurer] used the prospect of sustained and expensive litigation as a 'club' in an attempt to coerce them, and other similarly situated claimants, to surrender those causes of action that sought only modest damages. We have little trouble concluding that such a use of court processes would be improper."); *Givens* v. *Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 401 (Tenn. 2002) ("a primary desire to harass and cause unnecessary expense to the other party in litigation is a sufficient ulterior motive to constitute an abuse of process"); *Givens* v. *Mullikin ex rel. Estate of McElwaney*, supra, 401–402 (insurer's intent to weaken claimant's resolve to pursue litigation is improper purpose); see also *Bull*

v. *McCuskey*, 96 Nev. 706, 709, 615 P.2d 957 (1980) (filing lawsuit to coerce nuisance settlement constitutes abuse of process); cf. *McGann* v. *Allen*, 105 Conn. 177, 186–87, 134 A. 810 (1926) (filing criminal complaint for purpose of compelling plaintiff to settle claim for allegedly stolen goods tends to show malice for purpose of malicious prosecution claim).[12]

The foregoing review demonstrates, at the very least, that the present case involves complexities and nuances

[12] But see *Bird* v. *Rothman*, 128 Ariz. 599, 602, 627 P.2d 1097 (App. 1981) ("[t]here was no proof of an improper use of judicial process . . . as the purpose of settlement is includable in the goals of proper process"), review denied, Arizona Supreme Court (May 5, 1981), cert. denied, 454 U.S. 865, 102 S. Ct. 327, 70 L. Ed. 2d 166 (1981); *Azer* v. *Myers*, 8 Haw. App. 86, 129–30 and n.38, 793 P.2d 1189 (trial court properly instructed jury that "[t]he commencement of a lawsuit for the purpose of obtaining a settlement (which may include the payment of money or insurance proceeds) is included in the goals of proper process and, therefore, does not by itself give rise to liability for abuse of process"), rev'd in part on other grounds, 71 Haw. 506, 795 P.2d 853 (1990); *Myers* v. *Cohen*, 5 Haw. App. 232, 244, 687 P.2d 6 ("[e]ven if frivolous, the counterclaim had the purpose of settlement which is includable in the goals of proper process" (internal quotation marks omitted)), rev'd on other grounds, 67 Haw. 389, 688 P.2d 1145 (1984); *Ritter* v. *Ritter*, 381 Ill. 549, 555, 46 N.E.2d 41 (1943) ("Under [Illinois] jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is [wilful], intentional, malicious or fraudulent."); W. Barker et al., "Litigating About Litigation: Can Insurers Be Liable for Too Vigorously Defending Their Insureds?," 42 Tort Trial & Ins. Prac. L.J. 827, 854 (2007) ("[t]he cases almost uniformly reject plaintiffs' attempts to impose liability based on allegedly frivolous defenses, supposedly asserted only to delay an inevitable recovery"). At least one such case arises in the first-party insurance context. See *California Physicians' Service* v. *Superior Court*, 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95 (1992) (Although an insurance company's "ridiculously low" settlement offer could be introduced as evidence of bad faith, "[d]efensive pleading, including the assertion of affirmative defenses, is communication protected by the absolute litigation privilege. Such pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith. No complaint can be grounded [on] such pleading.")

that the majority does not fully examine.[13] There is ample support for the proposition that, when specific procedures—including "the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances"—are undertaken for an improper ulterior purpose, they are not subject to the litigation privilege, regardless of whether the underlying litigation was proper. *Nienstedt* v. *Wetzel*, 133 Ariz. 348, 352–53, 651 P.2d 876 (1982); see *Hough* v. *Stockbridge*, 152 Wn. App. 328, 346, 216 P.3d 1077 (2009) ("Depositions, motions, interrogatories, and other requests for discovery or legal maneuverings to compel or prohibit action by an opponent all invoke the authority of the court. They are, therefore, the type of process that will support an abuse of process claim."), review denied, 168 Wn. 2d 1043, 234 P.3d 1173 (2010). There also is ample support for the proposition that, for purposes of the tort of abuse of process, an improper ulterior purpose may include an intent by an insurance company to harass, to drain resources, to delay payment, to coerce the opposing party into abandoning the litigation or settling. See *General Refractories Co.* v. *Fireman's Fund Ins. Co.*, supra, 337 F.3d 308; *Crackel* v. *Allstate Ins. Co.*, supra, 208 Ariz. 258–59; *Givens* v. *Mullikin ex rel. Estate of McElwaney*, supra, 75 S.W.3d 401–402.

Similarly, if an insurance company misuses a litigation procedure with the intent of avoiding or delaying the performance of its contractual obligations to an insured, I see no reason why the litigation privilege should bar a bad faith claim based on that conduct. Such a claim is far more akin to an abuse of process claim than to a defamation claim, and multiple courts

[13] I do not fault the majority in this regard. As I have indicated, the plaintiff's allegations of bad faith are relatively weak, and neither party has adequately briefed the underlying legal complexities involved. To modify the adage, bad facts and inadequate briefing make bad law.

have recognized that an insurance company's obligation to investigate and settle claims in good faith does not end when litigation begins. See, e.g., *Tucson Airport Authority* v. *Certain Underwriters at Lloyd's, London*, 186 Ariz. 45, 48, 918 P.2d 1063 (App. 1996) ("[t]he duties [of good faith and fair dealing] would be rendered meaningless if . . . the litigation privilege could be employed to excuse a breach of those duties, which occurs as part of the conduct of a coverage action"), review denied, Arizona Supreme Court, Docket No. 2 CA-CV 95-0052 (June 19, 1996); *Gooch* v. *State Farm Mutual Automobile Ins. Co.*, 712 N.E.2d 38, 43 (Ind. App. 1999) (insurance company's intentional refusal to investigate matter relevant to claim in order to provide counsel with "a 'litigation position' " could support bad faith claim), transfer denied, 735 N.E.2d 223 (Ind. 2000); *Federated Mutual Ins. Co.* v. *Anderson*, 297 Mont. 33, 43, 991 P.2d 915 (1999) (jury could consider insurance company's frivolous appeal as evidence of bad faith conduct);[14] *O'Donnell ex rel. Mitro* v. *Allstate Ins. Co.*, 734 A.2d 901, 906 (Pa. Super. 1999) ("bad faith suits are not restricted to the denial of claims, but, rather, may extend to the misconduct of an insurer during the pendency of litigation" (internal quotation marks omitted)); *Poling* v. *Motorists Mutual Ins. Co.*, 192 W. Va. 46, 48, 450 S.E.2d 635 (1994) (plaintiff is not precluded from bringing bad faith action based on insurance company's litigation conduct).

The majority states that the litigation privilege applies in this case because the plaintiff's bad faith claim "does not require the plaintiff to challenge either the purpose of the underlying litigation or the purpose of a particular judicial procedure." Part II A of the majority opinion. This assertion is flatly incorrect. To prevail on her claim

[14] Thus, even if litigation misconduct in furtherance of an unfair claim settlement practice cannot provide the basis for a bad faith violation, it should be admissible as evidence of one.

that the defendant engaged in bad faith litigation conduct, the plaintiff would be required to establish that the defendant used litigation procedures, such as filing baseless special defenses or false discovery responses, for the improper purposes alleged in her complaint, namely, "forc[ing] [the plaintiff] to undergo an unnecessarily time consuming and expensive course of litigation to obtain what was legally due to [her]" and "frustrat-[ing] [her] ability to receive benefits due [to her] under her contract."

The majority also argues that, "[i]f [this concurring and dissenting opinion] were correct that the plaintiff's factual allegations were sufficient . . . to challenge the defendant's use of the courts, any plaintiff could pierce the litigation privilege with any cause of action by merely including allegations that a defendant's conduct constituted an abuse of the judicial system." Part II A of the majority opinion. Not at all. First, I have repeatedly stressed in this opinion that my conclusions are driven largely by the special considerations that arise from the relationship between an insurance company and a first-party insured, considerations that are embedded in the common-law bad faith doctrine, including the asymmetry between the insured and the insurer with respect to bargaining power and litigation experience and the special vulnerabilities of an insured who has suffered a covered loss. See part II A of this opinion; see also part III B of this opinion (discussing similar considerations in connection with CUIPA and CUTPA). Second, some "improper purposes," such as the intent to defraud or defame, have been found not to constitute abuse of process as a matter of law for purposes of the litigation privilege; an allegation that the defendant's fraud or defamation constituted abuse of process could not survive a motion to dismiss. But, if a party can allege facts showing that a defendant has abused judicial procedures for a purpose that *has* been recognized

as improper, such as to stonewall an insured who is entitled to payment of a valid claim under the applicable policy without resorting to litigation, I see no reason why the litigation privilege should bar that claim at this preliminary stage of the proceedings. Of course, the plaintiff then bears the burden of *proving* these allegations at trial.

I also disagree with majority's suggestion that a properly alleged bad faith claim based on an insurance company's litigation conduct would be subject to the litigation privilege because of the availability of alternative remedies, including a claim pursuant to General Statutes §§ 52-99[15] or General Statutes § 52-568.[16] See part II C of the majority opinion. In my view, that consideration should carry little weight if public policy otherwise counsels in favor of recognizing such claims, particularly when, as here, the supposed "remedy" may provide no meaningful relief at all to the individual plaintiff. Unlike a lawsuit alleging bad faith, the alternative remedies identified by the majority, such as court imposed sanctions, attorney grievance proceedings and contempt proceedings, are not intended to compensate the victims who actually have been injured by bad faith litigation conduct. Indeed, such alternative remedies are also available when a party has engaged in abuse of process, yet that tort is not subject to the privilege.

[15] General Statutes § 52-99 provides: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided no expenses for counsel fees shall be taxed exceeding ten dollars for any one offense."

[16] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

I would further note that, because §§ 52-99 and 52-568 make it clear that it is the strong public policy of this state to discourage dishonesty during the litigation process, those statutes *support* the plaintiff's argument that the privilege does not bar a claim that an insurance company violated its obligation of good faith by engaging in such conduct.

To summarize, I do not agree with the majority's conclusion that the plaintiff's bad faith claim is premised exclusively on false statements in the course of the litigation and, instead, would conclude that the plaintiff has adequately alleged a bad faith claim based on conduct entirely outside of the litigation. Even if I agreed with the conclusion that the plaintiff's bad faith claim is barred because it is premised exclusively on false statements in the course of the litigation, I would not agree with the remainder of the majority's analysis. I therefore dissent from part II of the majority opinion. Because the defendant makes no claim that an insurance company's bad faith conduct outside the context of litigation cannot provide the basis for a claim of negligent infliction of emotional distress, I would also conclude that the allegations in count four of the plaintiff's complaint are sufficient to withstand a motion to dismiss. If the plaintiff could demonstrate at trial that the defendant acted in bad faith within the meaning of Connecticut law, I believe that she would be entitled to recover damages for negligent infliction of emotional distress on that basis. Accordingly, I also dissent from part III of the majority opinion.

