CONNECTICUT DERMATOLOGY GROUP, PC, ET AL. *v.* TWIN CITY FIRE INSURANCE COMPANY ET AL. (SC 20695)

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

Syllabus

The plaintiffs, which own and operate healthcare facilities in Connecticut, sought, inter alia, a judgment declaring that the defendant insurers were required to provide coverage under certain commercial insurance policies for losses the plaintiffs sustained as a result of their suspension of business operations during the COVID-19 pandemic. The defendants insured the plaintiffs under separate but virtually identical insurance policies, which provided that the defendants would "pay for direct physical loss of or physical damage to" covered property caused by or resulting from a covered cause of loss. The policies included a business income provision providing that the defendants would pay for the actual loss of business income they sustained "due to the necessary suspension of" their operations during the "period of restoration," which the policies defined in relevant part as beginning "with the date of direct physical loss . . . caused by or resulting from a [c]overed . . . [l]oss" and ending on the date when the property "should be repaired, rebuilt or replaced . . . ." The policies also contained an exclusion for loss or damage caused by the presence, growth, proliferation, or spread of a virus. In response to the COVID-19 pandemic, various government officials and agencies had issued orders, recommendations and guidelines intended to prevent or slow the spread of the disease. In light of this response, the plaintiffs suspended their business operations and, as a result, lost business income and incurred costs in connection with sanitation and the erection of physical barriers, for which they submitted claims to the defendants. The defendants denied the plaintiffs' claims on the ground that, because the coronavirus did not cause property damage at the plaintiffs' respective places of business, the claimed losses were not covered. The parties filed separate motions for summary judgment. The plaintiffs and the defendants disputed whether the policies cover the claimed losses, which depended on whether there was a "direct physical loss" of covered property. The defendants alternatively claimed that any loss that otherwise would have been covered was subject to the virus exclusion. The trial court concluded that the plaintiffs' claims were subject to the virus exclusion, granted the defendants' motion for summary judgment, and rendered judgment thereon, from which the plaintiffs appealed. On appeal, the plaintiffs claimed that the trial court

incorrectly had concluded that their claims were subject to the virus exclusion.

Held that this court affirmed the trial court's judgment on the alternative ground that there was no genuine issue of material fact as to whether the policies did not cover the plaintiffs' claims, as the plaintiffs did not suffer a direct physical loss to their covered property:

The plain meaning of the phrase "direct physical loss" of property in the insurance policies did not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus, as the ordinary usage of that phrase clearly and unambiguously required some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible, and that interpretation was supported by Connecticut case law and the overwhelming majority of federal and sister state courts construing similar or identical policy language, as well as the dictionary definitions of the words "direct," "loss," and "physical."

Viewing the phrase "direct physical loss" in the context of the business income provisions in the insurance policies further supported this interpretation because the policies expressly distinguish between a loss resulting from "the necessary suspension of" an insured's operations and the "direct physical loss" of property and make payment for the former conditional on the latter, and, if "the necessary suspension of" operations were, itself, a "direct physical loss," that distinction would serve no purpose.

The provision in the insurance policies defining "period of restoration" to provide that the loss of business income is covered while the property is being "repaired, rebuilt or replaced" also strongly suggested that a "direct physical loss," unlike a loss resulting from the necessary suspension of business operations to avoid the transmission of a communicable disease, involves a physical alteration of the property such that the property is susceptible to being restored to its original condition.

Moreover, this court rejected the plaintiffs' argument that the COVID-19 pandemic physically transformed their properties from ordinary businesses into "potential viral incubators," as the record lacked any indication that the plaintiffs' properties underwent any physical transformation; rather, the pandemic caused a transformation in governmental and societal expectations and behavior that had a seriously negative impact on the plaintiffs' businesses.

Likewise, this court rejected the plaintiffs' argument that an insured necessarily suffers a physical loss of a property whenever it loses the productive use of the property, as "use of property" and "property" are not the same thing because the loss of the former does not necessarily imply the loss of the latter, and also rejected their argument that their

efforts to achieve and maintain a safe environment, including erecting physical barriers, supported their claim that they suffered a direct physical loss, as those activities were designed to prevent the transmission of the coronavirus on the properties and were not, as the plaintiffs claimed, "repairs" in any ordinary sense of the word.

Although the plaintiffs' contention that the coverage provision for "direct physical loss" of property applied to their claims, even though there has been no physical, tangible alteration of their properties, no persistent, physical contamination of the properties rendering them uninhabitable, and no imminent threat of physical damage to or destruction of the properties rendering them unusable or inaccessible, was not frivolous, the mere fact that the parties advanced different interpretations of an insurance policy does not necessitate a conclusion that the policy language was ambiguous, and, in light of the entirety of the insurance policies at issue, the plaintiffs' interpretation was not reasonable.

Argued September 15, 2022—officially released January 27, 2023*

Procedural History

Action for a judgment declaring that the defendants were obligated to provide coverage under certain insurance policies for the plaintiffs' alleged business losses as a result of the COVID-19 pandemic, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where the court, *Noble*, *J.*, denied the plaintiffs' motion for summary judgment, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

R. Cornelius Danaher, Jr., with whom were *Thomas J. Plumridge* and, on the brief, *Calum B. Anderson*, *Allan Kanner*, pro hac vice, and *Cynthia St. Amant*, pro hac vice, for the appellants (plaintiffs).

Jonathan M. Freiman, with whom were *Ariela C. Anhalt* and, on the brief, *Sarah D. Gordon*, pro hac vice, *Erica Gerson*, pro hac vice, and *Justin Ben-Asher*, pro hac vice, for the appellees (defendants).