III

I next address part IV of the majority opinion addressing the plaintiff's CUIPA/CUTPA claim. To put the matter directly, I am concerned that the majority's discussion of the litigation privilege in this case will be extended to CUIPA/CUTPA cases involving allegations

that an unscrupulous insurance company is engaging in unfair claim settlement practices, in whole or in part, by purposely utilizing the litigation process, or particular litigation tactics, as an integral part of a general business with that objective. I genuinely appreciate the majority's effort to acknowledge the limited scope of its holding,[17] and, in light of that caveat, I may be overreacting to the possibility that its holding will be extended to the situation I describe. A cautionary note seems prudent nonetheless. In part III A, I express my disappointment that the majority reaches the question at all of whether the litigation privilege applies to the CUIPA/CUTPA claim, as alleged in count five of the plaintiff's complaint; in my estimation, that claim is legally insufficient wholly apart from any issue of privilege. Part III B of this opinion takes issue with certain language used by the majority that I consider unnecessary to the opinion and better left to a case in which the issues addressed are properly before the court.

A

In my view, there is no need to address the litigation privilege at all in connection with the CUIPA/CUTPA claim, as alleged by the plaintiff in the present case. The majority correctly observes that the only part of the plaintiff's complaint coming anywhere close to asserting a CUIPA violation are her allegations that (1) the defendant responded falsely to the plaintiff's discovery requests, and (2) this conduct represents a general business practice because the defendant admit-

[17] I refer in particular to the following passage in the majority opinion: "This [holding] does not mean . . . that a defendant enjoys absolute immunity for all CUTPA claims under the litigation privilege, even those premised on a violation of CUIPA. Rather, we merely hold that this specific claim—a business practice of filing false discovery responses—is afforded absolute immunity. . . . Our holding leaves open the possibility that other CUTPA claims may not be barred by absolute immunity under the litigation privilege." Part IV of the majority opinion.

ted that it did not single the plaintiff out for special treatment when it provided the false responses. See part IV of the majority opinion. I would have preferred that the majority explain that these factual assertions fail adequately to allege that the purported misconduct occurred with such frequency as to indicate a general business practice, and stop there. Instead, the majority chooses to "assume" that a general business practice is alleged, and then explains why the act of filing false discovery responses is within the scope of the litigation privilege in a CUIPA/CUTPA case. See id.

I am aware of no good reason to assume that a legally insufficient pleading is legally sufficient under these circumstances, and I consider it unwise to do so. The discussion of the litigation privilege in the majority opinion is unnecessary because the critical allegation required to state a CUIPA claim—that filing false discovery responses is part of the defendant's "general business practice"—is deficient as a matter of law. As the majority points out, the sole, relevant allegation consists of the plaintiff's assertion that "the defendant 'did not single [her] out . . . for special or unique treatment when it responded falsely to [her] discovery requests.' " Id. Even if this allegation is construed liberally, as it must be, the complaint fails to allege that the conduct at issue was committed "with such frequency as to indicate a general business practice," as CUIPA requires. General Statutes § 38a-816 (6). The allegation that the plaintiff was not singled out for special or unique treatment does not state, or even imply, that the defendant files false discovery answers frequently, as part of a general business practice, plan or strategy. It means only that the discovery misconduct of which the plaintiff complains was not undertaken against her with any personal animus or particularized intent. The plaintiff is "the master of her complaint," as the majority points out; footnote 6 of the majority opinion; and was permit-

ted in this case to amend that pleading numerous times before its sufficiency was tested by motion. If the plaintiff wanted to allege that the defendant frequently engages in the same misconduct with other insureds, it is not too much to require an explicit allegation to that effect.

Normally, it would not be a cause for concern that we proceed to take up a merits issue by assuming that the plaintiff's complaint states an otherwise cognizable claim. But the situation is different here for three related reasons. First, the merits issue, even in its most basic formulation—namely, the applicability of the litigation privilege to CUTPA claims—presents an important issue of first impression in this court. Second, while that issue of first impression is difficult enough in its simplest form, it becomes far more complicated in the context of a case like this one, which involves a first-party CUIPA/CUTPA claim against an insurance company. The difficulty arises because the defendants in these cases are engaged in the *business* of litigation and are therefore able, if they choose, to misuse litigation systemically in a way that distinguishes CUIPA/CUTPA claims from the type of garden-variety tort claims in which the litigation privilege traditionally applies, and that distinguishes insurance company defendants from the class of litigants traditionally subject to the privilege. Third, this particular case is very poorly suited as a means to properly address the important and difficult merits issues, not only because the factual allegations are so thin and weak, but also because neither party has provided us with adequate briefing on the CUIPA/CUTPA issue.

These three reasons help explain why I would have avoided the merits altogether with respect to the plaintiff's CUIPA/CUTPA claim. Although the majority opinion is intended to apply only to the facts as alleged, in my view, it would be better to say nothing at all, because,

especially in the absence of adequate briefing, the court cannot be expected to grapple with, much less resolve, the far more complex and nuanced issues that would be implicated in CUIPA/CUTPA cases involving genuinely serious claims of unfair claim settlement practices effectuated, in whole or part, through a business practice involving litigation misconduct.

B

The majority states that "the litigation privilege bars CUTPA claims, like the claim at issue, premised solely on general allegations of intentionally false discovery responses . . . ." Part IV of the majority opinion. In addition, the majority concludes that the claim is barred because other remedies are available. Id. This narrow holding appears to leave open the possibility that a CUIPA/CUTPA claim that is not based *solely* on the falsity of communications made during the course of litigation would not be barred.[18] I take this as positive

[18] All of the cases cited by the majority in support of its conclusion that the litigation privilege bars CUTPA claims involved claims by the plaintiff that the defendant had provided false information during a judicial proceeding. See *Graham* v. *U.S. Bank, National Assn.*, Docket No. 3:15-cv-0990-AC, 2015 WL 10322087, *15 (D. Or. December 2, 2015) (privilege protects communications made during judicial proceeding), report and recommendation adopted, 2016 WL 393336 (D. Or. February 1, 2016); *Trent* v. *Mortgage Electronic Registration Systems, Inc.*, 618 F. Supp. 2d 1356, 1360 (M.D. Fla. 2007) (privilege applies to communications in judicial proceedings), aff'd, 288 Fed. Appx. 571 (11th Cir. 2008); *PSN Illinois, Inc.* v. *Ivoclar Vivadent, Inc.*, Docket No. 04 C 7232, 2005 WL 2347209, *6 (N.D. Ill. September 21, 2005) (litigation privilege precludes deceptive trade practices claim based on statements made in course of litigation); *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 725, 161 A.3d 630 (2017) (privilege confers immunity on "those who provide information in connection with judicial and quasi-judicial proceedings" (internal quotation marks omitted)); *Tyler* v. *Tatoian*, 164 Conn. App. 82, 94, 137 A.3d 801 (statements made in course of judicial proceedings are privileged), cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). For the reasons stated in the body of this opinion, I believe that a strong argument can be made that the policy considerations underlying this rule carry much less weight when the defendant has made it a *business practice* to provide false information in judicial proceedings. Even if the majority is correct, however, that false statements in the course of litigation are always subject to the privilege, that would not mean that CUIPA/CUTPA claims

news. The issues under consideration are complex, and there is strong authority for the proposition that, in a case involving more robust factual allegations, conduct that is designed to harass or delay an insured can constitute abuse of process.[19] See part II C of this opinion (addressing authorities at length.) In addition, multiple courts have held that litigation conduct by an insurance company that is designed to coerce the withdrawal of a claim or a settlement unfavorable to the plaintiff may give rise to a claim of bad faith.[20] I see no reason why a CUTPA claim based on the systematic use of litigation for these purposes should be barred merely because the underlying litigation pursued by the insured was properly brought. Indeed, this point seems especially strong because the legislature has expressly recognized that an insurance company can engage in an unfair claim settlement practice by forcing an insured into litigation in order to obtain his or her contractual benefits. See General Statutes § 38a-816 (6) (G) (listing as prohibited unfair claim settlement practice "compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds"). This statutory provision means that an insurance company, unlike other litigants, can abuse the litigation system merely by compelling an insured to resort to that system as a means of "dispute" resolution.

based on other litigation misconduct designed to harass the plaintiff or delay the proceedings would be barred. See part II of this opinion.

[19] See, e.g., *General Refractories Co.* v. *Fireman's Fund Ins. Co.*, supra, 337 F.3d 308; *Crackel* v. *Allstate Ins. Co.*, supra, 208 Ariz. 258–59; *Givens* v. *Mullikin ex rel. Estate of McElwaney*, supra, 75 S.W.3d 401–402.

[20] See *Tucson Airport Authority* v. *Certain Underwriters at Lloyd's, London*, supra, 186 Ariz. 48; *Gooch* v. *State Farm Mutual Automobile Ins. Co.*, supra, 712 N.E.2d 43; *Federated Mutual Ins. Co.* v. *Anderson*, supra, 297 Mont. 43–44; *O'Donnell ex rel. Mitro* v. *Allstate Ins. Co.*, supra, 734 A.2d 906; *Poling* v. *Motorists Mutual Ins. Co.*, supra, 192 W. Va. 48.

My point is not that there is a perfect identity between an abuse of process claim and a well pleaded CUIPA/CUTPA claim alleging that the defendant has engaged in unfair claim settlement practices effectuated, in whole or part, through a business practice involving litigation misconduct. A perfect fit is not required to make the litigation privilege inapplicable, or, otherwise, the majority's analysis could be stated in one sentence: a CUIPA/CUTPA claim is barred because every claim is barred that does not state a cause of action for vexatious litigation or abuse of process. As the majority recognizes, the proper inquiry, rather, is whether, when viewed in its factual context, the plaintiff's claim—whether it be for fraud, tortious interference, or a statutory violation—is more like a claim for defamation or fraud, on the one hand, or a claim for vexatious litigation or abuse of process, on the other. See *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 631 (considering whether "the allegations in the counterclaim [for retaliation] are more akin to an abuse of process claim [than] a defamation or tortious interference claim" (internal quotation marks omitted)); *Simms* v. *Seaman*, supra, 308 Conn. 547–51 (analyzing whether fraud is similar to defamation for purposes of litigation privilege). We cannot resolve the inquiry in the abstract with respect to some future CUIPA/CUTPA claim, and I do not intend to suggest a definitive answer here. I am convinced only that it is a real issue and has not yet been properly presented or briefed before this court.

With respect to the issue of alternative remedies, the legislature enacted CUTPA with the intent "of encouraging litigants to act as private attorneys general" to combat *systemic* unfair business practices. *Stone* v. *East Coast Swappers, LLC*, 337 Conn. 589, 605, 255 A.3d 851 (2020). It undermines this intent to limit a plaintiff's remedies to sanctions, grievance proceedings and contempt proceedings restricted to particular acts of miscon-

duct in a single case, when the allegations claim a *systemic* business practice across multiple cases.

Despite leaving open the possibility that CUIPA/CUTPA claims based on other types of litigation misconduct might not be subject to the litigation privilege, the majority suggests that, if the legislature had wanted claims based on systematic litigation misconduct to be subject to CUTPA, it "would have been explicit in abrogating the immunity . . . ." Part IV of the majority opinion. I disagree with this speculation. This court has recognized that "[t]he Connecticut General Assembly deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints." *Sportsmen's Boating Corp.* v. *Hensley*, 192 Conn. 747, 755, 474 A.2d 780 (1984). "Because CUTPA is a self-avowed remedial measure . . . it is construed liberally in an effort to effectuate its public policy goals." (Citation omitted; internal quotation marks omitted.) Id., 756. In light of the legislature's deliberate choice to allow the courts to define the scope of proscribed conduct and the statute's broad remedial purpose, it seems extremely doubtful to me that the legislature's failure to expressly recognize an exception to the common-law litigation privilege for CUTPA claims involving conduct during litigation evinces an intent to bar such claims. Cf. *Barefield* v. *DPIC Cos.*, 215 W. Va. 544, 554, 600 S.E.2d 256 (2004) ("We find no caveat in the [West Virginia Unfair Trade Practices Act] . . . [that] states that an insurance company or other person in the business of insurance . . . has a duty to refrain from unfair methods of competition or unfair or deceptive acts or practices [only] prior to the filing of a lawsuit by a party, but has no such duty thereafter. We find nothing to show that the public policy established in [the statute] is obviated once litigation ensues. We therefore must conclude that the language of the [statute] does not

restrict the scope of the conduct that is proscribed . . . to that which occurred prior to the filing of a lawsuit." (Internal quotation marks omitted.)).[21] This is especially so because, as discussed, the legislature expressly included litigation related misconduct as one means by which an insurance company could engage in unfair claim settlement practices. See General Statutes § 38a-816 (6) (G). It would be incongruous for the legislature to have declared such conduct unlawful if it believed that the

[21] The court in *Barefield* also concluded that, although "the conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act," "an insurance company cannot be held liable . . . for the actions of a defense attorney retained to defend an insured, when the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured, and are not otherwise relied [on] or ratified by the insurance company in a manner contrary to the [a]ct." *Barefield* v. *DPIC Cos.*, supra, 215 W. Va. 559.

The majority cites to *Harrison* v. *Nationwide Mutual Fire Ins. Co.*, 580 F. Supp. 133, 136 (E.D. Pa. 1983), for the proposition that "an unfair insurance practices claim [that] is premised on pleadings or documents filed in and relevant to an underlying judicial proceeding . . . is absolutely privileged, even if the statements were made falsely or maliciously." Part IV of the majority opinion. The majority misreads *Harrison*. The claim in that case was not that the defendant insurance company had violated Pennsylvania's Unfair Insurance Practices Act by systematically abusing the judicial process for the purpose of coercing the abandonment of claims or favorable settlements. Rather, the plaintiffs claimed that the insurance company had *defamed* them by claiming that the house fire for which the plaintiffs sought coverage was caused by arson and that they had misrepresented their damages. Id., 134. The court held that a defamatory statement contained in an answer to a complaint is "*absolutely privileged* and . . . even if made falsely or maliciously and without reasonable and probable cause, *is an absolute bar* to an action of libel based on such averments." (Emphasis in original; internal quotation marks omitted.) Id., 136. This is hardly surprising, as defamation is the paradigmatic tort to which the privilege applies. Although the plaintiffs in *Harrison* did raise a claim under Pennsylvania's Unfair Insurance Practices Act; see id., 137; the basis for the claim was not stated, and there is no indication that the insurance company raised a litigation privilege defense to the claim. Rather, the court concluded that the claim was barred because "[t]he relief sought by [the] plaintiffs [namely, damages in excess of $20,000] is not what [the Unfair Insurance Practices] Act provides as a penalty for its violation." Id., citing *Nazer* v. *Safeguard Mutual Assurance Co.*, 293 Pa. Super. 385, 439 A.2d 165 (1981); see *Nazer* v. *Safeguard Mutual Assurance Co.*, supra, 387 (Pennsylvania act does not create private cause of action).

policies underlying the litigation privilege should apply to insurance companies defending first-party claims. In any event, the parties have not given us a word of briefing on the issue, and the facts of the case provide us with an extremely poor framework within which to decide the issue. Indeed, the majority appears to agree that, in the appropriate, future case, we could decide, like the court in *Barefield*, that the balancing of public policy interests clearly weighs in favor of allowing properly pleaded CUTPA claims based on systemic abusive litigation tactics by insurance companies in furtherance of an unfair claim settlement practice. As I explained in part II of this opinion, it is well established that insurance contracts impose, at the very least, a duty of good faith and fair dealing running from an insurer to its insured, and several courts have held that that obligation continues during and within the litigation process. When the proper case arises, we should seriously consider the possibility that systemic imbalances between insurers and insureds make it tempting and profitable for insurance companies to violate this obligation of good faith as a general business practice. See J. Ellison & T. Law, "Bad Faith and Punitive Damages: The Policyholder's Guide to Bad Faith Insurance Coverage Litigation—Understanding the Available Recovery Tools," American Law Institute—American Bar Association Continuing Legal Education, Westlaw No. SK095 ALI-ABA *251, *259–72 (June 16, 2005) (discussing systemic imbalances between insureds and insurers). As one court has observed, "[i]nsurance is different. Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a hard-ball approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to cover if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders perfor-

mance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance. In a typical contract, the [nonbreaching] party can replace the performance of the breaching party by paying the [then prevailing] market price for the counter-performance. With insurance this is simply not possible. This feature of insurance contracts distinguishes them from other contracts and justifies the availability of punitive damages for breach in limited circumstances." (Footnotes omitted; internal quotation marks omitted.) *E.I. DuPont de Nemours & Co.* v. *Pressman*, 679 A.2d 436, 447 (Del. 1996).

As I indicated, insurance is also different because insurance companies are effectively in the business of litigation.[22] "[I]nsurance companies are bulk purchasers

[22] The majority points out that "this court consistently has applied the litigation privilege to attorneys, who, without a doubt, are in the business of litigation." Footnote 18 of the majority opinion. The comparison between litigation attorneys and insurance companies is inapt. First, litigation attorneys, unlike liability insurance companies sued in first-party actions, do not owe any duty of care (except as imposed by ethical rules) to the opposing party, whereas liability insurance companies owe a heightened duty of care to their insureds. Compare *State* v. *Acordia, Inc.*, 310 Conn. 1, 37, 73 A.3d 711 (2013) (stating, albeit in dictum, that "an insurer generally has a fiduciary relationship with its insured"), with *Mozzochi* v. *Beck*, supra, 204 Conn. 497 (stating that liability rules must not "interfere with the attorney's primary duty of robust representation of the interests of his or her client"). Second, attorneys, unlike insurance companies, are categorically excluded from CUTPA in connection with their litigation activities, privileged or not. See *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 34, 699 A.2d 964 (1997) (CUTPA applies to attorneys only with respect to "the entrepreneurial or commercial aspects of the profession"). Third, the crux of the problem that I address in this opinion is precisely that liability insurance companies, *as parties*, are in the business of litigation *in furtherance of their business interests outside of litigation*, i.e., as insurance companies. Their unusual hybrid character enables them, if so inclined, to *systematically* misuse their litigation activities *for the purpose of furthering that nonlitigation business activity*. Litigation attorneys who engage in wrongful litigation conduct, by contrast, have both feet firmly planted in the business of litigation; any systemic abuse they may perpetrate occurs wholly within the judicial system

of legal services; they incur proportionately lower litigation costs than their policyholders, and can reuse work product from case to case." J. Ellison & T. Law, supra, *270; see id., *264 ("[l]itigation is the bread and butter of liability insurance companies and they are comfortable with it"). In 2005, "[t]he insurance industry . . . admitted that it [spent] one billion dollars a year in so-called 'coverage litigation' " in the property and casualty field alone. Id., *265 and n.32. Even with these enormous expenditures, insurance companies can profit by engaging in dilatory litigation tactics because "insurance companies earn investment income—a profit— during an insurance coverage dispute with a policyholder. This is done by continuing to invest the policyholder's premiums and the reserves for the duration of the dispute." Id., *270. "If its investments have been good, it may even have made enough to cover any prejudgment interest, costs, or consequential damage[s] award, or counsel fees collected by the policyholder." (Internal quotation marks omitted.) Id., *272. This systemic imbalance "allow[s] insurance companies to wage wars of attrition against individual policyholders who litigate an insurance dispute once in a lifetime."[23] Id., *270. Even if

and is subject to its disciplinary oversight. Fourth and finally, insurance companies are in the business of litigation, *whereas insureds are not*, which I believe is one of the primary reasons that the law imposes a common-law and statutory duty of good faith in connection with, among other things, an insurance company's litigation related conduct. At least when the system is working properly and each side is represented by counsel, no comparable imbalance exists with respect to litigation attorneys, because each party has one. At the very least, even an unrepresented party knows that it is not "in good hands" when relying on opposing counsel.

[23] As the court in *Poling* v. *Motorists Mutual Ins. Co.*, supra, 192 W. Va. 46, stated, "[o]ften in lawsuits, there is a disparity of bargaining power between the plaintiff and [the] defendant. In most cases, the defendant has a resource advantage over the plaintiff and is able to draw out a trial into a prolonged blizzard of mindless motions, countless continuances, and dreadful delay.

"The mere fact that after months of delay and hassle the insurance company deigns to speak to the injured party and settles the case for the policy limits after realizing that the plaintiff is not going to accept some outlandish

an insurance company occasionally loses money in a particular case, the system ensures that insurance companies will profit from a general practice of using litigation to coerce lowball settlements and, if that is not possible, to delay payment as long as possible.

In light of the foregoing, members of this court—properly briefed by the parties in a case raising the issues squarely, as the present case does not—may well conclude that public policy weighs in favor of the conclusion that the litigation privilege does not bar CUIPA/CUTPA claims based on systematic litigation conduct by an insurance company in furtherance of an unfair claim settlement practice. If the litigation privilege does not bar abuse of process claims or bad faith claims based on litigation conduct in an individual case, there is indeed a very strong argument that the systematic abuse of litigation procedures as a general business practice in violation of CUTPA should not be subject to the privilege. Perhaps it would make far better sense to hold that the privilege should be limited to its historic application to defamation claims and causes of action that are similar to that tort, i.e., those based on false statements made during the litigation that are not part of a systemic business practice prohibited by law. Public policy surely does not weigh in favor of extending the privilege to systematic litigation conduct in clear violation of the law; cf. *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 170, 757 A.2d 14 (2000) (" 'we exclude from the [attorney-client] privilege communications made in furtherance of crime or fraud because the costs to truth-seeking outweigh the justice-enhancing effects of complete and candid attorney-client conversations' "), quoting *In re Grand Jury Proceedings*, 183 F.3d 71, 76–77 (1st Cir. 1999); and it is

[lowball] offer, does not automatically preclude the plaintiff from later bringing a bad faith action that includes a request for punitive damages." (Internal quotation marks omitted.) Id., 48.

unreasonable to assume that the legislature intended otherwise merely because it failed to expressly exempt CUTPA claims from the privilege. I therefore disagree with the majority's dictum to the extent that it suggests that the litigation privilege would bar all CUTPA claims based on conduct during litigation.

I agree, however, that the plaintiff in the present case did not adequately allege a CUTPA claim. Accordingly, I concur in part IV of the majority opinion, in which the majority concludes that the trial court properly dismissed that claim.