* January 27, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. The dispositive issue in this appeal is whether a property insurance policy providing coverage for "direct physical loss of or physical damage to" covered property provides coverage for business income losses arising from the suspension of business operations during the COVID-19 pandemic. The plaintiffs, Connecticut Dermatology Group, PC (Connecticut Dermatology), Live Every Day, LLC (Live Every Day), and Ear Specialty Group of Connecticut, PC (Ear Specialty Group), own and operate healthcare facilities at various locations in Connecticut. They suspended their business operations during the COVID-19 pandemic and, as a result, lost business income and incurred other expenses. The plaintiffs filed claims for their losses with the defendants, Twin City Fire Insurance Company, Sentinel Insurance Company, Ltd., Hartford Fire Insurance Company, doing business as The Hartford, and the Hartford Financial Services Group, Inc., under insurance policies containing provisions requiring the insurance companies to "pay for direct physical loss of or physical damage to" covered property caused by a covered cause of loss. The defendants denied the claims, and the plaintiffs brought this action seeking, among other things, a judgment declaring that the insurance policies covered their economic losses. The plaintiffs now appeal[1] from the trial court's granting of the defendants' motion for summary judgment on the ground that the claimed losses were subject to a virus exclusion in the policies. We affirm the trial court's judgment on the alternative ground that there is no genuine issue of material fact as to whether the policies did not cover the plaintiffs' claims because the plaintiffs

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

did not suffer any direct physical loss of covered property.

The record, which we view in the light most favorable to the plaintiffs for purposes of reviewing the trial court's rendering of summary judgment, reveals the following facts and procedural history. The plaintiffs are insured under separate but identical commercial insurance policies issued by the defendants.[2] The policies provide in relevant part that the defendants "will pay for direct physical loss of or physical damage to [c]overed [p]roperty at the premises described in the [d]eclarations (also called 'scheduled premises' . . .) caused by or resulting from a [c]overed [c]ause of [l]oss." In addition, the policies provide that the defendants "will pay for the actual loss of [b]usiness [i]ncome [the insured] sustain[s] due to the necessary suspension of [its] 'operations' during the 'period of restoration' " and for "reasonable and necessary [e]xtra [e]xpense [the insured] incur[s] during the 'period of restoration' that [it] would not have incurred if there had been no direct physical loss or physical damage to property at the 'scheduled premises' . . . ." The policies define "period of restoration" in relevant part as "the period of time that: (a) [b]egins with the date of direct physical loss or physical damage caused by or resulting from a [c]overed [c]ause of [l]oss at the 'scheduled premises,' and (b) [e]nds on the date when: (1) [t]he property at the 'scheduled premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality; (2) [t]he date when [the insured's] business is resumed at a new, permanent location. . . ."

In early 2020, the world experienced the outbreak of the highly virulent infectious disease known as COVID-

[2] The defendants are interrelated corporate entities, and there is some dispute as to which defendant is responsible for paying the claim submitted by each specific plaintiff. Because these issues are complex and have no bearing on the issue before us in this appeal, we do not address them.

19. The outbreak and ensuing pandemic were fueled by close contact between people in indoor spaces. In response to the pandemic, government officials and agencies at both the state and federal levels issued numerous emergency orders, recommendations and guidelines intended to prevent or slow the spread of the disease. These decrees directed people to stay at home if possible, imposed social distancing rules, limited occupancy of certain buildings, and urged the installation of Plexiglass barriers, increased ventilation and the regular disinfection of surfaces to prevent transmission of the coronavirus inside buildings. One such order, which temporarily required the elimination of in-person workforces for nonessential businesses and required telecommuting or work from home "to the maximum extent possible" for all other businesses or not-for-profit entities, was Governor Ned Lamont's Executive Order 7H,[3] which he issued on March 20, 2020. The order classified "hospitals, clinics" and "companies and institutions involved in . . . any other healthcare related supplies or services" as "essential" businesses.

In response to the pandemic, in March, 2020, the plaintiffs suspended the operation of their businesses.[4]

[3] Executive Order 7H provides in relevant part: "Effective on March 23, 2020, at [8] p.m. and through April 22, 2020, unless earlier modified, extended, or terminated by [the governor], all businesses and not-for-profit entities in the state shall employ, to the maximum extent possible, any telecommuting or work from home procedures that they can safely employ. [Nonessential] businesses or not-for-profit entities shall reduce their in-person workforces at any workplace locations by 100 [percent] not later than March 23, 2020 at [8] p.m. Any essential business or entity providing essential goods, services or functions shall not be subject to these in-person restrictions. . . ."

[4] The plaintiffs make no claim that they were required by law to suspend the operation of their businesses, and they have abandoned any claim that they are entitled to coverage pursuant to the "civil authority" clause of the insurance policies providing coverage for the actual loss of business income sustained when access to the covered property is specifically prohibited by order of a civil authority as the direct result of a covered cause of loss to property in the immediate area of a covered premises.

As a result, they suffered losses of business income. The plaintiffs also incurred costs in connection with the daily sanitation of their premises and the erection of physical barriers to protect patients and staff and to minimize the suspension of normal operations. They submitted claims for their losses to the defendants, which either denied the claims or failed to respond.[5] In their letters denying the claims, the defendants stated that, "[because] the coronavirus did not cause property damage at [the insured's] place of business or in the immediate area, this business income loss is not covered."

Thereafter, the plaintiffs brought this action seeking, among other things, a judgment declaring that the defendants were obligated to provide coverage for "sue and labor" expenses,[6] current and future lost business income, and "extra expense" related to the costs of daily sanitation and erecting physical barriers during the suspension of operations.[7] In their answer, the defendants denied the plaintiffs' substantive allegations and claimed as a special defense that, if the plaintiffs suffered any losses that would otherwise be covered by the insurance policies, the losses were subject to an exclusion for "loss or damage caused directly or indirectly by . . . [the] [p]resence, growth, proliferation, spread or any activity

[5] According to the plaintiffs, Connecticut Dermatology received no response to its claim.

[6] The insurance policies require that, in the event of a loss, the insureds take all reasonable steps to protect the covered property from further damage. Coverage for these expenses is commonly known as "sue and labor" coverage.

[7] Connecticut Dermatology, which received no response to its claim; see footnote 5 of this opinion; sought a judgment declaring that its losses were covered by its insurance policy. Live Every Day and Ear Specialty Group sought damages for breach of the covenant of good faith and fair dealing and for violations of the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq., and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., based on the denial of their claims.

of 'fungi,' wet rot, dry rot, bacteria or virus" (virus exclusion).[8]

The parties filed separate motions for summary judgment. In their motion, the defendants contended, among other things, that there was no genuine issue of material fact as to whether the insurance policies did not cover the claimed losses because there was no " 'direct physical loss of or physical damage to' " any property covered by the policies. In addition, the defendants contended that there was no genuine issue of material fact as to whether, if there was a loss that otherwise would be covered, it was subject to the virus exclusion. In their motion, the plaintiffs claimed, among other things, that there was no genuine issue of material fact as to whether the insurance policies provided coverage because the plaintiffs had suffered a "direct physical loss" of covered property. The trial court concluded that the plaintiffs' claims were subject to the virus exclusion and rendered summary judgment for the defendants. This appeal followed.