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## STATE OF CONNECTICUT *v.* DAMARQUIS GRAY (SC 20368)

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

*Syllabus*

Convicted of numerous crimes, including felony murder, in connection with the shooting death of the victim, the defendant appealed to this court. During the course of the defendant's trial, the trial court detained three eyewitnesses to the shooting, W, G, and H, who were reluctant to testify. Due to the state's difficulty in locating and serving subpoenas on W and H, the trial court issued material witness warrants pursuant to statute (§ 54-82j) to secure their appearance at trial. After completing his direct examination of W, the prosecutor requested that W be detained overnight to ensure that she return the next day for cross-examination. When W's assigned counsel indicated that W did not have overnight childcare for her daughter, the court first suggested that the state contact the Department of Children and Families but then gave W time to make childcare arrangements, which she ultimately was successful in doing. The trial court also granted the prosecutor's request to detain H for an additional night in light of H's demeanor at trial and his prior efforts to avoid the state's subpoenas. H's testimony was then delayed for another day because the testimony of certain other witnesses was prioritized,

* This case was originally argued before a panel of this court consisting of Chief Justice Robinson, and Justices McDonald, D'Auria, Kahn, Ecker and Keller. Thereafter, Justice Mullins was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

but the court released H with electronic monitoring at the request of H's assigned counsel. In addition, although G initially appeared at trial pursuant to a subpoena, she failed to appear the next day because her mother was unavailable to drive her to the courthouse. The court confirmed that G was twenty-one years old and ordered that she be taken into custody pursuant to the capias statute (§ 52-143 (e)). After G was brought to court, the prosecutor requested that she, too, be detained. G's assigned counsel argued that G was five months pregnant and that her initial appearance indicated her willingness to testify. The court, however, was not satisfied that electronic monitoring would be sufficient to ensure her appearance and ordered that she be held overnight. The following day, the court allowed G's assigned counsel to attempt to secure electronic monitoring, but those efforts were unsuccessful, and G was detained for an additional night before completing her testimony. Defense counsel did not at any time object to the detention of W, G, or H. With respect to the substance of the testimony of the various witnesses, because W and another witness, L, testified that they lacked any memory of the shooting, the prosecutor reenacted portions of their respective grand jury testimony, whereby a court clerk read from the grand jury transcripts containing W's and L's answers. Defense counsel did not object to the reenactment but did object to the admission of certain portions of W's grand jury testimony that were consistent with W's in-court testimony, pursuant to *State* v. *Whelan* (200 Conn. 743), in which this court adopted a hearsay exception allowing the substantive use of prior inconsistent statements. The trial court overruled the objection, concluding that the admission of the consistent portions was necessary to avoid confusing the jury. After the reenactment, the prosecutor moved to introduce the transcripts of W's and L's grand jury testimony. Defense counsel objected on the ground that the reenactment rendered the admission of the transcripts cumulative, but the trial court disagreed and admitted the transcripts as full exhibits. *Held*:

1. The defendant's unpreserved claim that the trial court had violated his federal constitutional right to due process by detaining W, G, and H on the ground that such detention had a coercive effect on their testimony, thereby rendering that testimony involuntary, failed under the third prong of *State* v. *Golding* (233 Conn. 213), this court having concluded that, although the in-court attendance of W, G, and H was compelled by the material witness process or the issuance of a capias, the detention of those witnesses did nothing more than compel their appearance at trial and did not influence the substance of their testimony: W, G, and H each received the benefit of appointed counsel to advocate for their rights, as well as the conditions of their confinement and the terms of their release, the jury was aware of the circumstances underlying their testimony, as each witness testified that he or she was not testifying voluntarily and had been detained as a material witness but was giving

testimony without any influence or seeking favor, and, even though it took several days for each witness to finish his or her testimony, there was no evidence that the inherently coercive aspects of the procedures employed, including the overnight detention, affected the reliability of their in-court testimony; moreover, defense counsel had the opportunity to cross-examine each witness but, rather than questioning them about the circumstances of their in-court testimony, focused on the inconsistencies in their various statements, and, in the absence of separate findings concerning the coercive effects of the witnesses' detention on the substance and voluntariness of their testimony, or any cross-examination on that point, the defendant failed to establish that the witnesses' testimony, as opposed to the witnesses' attendance, was compelled; nonetheless, this court emphasized that trial courts always should employ the least restrictive means necessary to ensure a witness' appearance at trial, urged trial courts to instruct detained witnesses that only their presence is compelled and that the substance of their testimony will not be considered in determining when they will be released from custody, as the trial court instructed H before releasing him with electronic monitoring, and observed several instances in the present case that raised concerns about whether the witnesses' liberty interests were adequately considered, specifically, placing the burden on the witnesses and G's counsel, in particular, to seek out electronic monitoring, referring to the power of the Department of Children and Families in responding to W's childcare concerns, which could have had an unduly coercive effect on W's testimony, and prioritizing the testimony of other witnesses over that of H.

(*One justice concurring separately*)

2. The defendant could not prevail on his claim that the trial court had abused its discretion in admitting, pursuant to *Whelan*, both consistent and inconsistent statements from W's and L's grand jury testimony:

a. This court declined to review the defendant's claim, raised for the first time on appeal, that the trial court had abused its discretion in admitting W's and L's grand jury testimony for substantive purposes under *Whelan* on the ground that W's and L's prior statements during the grand jury proceedings were unreliable: defense counsel objected to the admission of the grand jury testimony only on the ground that the transcripts were cumulative in light of the reenactment of their grand jury testimony at the defendant's trial, and, when the trial court specifically asked whether counsel objected to the admission of the grand jury testimony under *Whelan*, counsel indicated that he had "no legal basis" to do so; accordingly, the defendant's claim on appeal that the trial court should have limited the admission of the prior statements of W and L in their grand jury testimony to impeachment purposes only because those statements were unreliable was not preserved for appellate review.

b. The trial court did not abuse its discretion in admitting the portions of W's grand jury testimony that were consistent with W's in-court testimony; that court properly considered the nature of the testimony, as well as its implications on the jury, and correctly determined that the challenged, consistent portions of the grand jury testimony were necessary to avoid confusing the jury and to provide context for the inconsistent statements admitted pursuant to *Whelan*.

c. The trial court did not abuse its discretion in admitting the transcripts of W's and L's grand jury testimony following the reenactment thereof during the defendant's trial: during their in-court testimony, both W and L claimed that they did not recall testifying to the statements that they made during their grand jury testimony, and neither admitted to the substance of their prior statements before the grand jury; moreover, the transcripts could have been admitted into evidence first and subsequently read from, doing so in reverse did not render the admission of the transcripts cumulative, and the jury would have been free to request playback of the relevant testimony at any time during its deliberations, such that the admission of the grand jury transcripts did not emphasize or increase their availability to the jury.

Argued May 5, 2021—officially released March 29, 2022

*Procedural History*

Substitute information charging the defendant with the crimes of murder, felony murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Vitale, J.*; verdict and judgment of guilty of felony murder, criminal attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol without a permit, from which the defendant appealed to this court. *Affirmed.*

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

*James M. Ralls*, assistant state's attorney, with whom, on the brief, were *Patrick K. Griffin*, state's attorney, *Michael Pepper*, senior assistant state's attorney, and *Lisa D'Angelo*, assistant state's attorney, for the appellee (state).

*Desmond M. Ryan* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

*James B. Streeto*, senior assistant public defender, *Christine Perra Rapillo*, chief public defender, and *Jennifer Bourn*, supervisory assistant public defender, filed a brief for the Division of Public Defender Services as amicus curiae.

*Opinion*

ROBINSON, C. J. This appeal requires us to consider the extent to which the detention of witnesses in order to secure their attendance at a criminal trial constitutes coercion that implicates the due process rights of a criminal defendant, as well as the practices that a trial court may employ to mitigate the potentially coercive effects of the detention process. The defendant, Damarquis Gray, appeals[1] from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, among other crimes. On appeal, the defendant claims that the trial court (1) violated his federal due process rights by detaining three eyewitnesses to secure their attendance at trial because those detentions resulted in coerced and involuntary testimony in the state's favor, and (2) abused its discretion by permitting the prosecutor to read both inconsistent and consistent passages from the witnesses' grand jury transcripts to the jury for substantive purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). We conclude that (1) with respect to the defendant's first claim, which is unpreserved, he has not established a due process violation under the third prong 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), and

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

(2) the trial court's *Whelan* ruling was not an abuse of its discretion. Accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural history. On January 20, 2014, the defendant was with a group of his friends, including Anton Hall and Delano Lawrence, at his house. Around the same time, Daryl Johnson was at his house with his sister, Alexis, and her friends, Chyna Wright and Erika Gomez. Upon learning that the victim, Durell Law, had been " 'messing with' " Alexis, Johnson decided to confront the victim. At trial, Hall testified that the defendant and his friends set out from his house to rob the victim of his iPhone and money. Thereafter, the defendant separated from his group and met up with the victim, Alexis, Wright, and Gomez. Wright proceeded to tell the defendant that Johnson intended to fight the victim, and the defendant once again separated to meet back up with his original group. Upon meeting back up with his friends, the defendant was handed a gun. At trial, Gomez and Wright testified that the defendant and his friend, Tymaine Riddick, approached the victim to rob him. The victim then struck the defendant, who subsequently shot the victim, fatally wounding him.[2]

An investigative grand jury was impaneled on June 2, 2015, pursuant to General Statutes § 54-47b. The defendant was subsequently arrested, and the state charged him with murder, felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol without a permit. The case was tried to a jury. At trial, Wright, Gomez, Hall, and Lawrence all testified about the events of January 20, 2014. The jury found the defendant guilty

[2] We note that the defendant argued at trial that he was, at most, a bystander to Johnson, who had shot the victim.

on all counts except murder. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective term of forty-seven years' imprisonment. This appeal followed. Additional relevant facts and procedural history will be set forth in the context of each claim on appeal.

I

The defendant first claims that his federal due process right against testimony resulting from pressure or coercion was violated when Wright, Gomez, and Hall, who were material witnesses, were arrested and taken into custody pursuant to the material witness statute, General Statutes § 54-82j,[3] or the capias statute, General Statutes § 52-143 (e).[4] The defendant argues that the

[3] General Statutes § 54-82j provides in relevant part: "Upon the written complaint of any state's attorney addressed to the clerk of the superior court for the judicial district wherein such state's attorney resides, alleging (1) that a person named therein is or will be a material witness in a criminal proceeding then pending before or returnable to the superior court for such judicial district, and in which proceeding any person is or may be charged with an offense punishable by death or imprisonment for more than one year, and (2) that the state's attorney believes that such witness is likely to disappear from the state, secrete himself or otherwise avoid the service of subpoena upon him, or refuse or fail to appear and attend in and before such superior court as a witness, when desired, the clerk or any assistant clerk of the court shall issue a warrant addressed to any proper officer or indifferent person, for the arrest of the person named as a witness, and directing that such person be forthwith brought before any judge of the superior court for such judicial district, for examination. . . ."

[4] General Statutes § 52-143 (e) provides: "If any person summoned by the state, or by the Attorney General or an assistant attorney general, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d) of this section, or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section, or on proof of the service of a subpoena and the tender of such fees, may issue a capias

detention of these witnesses had a coercive effect that rendered their testimony involuntary. The state responds that the defendant has not satisfied the conditions established in *State* v. *Golding*, supra, 213 Conn. 239–40, for appellate review of unpreserved constitutional claims. In particular, the state contends that the record is inadequate for review under *Golding*'s first prong and that the defendant has failed to satisfy *Golding*'s third prong because, although the witnesses' attendance at trial was compelled, the record establishes that, once in the courtroom, the material witness process did not compel them to testify in any particular way. Although we agree with the state's argument under the third prong of *Golding*, we nevertheless emphasize that our review of the record reflects how important it is for a trial court to consider the least restrictive means necessary to ensure that a witness appears to testify and to balance the witness' liberty interests along with the interests of the state and the defendant in the witness' availability and testimony.

A

The record reveals the following additional relevant facts. Wright, Gomez, and Hall were all eyewitnesses to the shooting. Wright was residing in North Carolina prior to the trial and failed to accept the service of an interstate subpoena. The prosecutor's office in North Carolina communicated to the state that it had been unable to serve Wright with a subpoena, and Wright's grandmother informed North Carolina authorities that Wright had no intention of testifying in Connecticut. Upon Wright's return to Connecticut, the state attempted to locate her to serve her with a subpoena but was unsuccessful. A material witness warrant was issued the following day pursuant to § 54-82j, resulting in her

directed to some proper officer to arrest the witness and bring him before the court to testify."

appearance at trial. At trial, the majority of Wright's testimony consisted of her stating that she did not remember the course of events that took place prior to the shooting or the statements that she made during her grand jury testimony. Upon the conclusion of direct examination by the state, the court heard arguments to determine which measures would be necessary to ensure Wright appeared at trial the following day. The state argued that, because Wright had been difficult to serve with a subpoena and had made clear that she did not want to testify, "continuing to hold [her would] ensure her availability . . . for cross-examination [the next day]." In response, Wright's assigned counsel argued that the least restrictive means should be used to ensure Wright's appearance in court, that Wright understood the seriousness of her attendance, and that detention would result in hardship for her because she would be unable to arrange childcare for her daughter.

The trial court stated that it was "concerned with the fact that, based on what [the court] heard from the state, and based, frankly, on [Wright's] conduct here before the court, her demeanor, her response to the questions that are being asked, and the circumstances that gave rise . . . to her being here . . . [the court has] no reason at this point to doubt . . . that her grandmother provided false information to the authorities [and] that [Wright] had no intention of willingly testifying in Connecticut . . . . So, based on all those reasons, the court believes she's a risk of nonappearance." Acknowledging "the ramifications" of detaining Wright, the court nevertheless concluded that it was appropriate to do so. When Wright claimed that she would not be able to obtain childcare if she were detained, the trial court responded that it "suppose[d] [that] the state is going to be required to contact [the Department of Children and Families] if she is indicating that she is not going to be able to have [an] arrangement to take care of her

child while she's incarcerated . . . ." The trial court then gave Wright and her counsel time to arrange childcare, which they were ultimately successful in doing. Wright appeared the following day to testify and continued to testify as to her lack of memory; she was released from custody at the conclusion of her testimony.

The next witness, Gomez, was similarly reluctant to appear for trial. During a hearing on a second capias, Douglas Jowett, an inspector with the prosecutor's office, testified that he served a subpoena on Gomez to appear on October 1, 2018, but that she had indicated to him that she had no intention of testifying. Although Gomez subsequently appeared to testify on October 1, Jowett instructed her to appear the following day instead because of the trial schedule. Gomez then failed to appear on October 2, 2018. Gomez' mother informed Jowett that her work schedule conflicted with the new time for Gomez' testimony on October 2, 2018, which rendered Gomez unable to testify because she could not get to the courthouse without transportation provided by her mother. The trial court, upon confirming that Gomez was twenty-one years old, determined that her mother's work schedule was irrelevant and issued a capias ordering that Gomez be brought to court without bond until further order. On October 3, the state requested that Gomez be detained. In response, Gomez' assigned counsel argued that Gomez had no history of arrest or conviction, was five months pregnant, and that her prior appearance on October 1 indicated her willingness to testify.

The trial court concluded that there was "certainly . . . materiality in connection with what her anticipated . . . testimony is going to be. But, obviously, unfortunately [York Correctional Institution] is well equipped to deal with inmates who are pregnant. So she's twenty-one, she's certainly an adult now . . . .

I'm not satisfied that [electronic] monitoring under the circumstances is going to be sufficient, particularly given the comments made that she had no plans of coming or attending; that seemed to be borne out by her nonappearance on Tuesday."

Gomez began her testimony on October 4. Upon the close of her testimony, the court allowed Gomez' counsel to attempt to secure electronic ankle monitoring for her but learned that it was unavailable. The court indicated that it would have been "inclined to release [Gomez] if [it] could have been adequately assured of [her] return . . . tomorrow by use of some kind of electronic monitoring so that [Gomez'] whereabouts overnight could be determined. . . . Given the situation here . . . what led to [Gomez'] having to be incarcerated, those facts are still what they are, and [Gomez is] now in [the] midst of [her] testimony, so it's even more vitally important that [she] return tomorrow. . . . [U]nfortunately, [the court is] going to have [Gomez] held again overnight."

Similar to Wright and Gomez, the state had difficulty in locating the third witness, Hall, to serve him with a subpoena. The trial court subsequently issued a material witness warrant, and Hall was detained on October 3, 2018. The state did not call Hall to testify immediately, and, with a long weekend approaching, Hall's appointed counsel argued for his release on October 4, 2018. The trial court observed that Hall's demeanor during trial, as well as his avoidance of the state's subpoenas, "did not instill the court with great confidence of his return if he was to be released." The court decided to detain Hall for another night and directed his counsel to return tomorrow with a plan for Hall's release should he not testify that day. The following day, October 5, 2018, Hall had not yet testified because of the need to complete the testimony by an out-of-state witness and a state laboratory employee. Hall's counsel asked the trial

court to release him with electronic ankle monitoring, and the trial court released Hall from custody with the admonition that "[h]ow you answer the questions is up to you, but you have to be here. Understand?" Hall subsequently appeared and testified, initially denying any memory of the events leading up to the shooting but ultimately testifying that, although he did not wish to attend the trial because he was afraid of the defendant, the defendant and others had planned to rob the victim and that the defendant had shot the victim. Defense counsel did not object at any time to the detentions of Wright, Gomez, and Hall, the three material witnesses.

A defendant may prevail on an unpreserved claim under *Golding* when "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 360, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). We conclude that the defendant has failed to demonstrate the existence of a due process violation for purposes of the third prong of *Golding* because there is no evidence that the witnesses' compelled attendance in court affected the substance of their testimony.

We begin with the first prong of *Golding*, namely, whether the record is adequate for review of the defendant's claims. As the state points out, the trial court never ruled on any challenge to the voluntariness of any of the witnesses' statements in light of their detention because the defendant never raised the issue of voluntariness to the trial court. We therefore lack the benefit of any factual findings the trial court would have made regarding the witnesses' demeanor, their answers to questioning, and other circumstances surrounding their testimony, which would have informed whether that testimony was in fact coerced or involuntary as a result of their detentions. Although the ultimate determination of voluntariness is a legal determination that is subject to plenary review; see, e.g., *State* v. *Lawrence*, 282 Conn. 141, 153–54, 920 A.2d 236 (2007); the factual predicates for that legal determination are findings that are within the province of the trial court. See *State* v. *Christopher S.*, 338 Conn. 255, 274–75, 257 A.3d 912 (2021) (deference is afforded to trial court's factual findings regarding voluntariness of defendant's statement); *State* v. *Lawrence*, supra, 153 ("we give deference to the trial court concerning . . . factual determinations" of voluntariness (internal quotation marks omitted)); *State* v. *Medina*, 228 Conn. 281, 300–301 and n.24, 636 A.2d 351 (1994) (emphasizing that determination of voluntariness is not pure question of law and requires factual findings by trial court). Nevertheless, we disagree with the state's argument that the record is inadequate for review insofar as the record reflects the circumstances under which the three witnesses were detained, along with their subsequent in-court testimony that the defendant challenges in this appeal.[5] To the extent that there

[5] Because the relevant facts are apparent from the record, this renders distinguishable those cases in which the record was deemed to be inadequate to review constitutional challenges to out-of-court events, such as statements that are claimed to be involuntary, under *Golding*. See *State* v. *Medina*, supra, 228 Conn. 300 (record was inadequate to review claim of involuntary confession under *Golding* because defendant "did not clearly raise [that]

are gaps in the record created by the unpreserved nature of this claim, they affect the defendant's burden of establishing the existence of a constitutional violation under the third prong of *Golding* rather than the reviewability of the claim under the first prong.

Turning to the second prong of *Golding*, we note that the state does not dispute the constitutional nature of the defendant's claim. Thus, we assume, without deciding, that the detention of a witness, either pursuant to a capias under § 52-143 (e) or as a material witness pursuant to § 54-82j, may take place under circumstances that are so coercive as to render the witness' testimony at trial false or otherwise unreliable, rendering its use a violation of a defendant's due process rights.[6] See *United States* v. *Tavares*, 705 F.3d 4, 22 (1st

claim in the trial court, the state was not put on notice that it was required to defend against such a claim," and, accordingly, "neither the state nor the trial court—nor this court on appeal—had the benefit of a complete factual inquiry into the defendant's mental condition at the time his statements were made"); see also *State* v. *Brunetti*, 279 Conn. 39, 61, 901 A.2d 1 (2006) ("[b]ecause the state had no reason to adduce any evidence regarding . . . the consent to search, there was no meaningful factual inquiry into that issue, and, consequently, we have no idea what such an inquiry would have revealed and no idea what the trial court would have found about . . . consent or lack thereof"), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007); *State* v. *Daniels*, 248 Conn. 64, 80–81, 726 A.2d 520 (1999) (record was inadequate to review unpreserved constitutional claim that out-of-court identification violated defendant's due process rights because not all relevant facts were adduced in trial court), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005).

[6] Although the state does not dispute the constitutional magnitude of the defendant's claim on appeal for purposes of the second prong of *Golding*, we note that the federal courts are divided as to the extent to which coerced testimony by a witness violates a defendant's due process right to a fair trial. Indeed, the United States Supreme Court has not yet ruled such testimony unconstitutional per se. See *Samuel* v. *Frank*, 525 F.3d 566, 569 (7th Cir. 2008); see also *Walker* v. *United States*, 201 A.3d 586, 595 n.6 (D.C. 2019) (citing authorities and noting that "[s]ome courts recognize a defendant's right to challenge involuntary witness statements on due process grounds, but they require a showing that the witness testimony is false or unreliable or that there was extreme government misconduct"); K. Sheridan, Note, "Excluding Coerced Witness Testimony To Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct," 38

Cir.), cert. denied, 571 U.S. 964, 134 S. Ct. 450, 187 L. Ed. 2d 301 (2013), and cert. denied sub nom. *Jones* v. *United States*, 569 U.S. 986, 133 S. Ct. 2371, 185 L. Ed. 2d 1089 (2013); *Raphael* v. *State*, 994 P.2d 1004, 1010 (Alaska 2000). Nevertheless, the defendant's claim founders on the third prong of *Golding* because the record does not reveal any evidence that the detention of the witnesses did anything more than legally compel their attendance in court for the defendant's trial.