On appeal, the plaintiffs claim that the trial court incorrectly concluded that their claims were subject to the virus exclusion. The defendants disagree and further contend, as an alternative ground for affirmance, that the insurance policies did not cover the losses because there was no "direct physical loss of or physical damage to" any property covered by the policies. We agree with the defendants that the insurance policies do not cover the plaintiffs' losses, and, therefore, we need not decide whether the trial court correctly determined that their claims were subject to the virus exclusion. See, e.g., *State* v. *Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008) ("[i]t is well established that this court may rely on any grounds supported by the record in

[8] The defendants also raised other special defenses that are not relevant to this appeal.

affirming the judgment of a trial court"); see also, e.g., *Grady* v. *Somers*, 294 Conn. 324, 349–50 n.28, 984 A.2d 684 (2009) (addressing alternative ground for affirmance that trial court did not reach because it involved question of law over which review was plenary).

"The standard of review of a trial court's decision to grant summary judgment is well established. [W]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Heisinger* v. *Cleary*, 323 Conn. 765, 776, 150 A.3d 1136 (2016). "This court's review of the trial court's decision to grant summary judgment in favor of the defendants is plenary." Id., 777.

"The general principles that guide our review of insurance contract interpretations are well settled. [C]onstruction of a contract of insurance presents a question of law for the court [that] this court reviews de novo. . . . An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant

portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37–38, 84 A.3d 1167 (2014).

"[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Afkari-Ahmadi*v. *Fotovat-Ahmadi*, 294 Conn. 384, 391, 985 A.2d 319 (2009). Rather, "[an insurance] contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Internal quotation marks omitted.) *Enviro Express, Inc.* v. *AIU Ins. Co.*, 279 Conn. 194, 199, 901 A.2d 666 (2006). The contract is ambiguous only if, after considering the ordinary meaning of the language in dispute and the entirety of the insurance contract, the court determines that the language is susceptible to more than one reasonable interpretation.[9] See id.

[9] This court previously has stated that the "rule of construction that favors the insured in case of ambiguity applies only when the terms are, without violence, susceptible of two [*equally reasonable*] interpretations . . . ."

With these principles in mind, we address the plaintiffs' claim that the policy provision covering "direct physical loss of . . . [p]roperty" covers the losses caused by the suspension of their business operations during the COVID-19 pandemic. We begin our analysis with the language of the relevant insurance policy provisions. The policy provides: "We [i.e., the insurance companies] will pay for *direct physical loss of or physical damage* to [c]overed [p]roperty at the premises described in the [d]eclarations . . . caused by or resulting from a [c]overed [c]ause of [l]oss." (Emphasis added.) This provision is contained in the portion of the policy entitled "Special Property Coverage Form." "Covered property" is defined to include buildings described in the declarations; permanent fixtures, machinery and equipment; building glass; personal property owned by the insured that it uses to maintain or service the buildings or structures on the premises; and personal property such as tools and equipment that the insured uses in its business.

Although this court has not previously construed this specific policy language, we considered the meaning of a similar policy provision in *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 67 A.3d 961 (2013) (*Capstone*). The general liability policy at issue in that case contained a provision covering "[p]hysical injury to tangible property, including all resulting loss of use of that property." (Internal quotation marks omitted.) Id., 782. We rejected the plaintiffs' claim in *Capstone* that this provision entitled them to coverage for the loss of the use of defectively installed chimneys, which resulted in the escape of carbon monoxide into

(Emphasis added; internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 155, 61 A.3d 485 (2013). We question whether the interpretations must be *equally* reasonable for the disputed term to be ambiguous. Because we conclude in the present case that the plaintiffs' interpretation simply is not reasonable when considered in light of the entirety of the contract, we need not resolve this question.

the building, on the ground that "the gas caused no physical, tangible alteration to any property," and, therefore, under the plain language of the policy provision, "the loss of use of the defective chimneys, standing alone, did not constitute property damage . . . ." (Internal quotation marks omitted.) Id., 782–83; see id., 767–69.

We find instructive a recent decision from the United States Court of Appeals for the Second Circuit that followed our decision in *Capstone* in concluding that losses resulting from the suspension of business operations because of the COVID-19 pandemic were not covered under similar policy language requiring a physical loss or physical damage. In *Farmington Village Dental Associates, LLC* v. *Cincinnati Ins. Co.*, Docket No. 21-2080-cv, 2022 WL 2062280, *1 (2d Cir. June 8, 2022), the United States Court of Appeals for the Second Circuit, extrapolating from *Capstone*, concluded that, under Connecticut law, a policy covering " 'accidental physical loss or accidental physical damage' " to property did not cover a loss incurred as result of the suspension of business operations during the COVID-19 pandemic because the loss was not physical, and the virus did not tangibly alter the property.[10] Id., *1. The overwhelming

[10] Recent decisions from the United States District Court for the District of Connecticut are consistent with the Second Circuit's decision in *Farmington Village Dental Associates, LLC*. See *ITT, Inc.* v. *Factory Mutual Ins. Co.*, Docket No. 3:21CV00156 (SALM), 2022 WL 1471245, *10 (D. Conn. May 10, 2022) (under Connecticut law, "the phrase physical loss or damage does not extend to mere loss of use of a premises, [when] there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property" and, therefore, do not cover loss incurred as result of suspension of business operations during COVID-19 pandemic (internal quotation marks omitted)), appeal filed (2d Cir. June 6, 2022) (No. 22-1245); *Great Meadow Cafe* v. *Cincinnati Ins. Co.*, Docket No. 3:21-CV-00661 (KAD), 2022 WL 813796, *6 (D. Conn. March 17, 2022) (under Connecticut law, "direct physical loss" requires "physical damage or physical alteration" and does not include loss incurred as result of suspension of business operations during COVID-19 pandemic); *Connecticut Children's Medical Center* v. *Continental Casualty Co.*, 581 F. Supp. 3d 385, 392–93 (D. Conn. 2022) (under Connecticut law, loss incurred as result of suspension of business operations during COVID-19 pandemic was not direct

majority of federal and state courts construing language similar or identical to the language contained in the policies at issue in the present case have reached the same conclusion.[11] This reading of the term "direct

physical loss of property), appeal filed (2d Cir. February 17, 2022) (No. 22-322).

The plaintiffs contend that, notwithstanding the Second Circuit's reliance in *Farmington Village Dental Associates, LLC*, on our decision in *Capstone*, any reliance on *Capstone* in the present case is misplaced because *Capstone* involved a claim for property *damage*, whereas they are making claims for *physical loss* of property. The plaintiffs point out that this court in *Capstone* expressly declined to address "the issue of whether the presence of carbon monoxide would meet the policy's second definition of property damage, 'loss of use of tangible property that is not physically injured.' " *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 783 n.21. In addition, the plaintiffs point out that *Capstone* involved a third-party general liability insurance policy, whereas they are making claims under a first-party property insurance policy. Although we agree that our decision in *Capstone* is not directly on point, it does provide some insight into the meaning of the term "physical," as applied to claims involving the loss of or damage to property. In any event, even if the plaintiffs were correct that *Capstone* provides *no* insight into the meaning of "direct physical loss," as used in their policies, that would not change our conclusion, based on the other reasons stated herein, that the phrase does not include losses resulting from the suspension of business operations during the COVID-19 pandemic.

[11] See *Rock Dental Arkansas, PLLC* v. *Cincinnati Ins. Co.*, 40 F.4th 868, 871 (8th Cir. 2022) (under Arkansas law, "accidental physical loss" "requires some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical destruction" (internal quotation marks omitted)); *United Talent Agency* v. *Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 834, 293 Cal. Rptr. 3d 65 (2022) (under California law, property insurance policy did not cover loss incurred as result of suspension of business operations during COVID-19 pandemic under "the generally recognized principle in the context of [first-party] property insurance that mere loss of use of physical property to generate business income, without any other physical impact on the property, does not give rise to coverage for direct physical loss" (internal quotation marks omitted)); *Commodore, Inc.* v. *Certain Underwriters at Lloyd's London*, 342 So. 3d 697, 702, 704–705 (Fla. App. 2022) (under Florida law, "because the ordinary meaning of 'physical' carries a tangible aspect, 'direct physical loss' requires some actual alteration to the insured property" and does not include loss incurred as result of suspension of business operations during COVID-19 pandemic); *Gilreath Family & Cosmetic Dentistry, Inc.* v. *Cincinnati Ins. Co.*, Docket No. 21-11046, 2021 WL 3870697, *2 (11th Cir. August 31, 2021) (under Georgia law, "accidental physical loss" does not include loss incurred as result of suspension of business operations during COVID-19 pandemic because loss requires "an actual change in insured property that either makes the property

unsatisfactory for future use or requires that repairs be made" (internal quotation marks omitted)); *Firebirds International, LLC* v. *Zurich American Ins. Co.*, Docket No. 1-21-0558, 2022 WL 1604438, *8 (Ill. App. May 20, 2022) (under Illinois law, policy covering "direct physical loss" to covered property did not "cover losses resulting from intangible causes that are not tied to actual physical damage to property," such as loss incurred as result of suspension of business operations during COVID-19 pandemic); *Indiana Repertory Theatre* v. *Cincinnati Casualty Co.*, 180 N.E.3d 403, 410 (Ind. App.) (under Indiana law, policy covering " 'direct physical loss' " did not cover loss incurred as result of suspension of business operations during COVID-19 pandemic because property "did not suffer any damage or alteration [but] . . . was unusable for its intended purpose because of an outside factor"), transfer denied, 193 N.E.3d 372 (Ind. 2022); *Wakonda Club* v. *Selective Ins. Co. of America*, 973 N.W.2d 545, 552 (Iowa 2022) (under Iowa law, insurance policy covering " 'direct physical loss' " of covered property "requires there to be a physical aspect to the loss of the property" and does not cover business income losses caused by suspension of business operations during COVID-19 pandemic); *Q Clothier New Orleans, LLC* v. *Twin City Fire Ins. Co.*, 29 F.4th 252, 258–59 (5th Cir. 2022) (under Louisiana law, "the unambiguous meaning of 'direct physical loss of or damage to property' " does not include loss incurred as result of suspension of business operations during COVID-19 pandemic because "that loss is not tangible . . . [or] an alteration, injury, or deprivation of *property*" (emphasis in original; footnote omitted)); *GPL Enterprise, LLC* v. *Certain Underwriters at Lloyd's*, 254 Md. App. 638, 645, 653–54, 276 A.3d 75 (2022) (under Maryland law, "direct physical loss or damage to property does not include loss of use unrelated to tangible, physical damage," such as loss incurred as result of suspension of business operations during COVID-19 pandemic (internal quotation marks omitted)); *Verveine Corp.* v. *Strathmore Ins. Co.*, 489 Mass. 534, 542–44, 184 N.E.3d 1266 (2022) (under Massachusetts law, "direct physical loss of or damage to property requires some distinct, demonstrable, physical alteration of the property" and does not include loss incurred as result of suspension of business operations during COVID-19 pandemic (internal quotation marks omitted)); *Gavrilides Management Co., LLC* v. *Michigan Ins. Co.*, Docket No. 354418, 2022 WL 301555, *4, *5 (Mich. App. February 1, 2022) (under Michigan law, as used in phrase "direct physical loss," "the word 'physical' necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises" and does not include loss incurred as result of suspension of business operations during COVID-19 pandemic), appeal denied, 981 N.W.2d 725 (Mich. 2022); *Monday Restaurants* v. *Intrepid Ins. Co.*, 32 F.4th 656, 657–59 (8th Cir. 2022) (under Missouri law, " 'direct physical loss' " unambiguously does not include loss incurred as result of suspension of business operations during COVID-19 epidemic because loss was not physical); *Circus Circus LV, LP* v. *AIG Specialty Ins. Co.*, Docket No. 21-15367, 2022 WL 1125663, *1–2 (9th Cir. April 15, 2022) (under Nevada law, "direct physical loss" does not include loss incurred as result of suspension of business operations during COVID-19 pandemic because "the loss must be due to a distinct, demonstrable, physical alteration of the property" (internal