Fordham Urb. L.J. 1221, 1256 (2011) (The author argues that "the [United States] Supreme Court should read the [c]onstitution so that: (1) criminal defendants have standing to contest admission of coerced witness testimony; and (2) all coerced statements of a witness will be excluded, regardless of their reliability. This method will best uphold the policy of the exclusionary rule: to deter police misconduct and [to] protect the constitutional due process rights of criminal defendants.").

With respect to this division, some courts have concluded that coerced witness statements violate due process only if they are actually false or otherwise shown to be unreliable. See *Avery* v. *Milwaukee*, 847 F.3d 433, 439 (7th Cir.) ("[b]ecause coerced testimony may in fact be true, the [due process] right to a fair trial [is not] implicated absent a violation of the . . . duty to disclose facts about the coercive tactics used to obtain it" pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)), cert. denied sub nom. *Hernandez* v. *Avery*, U.S. , 137 S. Ct. 2249, 198 L. Ed. 2d 680 (2017); *United States* v. *Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999) (due process is violated if "[the] witness was coerced into making *false* statements" (emphasis in original)); *United States* v. *Merkt*, 764 F.2d 266, 274–75 (5th Cir. 1985) (even if law enforcement elicited coerced statements at issue, coercion was not sufficiently egregious to exclude evidence). On the other hand, the United States Court of Appeals for the First Circuit has held that the use of any illegally coerced testimony may be a violation of due process. See *LaFrance* v. *Bohlinger*, 499 F.2d 29, 34 (1st Cir.) ("Due process does not permit one to be convicted [on the basis of] his own coerced confession. It should not allow him to be convicted [on the basis of] a confession wrung from another by coercion." (Internal quotation marks omitted.)), cert. denied sub nom. *Meachum* v. *LaFrance*, 419 U.S. 1080, 95 S. Ct. 669, 42 L. Ed. 2d 674 (1974), and cert. denied sub nom. *LaFrance* v. *Meachum*, 419 U.S. 1080, 95 S. Ct. 669, 42 L. Ed. 2d 674 (1974),; cf. *Bradford* v. *Johnson*, 354 F. Supp. 1331, 1336–38 (E.D. Mich. 1972) (defendant had standing to assert due process violation stemming from use of coerced witness testimony), aff'd, 476 F.2d 66 (6th Cir. 1973). Because the state does not dispute the constitutional magnitude of the defendant's claim, and we resolve this claim under the third prong of *Golding*, we leave this issue to another day.

The decision of the United States Court of Appeals for the First Circuit in *United States* v. *Tavares*, supra, 705 F.3d 4, is instructive with respect to the distinction between the legal compulsion of a witness' appearance in court and the coercion of testimony that gives rise to a due process violation. In *Tavares*, a defendant named Eddie Jones challenged his conviction for "knowingly transporting a minor, K.S., in interstate commerce with the intent that she engage in prostitution," among other crimes. Id., 21. K.S. was a very reluctant witness who testified at trial only because she had been subpoenaed and because a federal prosecutor and Federal Bureau of Investigation (FBI) agents had threatened her with incarceration and losing custody of her daughter after she had been arrested for failing to appear. Id., 21–22; see id., 22 (K.S. also had discarded summons to appear before grand jury). Jones argued that K.S.'s testimony for the government "was coerced and that its admission into evidence violated his [f]ifth [a]mendment right to due process." Id., 21. Discussing *United States* v. *Hall*, 434 F.3d 42, 57–58 (1st Cir. 2006), a prosecutorial misconduct case, the First Circuit observed that, "unlike [g]overnment efforts to prevent the testimony of certain witnesses, [t]here is no blanket rule against inducements by the government to witnesses to produce truthful testimony." (Internal quotation marks omitted.) *United States* v. *Tavares*, supra, 22. Nevertheless, the court "recognized the possibility that, in extreme circumstances, government [misconduct] could occur through improper efforts to shape testimony to the government's liking." (Internal quotation marks omitted.) Id.

Applying these principles, the First Circuit determined in *Tavares* that there was "no constitutional violation." Id. The court viewed the actions of the federal prosecutor and FBI agents not as " 'threats' " but "more accurately . . . as lawful coercion of a reluctant witness to

testify as required by law. *Such 'threats' are the legal consequences for failing to appear pursuant to a summons*." Id. (Emphasis added.) The court further emphasized that Jones had "fully cross-examined K.S. on this issue. There was ample testimony in the record to permit the jury to evaluate K.S.'s credibility in light of all these circumstances."[7] Id., 22–23.

Significantly, in rejecting Jones' claim "that the [D]istrict [C]ourt committed plain error in not conducting an evidentiary hearing [as to the coercion] prior to admitting the testimony" of K.S., the First Circuit distinguished *Tavares* from *LaFrance* v. *Bohlinger*, 499 F.2d 29, 35 (1st Cir.), cert. denied sub nom. *Meachum* v. *LaFrance*, 419 U.S. 1080, 95 S. Ct. 669, 42 L. Ed. 2d 674 (1974), and cert. denied sub nom. *LaFrance* v. *Meachum*, 419 U.S. 1080, 95 S. Ct. 669, 42 L. Ed. 2d 674 (1974), which involved a claim that a previous statement was a fabrication obtained while the witness was under the influence of narcotics. See *United States* v. *Tavares*, supra, 705 F.3d 23. The court observed "a material and qualitative distinction between the prosecutorial misconduct at issue in *LaFrance* and the situation [involving Jones]. *LaFrance* dealt with police extraction of a statement from a [drug impaired] witness, by means which [the court] described as 'police threats and other blatant forms of physical and mental duress.' . . . In her testi-

[7] "On direct examination, K.S. admitted that she did not want to testify, but was doing so under a subpoena. [Jones'] counsel conducted a full cross-examination of K.S. During that cross-examination, she agreed with defense counsel that she had been threatened by FBI agents and a federal prosecutor with remaining in jail after she was arrested for failing to appear as required by a summons and with losing custody of her daughter if she did not 'do what [they] wanted [her] to do.' She also agreed she was just going to tell the prosecution what they wanted to hear so she could move on with her life. On redirect, K.S. stated that she had been threatened by the FBI and federal prosecutors when she had been required to appear before the grand jury four years earlier and admitted that she had not told the [D]istrict [C]ourt that she had been threatened." (Footnote omitted.) *United States* v. *Tavares*, supra, 705 F.3d 21–22.

mony, K.S. related on cross-examination instances of lawful pressure. *She was apprised of the lawful consequences of her failing to testify, which she was legally required to do*. The purpose of informing her of those legal consequences, moreover, was to ensure that she fulfilled her obligation to testify, *not to ensure that she give particular testimony*." (Citation omitted; emphasis added.) Id.; cf. *United States* v. *Vangates*, 287 F.3d 1315, 1323–24 (11th Cir. 2002) (action of subpoenaing witness to court does not coerce that witness to waive fifth amendment privilege against self-incrimination).

In contrast to *Tavares*, the Alaska Supreme Court's decision in *Raphael* v. *State*, supra, 994 P.2d 1004, provides an example—rare in the case law—of when a trial court's decision to detain a witness has a sufficiently coercive effect on that witness to constitute a violation of a criminal defendant's due process rights. *Raphael* was a domestic violence case in which the prosecutor told the judge at an ex parte hearing during a kidnapping and assault trial "that the complaining witness, I.W., was likely to recant, was intoxicated, and should be incarcerated until she testified"; she also had been evicted from a shelter at which the prosecutor had arranged for her to stay. Id., 1006. Without first notifying the defendant, Wilfred Raphael, or his attorney of the prosecutor's ex parte claims, "the trial judge granted the prosecutor's request, jailing I.W. and placing her children in protective custody." Id. At that time, the trial judge stated to I.W.: "I'm going to order that you be remanded into custody on the case, no bail, and you're—she's not to have any contact with [Raphael]. *And she's going to be—once the testimony is done, then we'll revisit it. And she gives testimony and we'll revisit the case, and presumably let her—she'll be able to be released*." (Emphasis added; internal quotation marks omitted.) Id., 1007. I.W. was then incarcerated for three days before it was her turn to testify, and she

remained in custody during the defense case; during her testimony, she "described Raphael's conduct before, during, and after the alleged assault in a manner that comported with her earlier inculpatory testimony before the grand jury." Id.

The Alaska Supreme Court agreed with Raphael's argument that, "by summarily incarcerating I.W. and taking away her children, the trial court and the [s]tate coerced I.W. into testifying against Raphael, thus violating Raphael's right to due process." Id. The court observed that "[s]tatements that are the product of coercion may be unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. Although a trial court may use its subpoena power to force a witness to testify, coercion and intimidation of witnesses by the [s]tate [are] improper. This rule applies to witnesses for the [s]tate as well as the defense." (Footnotes omitted; internal quotation marks omitted.) Id.; see id., 1008 (rejecting state's standing argument because "both [Alaska] case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial"). Reviewing "the totality of the circumstances surrounding a [witness'] testimony to determine the coercive effect of the trial court's and [the] prosecutor's conduct," the court held that "the actions and statements of the trial court were coercive." Id., 1008. The court specifically concluded that "the trial court's [near total] denial of I.W.'s due process rights sent the message that she was at the mercy of the power of the [s]tate and that I.W. thus did not feel free to testify unfavorably to the [s]tate." (Internal quotation marks omitted.) Id.

Likening the trial court's treatment of I.W., who did not have an opportunity to be heard, to an "English [c]ourt of the Star Chamber" proceeding, the Alaska

court emphasized that the trial court had "denied I.W. nearly all of the basic fundamental protections that a defendant in a civil contempt proceeding must receive to comport with due process, including the right to counsel . . . ." (Internal quotation marks omitted.) Id., 1008–1009. The Alaska court further relied on the trial court's juxtaposition of a no contact order between I.W. and Raphael with its statement that it would " 'revisit' " I.W.'s detention after her testimony, including custody of her children; id.,1007; to conclude that "the trial judge conveyed the strong impression that I.W.'s release from imprisonment was conditioned not only on *whether* she testified, but on *how* she testified as well . . . ." (Emphasis in original.) Id., 1009; see id. (noting that, "[i]f the trial court conditioned I.W.'s imprisonment solely on her agreement to testify, no need for the trial court to 'revisit' any issue would exist," and that I.W. "could have interpreted the trial judge's statement that he 'hope[d]' [she] would be 'able to get home and get [her] kids' after trial as a veiled threat to keep her in jail if her testimony was not pleasing to the court or the [s]tate"). In holding that the coercion of I.W. violated Raphael's due process rights, the court emphasized that "I.W. did not refuse to testify. And even though [there was a concern] that her intoxication could impede her ability to testify, by threatening continued incarceration and by flagrantly ignoring the requirements of due process, the trial court and the [s]tate implied that they held the only key to I.W.'s freedom and that her sobriety and ability to testify would be insufficient to regain that freedom." Id.; see id., 1011 (concluding that error was harmful because defense counsel's "ability to cross-examine I.W. effectively regarding bias was limited at best" given ex parte nature of trial court's actions, and her "testimony was central to the [s]tate's case against Raphael" because only she "testified about Raphael's behavior before, during, and after the alleged assault").