quotation marks omitted)); *AC Ocean Walk, LLC* v. *American Guarantee & Liability Ins. Co.*, Docket No. A-1824-21, 2022 WL 2254864, *13 (N.J. Super. App. Div. June 23, 2022) (under New Jersey law, "[the coronavirus'] presence and/or the [government mandated] shutdown does not constitute a direct physical loss of or damage to" property); *Consolidated Restaurant Operations, Inc.* v. *Westport Ins. Corp.*, 205 App. Div. 3d 76, 85, 167 N.Y.S.3d 15 (under New York law, "physical loss or damage in an insurance policy requires actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves [i.e., the COVID-19 pandemic], or the adverse business consequences that flow from such closure" (internal quotation marks omitted)), appeal granted in part, 39 N.Y.3d 943, 198 N.E.3d 788, 177 N.Y.S.3d 545 (2022); *North State Deli, LLC* v. *Cincinnati Ins. Co.*, 284 N.C. App. 330, 333–34, 875 S.E.2d 590 (2022) (under North Carolina law, " 'physical loss' " unambiguously does not include loss incurred as result of suspension of business operations during COVID-19 pandemic); *Nail Nook, Inc.* v. *Hiscox Ins. Co.*, 182 N.E.3d 356, 359–60 (Ohio App. 2021) (under Ohio law, policy covering " 'direct physical loss of . . . [c]overed [p]roperty' " plainly and unambiguously does not cover loss incurred as result of suspension of business operations during COVID-19 pandemic); *Goodwill Industries of Central Oklahoma, Inc.* v. *Philadelphia Indemnity Ins. Co.*, 21 F.4th 704, 710 (10th Cir. 2021) (under Oklahoma law, " 'direct physical loss' " does not include loss incurred as result of suspension of business operations during COVID-19 pandemic because that term "requires an immediate and perceptible destruction or deprivation of property"), cert. denied, U.S. , 142 S. Ct. 2779, 213 L. Ed. 2d 1017 (2022); *Sullivan Management, LLC* v. *Fireman's Fund Ins. Co.*, 437 S.C. 587, 592, 879 S.E.2d 742 (2022) (under South Carolina law, "mere loss of access to a business [during the COVID-19 pandemic] is not the same as direct physical loss or damage"); *Terry Black's Barbecue, LLC* v. *State Automobile Mutual Ins. Co.*, 22 F.4th 450, 456 (5th Cir. 2022) (under Texas law, "the plain meaning of 'physical loss' " did not cover loss incurred as result of suspension of business operations during COVID-19 pandemic because loss did not involve "any tangible alteration or deprivation of . . . property"); *Hill & Stout, PLLC* v. *Mutual of Enumclaw Ins. Co.*, 200 Wn. 2d 208, 220, 515 P.3d 525 (2022) (under Washington law, "the claim for loss of intended use and loss of business income [during the COVID-19 pandemic] is not a *physical* loss of property" (emphasis in original)); *Uncork & Create, LLC* v. *Cincinnati Ins. Co.*, 27 F.4th 926, 932, 933 (4th Cir. 2022) (under West Virginia law, "the plain understanding of the terms 'physical loss' or 'physical damage' is material destruction or material harm," and those terms did not include loss incurred as result of suspension of business operations during COVID-19 pandemic); *Colectivo Coffee Roasters, Inc.* v. *Society Ins.*, 401 Wis. 2d 660, 672, 974 N.W.2d 442 (2022) (under Wisconsin law, "the presence of [the coronavirus] does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property" (internal quotation marks omitted)).

We note that there is some authority to the contrary. See *In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litigation*, 521

physical loss of . . . [p]roperty" is supported by the dictionary definitions of the words "direct," "loss" and "physical."[12]

F. Supp. 3d 729, 742 (N.D. Ill. 2021) (under Illinois law, reasonable jury could find that restaurants' suspension of business operations during COVID-19 pandemic constituted direct physical loss because "the restaurants [were] limited from using much of their physical space"); *Derek Scott Williams, PLLC* v. *Cincinnati Ins. Co.*, 522 F. Supp. 3d 457, 461, 463 (N.D. Ill. 2021) (under Texas law, "a reasonable [fact finder] could find that the term 'physical loss' is broad enough to cover . . . a deprivation of the use of [the] business premises" during COVID-19 pandemic). For the reasons that we explain more fully hereinafter in this opinion, we do not agree with the reasoning of these courts to the extent that they suggest that a limitation on the use of a property that results in a loss of business income, but that does not involve physical or tangible alteration of or physically prevent access to the property, constitutes a direct physical loss.

[12] See *Uncork & Create, LLC* v. *Cincinnati Ins. Co.*, 27 F.4th 926, 932 (4th Cir. 2022) ("In this context, the word 'physical' means 'relating to natural or material things' [Webster's Third New International Dictionary (2002) p. 1706] and the word 'loss' means 'the state or fact of being destroyed or placed beyond recovery: destruction, ruin.' [Id., p. 1338.] Finally, the word 'damage' in this context means an 'injury or harm . . . to property.' [Id., p. 571.] Thus, with reference to a defined premises, the plain understanding of the terms 'physical loss' or 'physical damage' is material destruction or material harm."); *Estes* v. *Cincinnati Ins. Co.*, 23 F.4th 695, 700 (6th Cir. 2022) ("Dictionaries confirm that the 'average person' would interpret the phrase 'direct physical loss' in this fashion. . . . The word 'direct' means 'stemming immediately from a source.' [Merriam Webster's Collegiate Dictionary (11th Ed. 2014) p. 353.] The word 'physical' means 'of or relating to material things.' [Id., p. 935.] And the word 'loss' means 'destruction' or 'deprivation' (that is, 'the act of losing possession'). [Id., p. 736; see also, e.g., American Heritage Dictionary of the English Language (5th Ed. 2018) pp. 511, 1037, 1331.] Putting these definitions together, a covered source itself must destroy covered property or deprive the property's owner of possession." (Citations omitted.)); *Goodwill Industries of Central Oklahoma, Inc.* v. *Philadelphia Indemnity Ins. Co.*, 21 F.4th 704, 710 (10th Cir. 2021) (under dictionary "definitions, a 'direct physical loss' requires an immediate and perceptible destruction or deprivation of property"), cert. denied, U.S. , 142 S. Ct. 2779, 213 L. Ed. 2d 1017 (2022); *Santo's Italian Café, LLC* v. *Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021) ("Whether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same. The policy does not cover this loss [resulting from the suspension of business operations during the COVID-19 pandemic]."); *Commodore, Inc.* v. *Certain Underwriters at Lloyd's London*, 342 So. 3d 697, 702 (Fla. App. 2022) ("Because the . . . dictionary defines 'loss' as 'losing possession and deprivation' . . . we look, in turn, to the definition of 'deprivation': 'the state of being kept from possessing, enjoying, or using something.' . . . But the use of 'deprivation' as a synonym for 'loss' does not address [the] fact that the phrase still

Viewing the phrase "direct physical loss of or physical damage to" in the context of the policies' business income provisions further supports this interpretation. The policy provides that the insurer "will pay for the actual loss of [b]usiness [i]ncome [the insured] sustain[s] due to the necessary suspension of [its] 'operations' during the 'period of restoration.' " The policy further provides that the "period of restoration" "[b]egins with the date of direct physical loss or physical damage caused by or resulting from a [c]overed [c]ause of [l]oss at the 'scheduled premises' " and ends when the property "should be repaired, rebuilt or replaced with reasonable speed and similar quality . . . ." Thus, the policy expressly distinguishes between a loss resulting from "the necessary suspension of [the insured's] 'operations' " and the "direct physical loss of . . . [p]roperty," and makes payment for the former *conditional* on the latter. If the "necessary suspension of . . . 'operations' " were, itself, a "direct physical loss," this distinction would serve no purpose. See, e.g., *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 391 ("in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous" (internal quotation marks omitted)); see also *Uncork & Create, LLC* v. *Cincinnati Ins. Co.*, 27 F.4th 926, 932 (4th Cir. 2022)

requires 'physical' loss . . . . Physical . . . means 'of or relating to matter or the material world; natural; tangible, concrete.' . . . Thus, because the ordinary meaning of 'physical' carries a tangible aspect, 'direct physical loss' requires some actual alteration to the insured property." (Citations omitted; emphasis omitted.)); *Hill & Stout, PLLC* v. *Mutual of Enumclaw Ins. Co.*, 200 Wn. 2d 208, 219, 515 P.3d 525 (2022) (" 'Physical' is defined as 'of or belonging to all created existences in nature' and 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary.' [Webster's Third New International Dictionary (2002) p. 1706.] 'Loss' is defined most pertinently as 'the act or fact of losing : failure to keep possession : DEPRIVATION' and 'the state or fact of being destroyed or placed beyond recovery.' [Id., p. 1338.] It follows that a 'physical loss of . . . property' is a property that has been physically destroyed or that one is deprived of in that the property is no longer physically in [his or her] possession.").

("[a]ny alternative meaning of the terms 'physical loss' or 'physical damage' that does not require a material alteration to the property would render meaningless this [precondition] to coverage for business income loss"); cf. *Mudpie, Inc.* v. *Travelers Casualty Ins. Co. of America*, 15 F.4th 885, 892 (9th Cir. 2021) ("[t]o interpret the [p]olicy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous").

Moreover, the provision defining "period of restoration" provides that the loss of business income is covered while the property is being "repaired, rebuilt or replaced . . . ." These terms strongly imply that a "direct physical loss," unlike a loss resulting from the necessary suspension of business operations to avoid the transmission of a communicable disease, is one that involves a physical alteration of the property such that the property is susceptible to being restored to its original condition.[13] See, e.g., *SA Palm Beach, LLC* v. *Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1361 (11th Cir. 2022) ("The need to repair, rebuild, replace, or expend time securing a new, permanent property is a [precondition] for coverage of lost business income and other expenses. Any alternative meaning of the terms physical loss or physical damage that does not require a material alteration to the property would render meaningless this [precondition] to coverage for business income loss." (Internal quotation marks omitted.)); *Oral Surgeons, P.C.* v. *Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) ("[t]hat the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use"); *Chief of Staff, LLC* v. *Hiscox Ins. Co.*,

[13] We address the plaintiffs' claim that they were required to "repair" their properties as the result of the COVID-19 pandemic subsequently in this opinion.

532 F. Supp. 3d 598, 603 (N.D. Ill. 2021) ("[t]he uneasy fit between the 'period of restoration' language and [the claim that 'direct physical loss' covers the suspension of business operations during the COVID-19 pandemic] confirms that the better reading of the provision is the one that requires some physical change to the condition or location of property at the insured's premises").

We conclude, therefore, that the plain meaning of the term "direct physical loss of . . . [p]roperty" does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase "direct physical loss of . . . [p]roperty" clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible.[14]

[14] Quoting 10A S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2005) § 148:46, p. 148-81, the plaintiffs contend that many of the cases holding that "direct physical loss" clearly requires some physical, tangible alteration of property are tainted by their reliance on a "misstatement" in a prominent insurance law treatise asserting that "physical loss" requires a " 'distinct, demonstrable, physical alteration of the property.' " Quoting R. Lewis et al., "Couch's 'Physical Alteration' Fallacy: Its Origins and Consequences," 56 Tort Trial & Ins. Prac. L.J. 621, 622 (2021), the plaintiffs point out that this statement recently has been sharply criticized as " 'wrong when [George J.] Couch first made it in the 1990s . . . and . . . wrong today.' " We note, however, that Couch also recognizes that there are exceptions to the "physical alteration" requirement in cases involving contamination by a harmful substance or an imminent threat of physical damage to property. See 10A S. Plitt, supra, § 148:46, p. 148-82 (observing that such cases allow "coverage based on physical damage despite the lack of physical alteration of the property"). These are the same types of cases that the authors of "Couch's 'Physical Alteration' Fallacy: Its Origins and Consequences" rely on to support their contention that Couch is wrong. For reasons that we discuss more fully hereinafter in this opinion, we conclude that the cases in which courts have found a physical loss, even though the insured property was not physically or tangibly altered, are distinguishable from the present case. Accordingly, even if we were to assume that some courts may have given undue weight to Couch's "physical alteration" requirement, that does not affect our analysis here.