Significantly, the Alaska court observed that, "[e]ven [when] a witness has flatly refused to testify, a trial court should condition imprisonment solely on the [witness'] continued refusal to testify; once the witness testifies, the witness is no longer in contempt of court and the justification for incarceration disappears. In this way, a defendant in a civil contempt proceeding 'carries the key to her freedom in her own pocket.' " (Footnote omitted.) Id., 1009. The court emphasized that "[its] holding . . . does not mean that all testimony by witnesses incarcerated in civil contempt proceedings is involuntary. Incarceration is a necessary remedial tool in a judge's arsenal when attempting to secure a recalcitrant [witness'] testimony. But . . . I.W. voluntarily appeared . . . and had not violated any court order. And when a witness can reasonably interpret a trial court's decision to imprison her as an attempt to influence the *substance* of her testimony . . . the risk that the witness may not testify freely and truthfully is too great. As a criminal defendant, Raphael ha[d] a constitutional right under the [d]ue [p]rocess [c]lause not to bear that risk." (Emphasis in original.) Id., 1010.

Several state court cases following *Raphael* emphasize the limited nature of that decision and, in the vein of *Tavares*, acknowledge the occasional necessity of detaining a material witness under appropriate circumstances to compel the witness' presence in court without influencing his or her testimony. See *Akelkok* v. *State*, 475 P.3d 1136, 1141–42 (Alaska App. 2020) (distinguishing *Raphael* because witness was detained after she had already twice failed to appear to testify under subpoena, she was intoxicated when brought to court on warrant and could not or would not provide her contact information, electronic monitoring was not available, and trial court's interactions with witness were to ensure "that the trial proceeded in an orderly and efficient manner, and that [the witness] addressed

the attorneys' questions," that is, that "she was capable of testifying that day—not that she testify a certain way"); *State* v. *Rice*, 135 N.E.3d 309, 320 (Ohio App. 2019) (*Raphael* was distinguishable because the defendant had a full opportunity to cross-examine the witness, a domestic violence victim who was present in court on a material witness warrant, insofar as the trial court had "compelled [her] presence but did not coerce her testimony. Once on the stand, she was free to testify as she wished."); *Skinner* v. *State*, 33 P.3d 758, 769–70 (Wyo. 2001) (distinguishing *Raphael* because, although domestic violence complainant was detained as material witness after state made several unsuccessful attempts to serve her with subpoena, prosecutor instructed witness during direct examination "to testify truthfully and . . . she would in turn be released from incarceration," and defendant had cross-examined witness about circumstances of her detention), cert. denied, 535 U.S. 994, 122 S. Ct. 1554, 152 L. Ed. 2d 477 (2002).

Guided by the principles set forth in *United States* v. *Tavares*, supra, 705 F.3d 4, and *Raphael* v. *State*, supra, 994 P.2d 1004, our review of the record establishes that the detentions of the witnesses in this case did not have the coercive influence over their testimony necessary to give rise to a due process violation. Most significant, each witness received the benefit of appointed counsel to advocate for their due process rights, and conditions of confinement and release, unlike the complaining witness, I.W., in *Raphael*. Although the in-court presence of Hall, Gomez, and Wright was compelled via the material witness process or the issuance of a capias, there is no evidence that the inherently coercive aspects of those procedures, including the detention of the witnesses, rose to the level of affecting the reliability of their in-court testimony, even though it took several days of trial for each witness to testify.[8] The jury was

[8] We note that the defendant argues that the trial court improperly "remarked on the witnesses' demeanor and the way they answered the

aware of the circumstances underlying the testimony of Hall, Gomez, and Wright, as each testified that they were not in court testifying voluntarily and had been detained as material witnesses but were giving testimony without any influence or seeking favor. The record discloses that Wright, in particular, did not appear intimidated by the process; she was vocal about her frustration with the length of the prosecutor's direct examination, stating before the afternoon break on the first day of her testimony that he was "[p]issing [her] off" and openly discussing her fear of what might happen "outside in [the] community . . . after this testimony." For her part, Gomez testified that she had initially refused to testify, was in court pursuant to a subpoena, and did not want to be there because people had been calling her "a snitch," both online and in the community, causing her to fear for her safety. Hall testified that, because of his fear of the defendant and being labeled a "snitch," he did not want to testify in court at trial, and similarly had not wanted to speak to the police or to testify before the grand jury. He had been avoiding the prosecutor's office for weeks leading up to the trial and did not review his testimony with law enforcement; he was present in court only because of a court order.[9] Finally, defense counsel had the opportunity to cross-examine each witness but did not

prosecutor's questions in the remarks," namely, the court's observation "that they claimed not to recall their prior grand jury testimony or police statements." The defendant contends that the trial court improperly considered how the witnesses answered the state's questions in determining whether they should remain detained. Read in context, we disagree with the defendant's reading of the record. Rather, as each witness gave answers on direct examination that conflicted with their grand jury testimony or statements to the police, the necessity of questioning them about each of those prior inconsistent statements could not help but extend the time of detention necessary to complete their testimony.

[9] We note that, after Hall was given an electronic monitoring device to allow him to leave custody midtrial and to attend his grandmother's funeral, the trial court instructed Hall that, although his attendance was required, "[h]ow you answer the questions is up to you . . . ."

question the witnesses about the circumstances of their in-court testimony. Rather, defense counsel effectively cross-examined the witnesses about the inconsistencies between their respective statements to the police, grand jury testimony, and trial testimony, raising questions about their veracity through admissions that they each had lied at various times during the process. Given the absence of separate findings about the coercive effects of the detention on the substance and voluntariness of their testimony, and without any cross-examination on this point, we conclude that the defendant has not established that the witnesses' testimony—as opposed to their attendance—was compelled or coerced and that this claim therefore fails under the third prong of *Golding*.

B

Although we conclude that the defendant cannot prevail on his unpreserved constitutional claims under *Golding*, we nevertheless take this opportunity to emphasize how important it is that trial courts employ the least restrictive means necessary to ensure that a material witness appears to give his or her testimony. As discussed in the amicus curiae briefs filed by the Connecticut Criminal Defense Lawyers Association and the Division of Public Defender Services (division), the material witness statutes, General Statutes § 54-82i et seq., do not provide any guidance to trial courts as to the appropriate interests to consider when determining whether to detain a material witness. Section 54-82j instructs only that a state's attorney may, on the granting of a written application, have any material witness arrested if the state's attorney believes that such witness is "likely" to flee the state, avoid subpoena service, or refuse to appear. The court may grant the request and issue a warrant for the witness' arrest "when desired . . . ." General Statutes § 54-82j. Once detained, the witness may be held indefinitely "subject

to the further orders of the judge." General Statutes § 54-82j.

The amicus curiae brief filed by the division explains that our trial courts routinely consider the least restrictive means for ensuring a criminal defendant's presence in court and argues that a similar analysis has value in the context of determining whether to detain a material witness. To this end, the rules of practice already provide a set of factors that a court applies in determining which "conditions of release will reasonably ensure the appearance of the defendant in court," including considerations of the defendant's (1) "past record of appearance in court," (2) "family ties," (3) "employment record," (4) "financial resources, character and mental condition," and (5) "community ties." Practice Book § 38-4 (b) (2) through (7).

The rules of practice also provide a hierarchical consideration of the means available to reasonably ensure that a criminal defendant appears in court besides incarceration, including the defendant's (1) "execution of a written promise to appear without special conditions," (2) "execution of a written promise to appear with nonfinancial conditions," (3) "execution of a bond without surety in no greater amount than necessary," (4) "deposit with the clerk of the court of an amount of cash equal to 10 percent of the amount of [a] surety bond set," and (5) "execution of a bond with surety in no greater amount than necessary." Practice Book § 38-4 (a) (1) through (5); see also Practice Book § 38-4 (c) (conditions of release for defendant charged with "a serious felony" or "a family violence crime"). Significantly, when considering the imposition of nonfinancial conditions on a criminal defendant, the trial court must impose "the least restrictive condition or combination of conditions" necessary to ensure the defendant's appearance, including "supervision [by] a designated person or organization," restrictions on travel, or electronic monitoring. Practice Book § 38-4 (g) (1), (2) and (8).

As is evident from the rules of practice applicable to the release of criminal defendants, there are numerous means available to ensure that a witness appears to testify in court that are less restrictive than incarceration. This court has long recognized that "[i]t is the duty of all good citizens when legally required to do so to testify to any facts within their knowledge affecting [the] public interest and . . . [that] no one has a natural right to be protected in his refusal to discharge that duty." (Internal quotation marks omitted.) *State* v. *Andrews*, 248 Conn. 1, 12–13, 726 A.2d 104 (1999). This important duty and state interest, however, do not diminish a witness' interest in not being subject to overly restrictive means of ensuring his or her appearance. Consistent with our long established practice with respect to criminal defendants, we emphasize that our trial courts should always employ the least restrictive means necessary to ensure a witness' appearance at trial. To mitigate the unavoidably coercive effects of the detention process, we also urge our trial courts, as the trial court did with Hall, to instruct detained witnesses that only their presence is compelled and that the substance of their testimony will not be considered in determining when they will be released from custody. See id., 13–14 (The trial court did not infringe on the defendant's right to cross-examination by instructing the witness "that he was required to testify and [by] inform[ing] him of the consequences of his continued refusal to do so," because "the trial court did not suggest or imply that [the witness] should testify in any particular manner, either favorably or unfavorably to the defendant. Rather, the court, in neutral and appropriate terms, merely informed [the witness] that he was legally obligated to testify and that he faced incarceration if he wrongfully persisted in refusing to do so.").

By way of illustration, we observe three particular instances in the present case that raise concerns about

whether the witnesses' liberty interests received adequate consideration, notwithstanding the apparent necessity for the implementation of measures to ensure their appearance in court. First, it is troubling that, initially, the witnesses were entirely burdened with the task of seeking out electronic monitoring, to no avail. For instance, appointed counsel for Gomez attempted, but failed, to secure electronic monitoring because the office responsible for providing that service had closed by the time the trial court permitted Gomez and Hall to seek that option, and there was confusion about which office could provide that service in the first instance. The trial court addressed this confusion the next day by requesting the presence in court of a member of the Office of Adult Probation, which provided monitoring for Hall. Second, we note that a court should refrain from referencing the power of the state, particularly that of the Department of Children and Families, in responding to a witness' concern about obtaining childcare while the witness is detained on a material witness warrant. The invocation of the involvement of the Department of Children and Families in response to Wright's childcare concern could have had an unduly coercive effect, and trial courts should avoid making such references whenever possible in order to avoid the appearance of undue coercion.[10] Third, we observe that Hall's testimony apparently was not prioritized, as the trial court accommodated the prosecutor's request to complete the testimony of Lawrence, who was an out-of-state witness, along with that of a state laboratory

[10] We note that the trial court did not mention the Department of Children and Families until *after* it had made the decision to detain Wright overnight. Wright, through counsel, did not inform the trial court that she had a child until after the court had decided to detain her; the court then properly afforded Wright time to determine whether the childcare arrangements that she had in place while she was in court could be extended overnight. Wright's counsel subsequently confirmed with the court that she was able to make arrangements for overnight child care, averting any need to contact the Department of Children and Families.

employee. Although the trial court released Hall later that day with electronic monitoring and direction to return to court after attending his grandmother's funeral; see footnote 9 of this opinion; we emphasize that the trial court should have exercised its "inherent authority to manage trials before it"; *State* v. *Jones*, 314 Conn. 410, 419, 102 A.3d 694 (2014); to minimize the incursion on the liberty of a detained witness by taking all measures necessary to expedite Hall's appearance and testimony during the trial in the first instance.