The plaintiffs raise numerous arguments in support of their claim that the insurance policies' coverage for "direct physical loss of or physical damage to" any insured property applies to their claims for business income losses and other expenses incurred as the result of the suspension of their business operations during the COVID-19 pandemic and their efforts to make the properties safer. The plaintiffs first suggest that they are seeking coverage for a "direct physical loss" of their properties because the COVID-19 pandemic physically transformed their "ordinary business properties" into "potential viral incubators that were imminently dangerous to human beings." Although we admire the ingenuity of this argument, the record does not indicate that there was any "physical transformation" of the plaintiffs' *properties* as the result of the COVID-19 pandemic. See *Verveine Corp.* v. *Strathmore Ins. Co.*, 489 Mass. 534, 543, 184 N.E.3d 1266 (2022) ("[a]lthough caused, in some sense, by the physical properties of the virus, the suspension of business [as a result of the COVID-19 pandemic is] not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage"). Rather, the COVID-19 pandemic caused a transformation in governmental and societal expectations and behavior that had a seriously negative impact on the plaintiffs' businesses.[15] See, e.g., *Inns by the Sea* v. *California Mutual Ins. Co.*, 71 Cal. App. 5th 688, 704, 286 Cal. Rptr. 3d 576 (2021) (The COVID-19 pandemic did not cause a direct physical loss of property because "[t]he property did not change. The world around it did." (Internal quotation marks omitted.)), review denied, California Supreme Court, Docket No. S272450 (March 9, 2022); E. Knutsen & J. Stempel, "Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage

[15] As we indicated, the plaintiffs in the present case make no claim that they were *required by law* to suspend their business operations.

Denial in a Pandemic," 27 Conn. Ins. L.J. 185, 201 (2020) ("[i]t was fairly clear at the outset [of the COVID-19 pandemic], particularly when citizens began to stockpile supplies and stay indoors and when governments issued closure orders, that [COVID-19] would have a serious negative impact on many businesses"). We therefore reject this claim.

The plaintiffs also appear to contend that, because an insured loses the use of a property when the property is physically destroyed or physically lost, an insured necessarily suffers the "physical loss" of a property whenever the insured loses the productive use of the property.[16] We disagree. Instead, we agree with the multiplicity of courts that have concluded that "use of property" and "property" are not the same thing, and the loss of the former does not necessarily imply the loss of the latter.[17] See, e.g., *Santo's Italian Café, LLC* v. *Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021) ("A loss of use simply is not the same as a physical loss. It is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it."); *GPL Enterprise, LLC* v. *Certain Underwriters at Lloyd's*, 254 Md. App. 638, 654, 276 A.3d 75 (2022) ("[a] loss of use simply is not the same as a physical loss" (internal quotation marks omitted));

[16] Because it has no bearing on our analysis, we assume for purposes of this opinion that, because the plaintiffs completely suspended their business operations, they completely lost the use of their properties during some portion of the COVID-19 pandemic. We note, however, that hospitals and many other essential businesses stayed open during the pandemic, albeit with certain restrictions and limitations on their operations, and the record reveals no apparent reason why the plaintiffs also could not have stayed open subject to similar restrictions and limitations. We further note that the plaintiffs make no claim that they lost access to their properties for nonbusiness purposes, such as inspection and maintenance, during the pandemic.

[17] The plaintiffs correctly point out that the right to use property is one stick in the bundle of ownership rights. See, e.g., *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 151, 763 A.2d 1011 (2001). The plaintiffs' insurance policies do not insure *ownership rights*, however, but *physical property*.

North State Deli, LLC v. *Cincinnati Ins. Co.*, 284 N.C. App. 330, 334, 875 S.E.2d 590 (2022) ("[the] [p]laintiffs' desired definition of 'physical loss' as a general 'loss of use' is not supported by our [case law] or the unambiguous language in the [p]olicies"); *Consolidated Restaurant Operations, Inc.* v. *Westport Ins. Corp.*, 205 App. Div. 3d 76, 86, 167 N.Y.S.3d 15 ("[the] inability to operate the property as intended is not discernable, direct physical damage or loss to . . . property, but rather an external force limiting [the] use of the property"), appeal granted in part, 39 N.Y.3d 943, 198 N.E.3d 788, 177 N.Y.S.3d 545 (2022).[18] Indeed, this argument is

[18] We note that there is authority to the contrary. See *Derek Scott Williams, PLLC* v. *Cincinnati Ins. Co.*, 522 F. Supp. 3d 457, 461, 463 (N.D. Ill. 2021) ("a reasonable [fact finder] could find that the term 'physical loss' is broad enough to cover . . . a deprivation of the use of . . . business premises" as result of COVID-19 pandemic)); *US Airways, Inc.* v. *Commonwealth Ins. Co.*, 64 Va. Cir. 408, 410, 415 (2004) (losses incurred when federal government shut down airports after September 11, 2001 terrorist attacks were covered by civil authority provision of insurance policy), rev'd on other grounds sub nom. *PMA Capital Ins. Co.* v. *US Airways, Inc.*, 271 Va. 352, 626 S.E.2d 369 (2006). In our view, the court in *Derek Scott Williams, PLLC*, incorrectly shifted the modifier "physical" from the word "loss" to the word "property." In other words, the court seems to have concluded that, if an insured is deprived by *any* mechanism, physical or otherwise, of the use of its physical property, there has been a "physical loss" of property. We believe that the better reading of the term "physical loss of . . . [p]roperty" is that the *cause of loss* must be physical. See *Oral Surgeons, P.C.* v. *Cincinnati Ins. Co.*, supra, 2 F.4th 1144 ("there must be some physicality to the *loss or damage* of property" (emphasis added)).

In *US Airways, Inc.* v. *Commonwealth Ins. Co.*, supra, 64 Va. Cir. 408, the policy covered "the loss sustained during the period of time, not to exceed [thirty] consecutive days when, as a direct result of a peril insured against, access to real or personal property is prohibited by order of civil or military authority." (Internal quotation marks omitted.) Id., 409. "Perils insured against" was defined as "all risk of direct physical loss of or damage to property described herein . . . ." (Internal quotation marks omitted.) Id. The court rejected the defendant insurance company's contention that physical damage to the property was a prerequisite to coverage under the civil authority provision. Id., 415. In our view, the court's interpretation is not supported by the language of the policy. In any event, the plaintiffs in the present case make no claim that a direct physical loss is not a prerequisite to coverage under their policies.

inconsistent with the plain language of these policies because, if loss of use constituted direct physical loss, then the policies would cover losses whenever a policyholder experienced a "necessary suspension of [its] 'operations,' " which they do not. Instead, they condition such coverage on a direct physical loss of property.