II

The defendant next argues that the trial court abused its discretion when it admitted into evidence (1) inconsistent statements witnesses previously made during their grand jury testimony for substantive purposes pursuant to *State* v. *Whelan*, supra, 200 Conn. 743, (2) portions of a witness' grand jury testimony that were consistent with her in-court testimony, and (3) the transcripts of grand jury testimony given by two witnesses, when that testimony had been reenacted at trial. Three witnesses, in particular, are the subject of the defendant's claims on appeal: Ameia Cato, Wright, and Lawrence. All three witnesses were present on the day of the shooting and testified at trial to lacking any memory of the shooting or their respective grand jury testimony.

The record reveals the following facts and procedural history relevant to the defendant's *Whelan* claims. During the state's cross-examination of Cato, the state offered a recording of her police interview pursuant to *Whelan*.[11] Defense counsel objected, arguing that the recording should be used only to refresh Cato's recollection, should not be submitted to the jury, and that any consistent portions should be redacted. The trial court concluded that the entirety of the recorded interview

[11] We note that the defendant does not challenge the admission of Cato's grand jury testimony under *Whelan*. See footnote 12 of this opinion.

was admissible and that any consistent portions were "needed to place the balance of what's inconsistent with her testimony into context." The recording was played for the jury; defense counsel did not object to providing the jury with a seventeen page transcript of the recording because its audio quality was poor.[12]

Subsequently, Wright and Lawrence similarly testified that they lacked specific memories of the day of the shooting. The state reenacted portions of Wright's grand jury testimony.[13] Defense counsel did not object to the state's reenactment. Counsel objected to certain consistent portions of Wright's testimony being presented, but the trial court concluded that, based on the testimony up to that point, submission of consistent portions was necessary to avoid confusing the jury.

"The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only [when] there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Tony M.*, 332 Conn. 810, 831, 213 A.3d 1128 (2019).

[12] We note that the defendant argues that his *Whelan* claims also apply to the admission into evidence of a transcript of Cato's recorded interview with the police. We need not, however, address the defendant's *Whelan* claims with respect to Cato, insofar as he concedes that the admission of that transcript was harmless error because she did not claim therein that he had the gun.

[13] In order to reenact the testimony, the prosecutor read the questions from the grand jury proceeding, and the court clerk responded with the transcribed answers provided by Wright and Lawrence, respectively, during that proceeding. The trial court explained the process to the jury prior to each reenactment.

A

The defendant first argues that the trial court abused its discretion when it admitted the prior grand jury testimony of Lawrence and Wright for substantive purposes under *State* v. *Whelan*, supra, 200 Conn. 743. In response, the state contends, inter alia, that this claim was not properly preserved for appellate review. We agree with the state and conclude that this claim was not preserved at trial.

In *Whelan*, "we adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination. This rule has also been codified [at] § 8-5 (1) of the Connecticut Code of Evidence, which incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 768–69, 155 A.3d 188 (2017). "In determining whether an inconsistency exists, the testimony of a witness as a whole, or the whole impression or effect of what has been said, must be examined. . . . Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . . . A statement's inconsistency may be determined from the circumstances and is not limited to cases in which diametrically opposed assertions have been made." (Citations omitted; internal quotation marks omitted.) *State* v. *Whelan*, supra, 200 Conn. 748–49 n.4. "Inconsistencies may be shown not only by contradictory statements but also by omissions." Id., 748 n.4.

It is well established that this court "is not bound to consider claims of law not made at the trial" and that, "[i]n order to preserve an evidentiary ruling for review, trial counsel must object properly." (Internal quotation

marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 211, 202 A.3d 350 (2019). "Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . . We have emphasized that [t]hese requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Citations omitted; internal quotation marks omitted.) Id., 211–12.

We are unable to reach the merits of the defendant's claim on appeal because, as the state argues, the defendant does not rely on the grounds defense counsel raised at trial. Instead, the defendant contends, for the first time on appeal, that we should, as a matter of law, limit the admission of prior statements in grand jury testimony to impeachment purposes only because such statements are not reliable and, therefore, should not be admitted for their truth. At trial, defense counsel did not object to the admission of the grand jury testimony on the ground of reliability, but only on the ground that the transcripts were cumulative insofar as the prosecutor had already reenacted the testimony for the jury through witness testimony. Indeed, when the trial court asked directly whether defense counsel objected to the prior grand jury testimony under *Whelan*, counsel stated he had "no legal basis" to do so. Accordingly, we conclude that this claim is unpreserved and decline to review it on appeal.

B

The defendant next argues that the trial court abused its discretion in admitting consistent portions of Wright's grand jury testimony and disclosing them to the jury. The state argues that the defendant did not identify at

trial which portions of Wright's grand jury testimony were consistent with her testimony at trial and, therefore, that he cannot now argue on appeal that admission of those consistent portions was an abuse of discretion. Although we disagree with the state that the record does not indicate which statements from Wright's grand jury testimony were claimed to be consistent, we nevertheless conclude that the trial court did not abuse its discretion in admitting those portions of testimony so as to avoid confusing the jury.

In admitting consistent portions of the grand jury testimony, the trial court specifically relied on *State* v. *Osbourne*, 162 Conn. App. 364, 131 A.3d 277 (2016), which provides: "In general, the court should seek to avoid admitting evidence that is likely to confuse or mislead the jury. . . . The principle of affording the fact finder the proper context in which to consider statements is codified [at] Connecticut Code of Evidence § 1-5 (a), which provides that [w]hen a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it. This type of determination is largely dependent on the unique circumstances in each case and, as with evidentiary issues in general, is best left to the sound discretion of the trial court." (Internal quotation marks omitted.) Id., 381.

In the present case, the state sought to introduce the transcript of Wright's grand jury testimony. Defense counsel objected to the admission of certain portions of the transcript, arguing that, because Wright eventually remembered identifying certain photographs during her grand jury testimony, those portions of her testimony at trial were consistent with her grand jury testimony

and were inadmissible under *Whelan*. The state responded that it was necessary to admit those portions so that the remaining testimony was provided in context in light of Wright's repeated recollection issues. The trial court considered Wright's testimony and concluded that, "given the entire nature of [Wright's] direct examination yesterday, her direct examination . . . today . . . or the whole impression and effect of what she said yesterday, the court must examine that in order to make sure that it is not confusing or misleading to the jury to then parse it line by line in connection with the specific objection [the defense is] imposing here . . . ." Given the court's consideration of the nature of the testimony and its implications to the jury, along with the need to provide the requisite context for the inconsistent statements admitted pursuant to *Whelan*, we conclude that the trial court did not abuse its discretion in admitting the consistent portions of the grand jury testimony.

C

Finally, the defendant argues that the trial court abused its discretion in admitting the transcripts of the grand jury testimony of Wright and Lawrence because the reenactment of that same testimony in court rendered the evidence cumulative. After reenacting the grand jury testimony of both Wright and Lawrence; see footnote 13 of this opinion; the state offered the grand jury transcripts as full exhibits under *Whelan*. The defendant objected, citing *State* v. *Correia*, 33 Conn. App. 457, 636 A.2d 860, cert. denied, 229 Conn. 911, 642 A.2d 1208, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994), in support of the argument that the admission of the transcripts was cumulative after the state's reenactment of the testimony for the jury. The trial court disagreed and concluded that, because the state could have offered the transcript as a full exhibit under *Whelan* and could have then sought per-

mission to read from it, doing so in reverse order did not render the admission of the transcripts cumulative.

"When a witness admits making [a] statement, additional documentary evidence of inconsistency might be deemed to have been merely cumulative." (Internal quotation marks omitted.) Id., 463, citing *State* v. *McDowell*, 179 Conn. 121, 127, 425 A.2d 935 (1979). "Evidence is cumulative if it multiplies witnesses or documentary matter to any one or more facts that were the subject of previous proof. . . . The court's power in that area is discretionary. . . . In precluding evidence solely because it is cumulative, however, the court should exercise care to avoid precluding evidence merely because of an overlap with the evidence previously admitted." (Internal quotation marks omitted.) *State* v. *Porfil*, 191 Conn. App. 494, 531, 215 A.3d 161 (2019), appeal dismissed, 338 Conn. 792, 259 A.3d 1127 (2021); cf. *State* v. *Correia*, supra, 33 Conn. App. 463 (The trial court did not abuse its discretion in declining to admit the victim's written statement to the police as a full exhibit under *Whelan* because the victim had admitted to making the statement, defense counsel had read it "to the jury several times and the trial court also permitted defense counsel to argue the statement's truth to the jury. Therefore, the portions of the statement that the defendant claimed consisted of prior inconsistent statements were before the jury and the witness' credibility had been called into question.").

Considering the testimony of Wright and Lawrence in its entirety, we conclude that the trial court did not abuse its discretion in admitting the transcripts into evidence following their reenactment. First, in contrast to *Correia*, on which the defendant relies, neither Lawrence nor Wright admitted the substance of their prior statements before the grand jury, claiming that they did not recall testifying about much of the *Whelan* material. Second, as the trial court observed, the transcripts

could have been admitted into evidence first and subsequently read aloud. Finally, the jury would have been free to request playback of the relevant testimony at any time during deliberations, meaning that providing the transcripts among other exhibits does not emphasize or increase their availability to the jury. See, e.g., *State* v. *Martinez*, 171 Conn. App. 702, 743–44, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1068 (2017); see also Practice Book § 42-26. The trial court, therefore, did not abuse its discretion by admitting into evidence as full exhibits the transcripts of the grand jury testimony of Wright and Lawrence.

The judgment is affirmed.

In this opinion McDONALD, D'AURIA, KAHN, ECKER and KELLER, Js.,concurred.

MULLINS, J., concurring in the judgment. I agree with and join part II of the majority opinion. I also agree with the majority's conclusion in part I of its opinion that the defendant's unpreserved claim that the trial court violated the defendant's due process rights by admitting coerced and involuntary testimony in the state's favor fails under *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). I write separately, however, because I respectfully disagree with the majority's analysis in part I of its opinion insofar as the majority concludes that the defendant's claim fails under the third prong of *Golding*. Instead, I would conclude that the defendant's claim fails under the first prong of *Golding* because the record is inadequate for review. Accordingly, I concur in the judgment.