The plaintiffs further contend that their claim that they suffered a "direct physical loss" is supported by the fact that, according to them, they were required "to undertake demonstrable, physical repairs to the properties to bring them back into use." They claim that "[t]hese 'repairs' included the erection of physical barriers within [their medical] practices, the purchase of additional personal protective equipment, and other efforts to achieve and maintain a safe environment for patients despite the ongoing presence of the pandemic in the community." This claim mirrors the plaintiffs' claim that their properties underwent a "physical transformation" as the result of the COVID-19 pandemic, which we have already rejected. We conclude that, just as the properties were not physically altered in any way by the COVID-19 pandemic, the plaintiffs' activities designed to prevent the transmission of the coronavirus on the properties were not "repairs" in any ordinary sense of the word. Numerous courts have reached the same conclusion. See, e.g., *Mudpie, Inc.* v. *Travelers Casualty Ins. Co. of America*, 487 F. Supp. 3d 834, 840 (N.D. Cal. 2020) ("[t]he words [r]ebuild, repair and replace all strongly suggest that the damage contemplated by the [p]olicy is physical in nature" (internal quotation marks omitted)), aff'd, 15 F.4th 885 (9th Cir. 2021).[19]

[19] See also *Glynn Hospitality Group, Inc.* v. *RSUI Indemnity Co.*, Docket No. 21-cv-10744-DJC, 2021 WL 5281616, *5 (D. Mass. November 12, 2021) ("[t]he terms 'repaired, rebuilt or replaced' suggest tangible damage to property"); *Dukes Clothing, LLC* v. *Cincinnati Ins. Co.*, Docket No. 7:20-cv-860-GMB, 2021 WL 1791488, *3 (N.D. Ala. May 5, 2021) (rejecting attempt to "shoehorn cleaning or disinfecting into the definitions of repair, rebuild, and replace" because "repair" is defined as "[t]o restore (a damaged, worn,

The plaintiffs also cite multiple cases that they contend support their claims that a property need not be physically or tangibly altered in order to constitute a "direct physical loss." We agree with the plaintiffs to the extent that they contend that a "direct physical loss" of a property need not always entail physical or tangible *alteration*. For example, as several courts have pointed out, a property that has been stolen has been physically lost even if its physical condition has not changed. See, e.g., *Santo's Italian Café, LLC* v. *Acuity Ins. Co.*, supra, 15 F.4th 404 (applying Ohio law); *Connecticut Children's Medical Center* v. *Continental Casualty Co.*, 581 F. Supp. 3d 385, 389–91 (D. Conn. 2022) (applying Connecticut law), appeal filed (2d Cir. February 17, 2022) (No. 22-322); *Chief of Staff, LLC* v. *Hiscox Ins. Co.*, supra, 532 F. Supp. 3d 602 (applying Connecticut law); *Verveine Corp.* v. *Strathmore Ins. Co.*, supra, 489 Mass. 545 (applying Massachusetts law). This is because a stolen property has been rendered *physically* inaccessible to the insured. Several of the cases that the plaintiffs cite in which a property has been deemed to have been subject to a direct physical loss, even though there was no alteration to the property itself, are analogous to the stolen property cases because, in each case, a discrete physical event occurred that created an imminent threat of physical harm to anyone entering the property, thus rendering the property inac-

or faulty object or structure) to good or proper condition by replacing or fixing parts; to mend, fix," and because "[c]leaning and disinfecting do not involve replacing or fixing parts, and a structure is not faulty because it has a contaminated surface that can be decontaminated by cleaning and disinfecting" (internal quotation marks omitted)), aff'd, 35 F.4th 1322 (11th Cir. 2022); cf. *Real Hospitality, LLC* v. *Travelers Casualty Ins. Co. of America*, 499 F. Supp. 3d 288, 295 (S.D. Miss. 2020) ("[T]he [c]ourt reject[ed] [the] [p]laintiff's [claim] . . . that when the [e]xecutive [o]rders are lifted, this would constitute a 'repair' because [the] [p]laintiff's property would be restored to a 'sound state.' . . . This contorted interpretation [was] inconsistent with the plain and [commonsense] meaning of the word 'repair.' " (Citation omitted; footnote omitted.)).

cessible or uninhabitable.[20] In the present case, the COVID-19 pandemic was not a discrete physical event, and it did not create a situation in which the properties would pose an imminent danger to anyone who entered them. Rather, any danger would be created by people who gathered within the buildings. Thus, these cases do not support the plaintiffs' position.[21] See *Mudpie, Inc.* v. *Travelers Casualty Ins. Co. of America*, supra, 487 F. Supp. 3d 841 (distinguishing cases in which direct physical loss was found, even though property itself

[20] See *Manpower, Inc.* v. *Ins. Co. of State of Pennsylvania*, Docket No. 08C0085, 2009 WL 3738099, *3 (E.D. Wis. November 3, 2009) (when partial collapse of building did not physically damage portion of building occupied by insured, but civil authorities prohibited occupancy of entire building, insured incurred " 'direct physical loss' " of its interest in property for period that it was unable to occupy building); *Hughes* v. *Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243, 248–49, 18 Cal. Rptr. 650 (1962) (when landslide left insureds' home "standing on the edge of and partially overhanging a newly formed [thirty foot] cliff," rendering home uninhabitable, but did not physically damage home itself, insureds incurred physical loss of " 'dwelling building' "); *Murray* v. *State Farm Fire & Casualty Co.*, 203 W. Va. 477, 481, 493, 509 S.E.2d 1 (1998) (risk that rocks and boulders from unstable "highwall" above plaintiffs' properties could fall on properties at any time constituted " 'direct physical loss' " to properties because losses "rendering the insured property unusable or uninhabitable . . . may exist in the absence of structural damage to the insured property").

[21] Several other cases cited by the plaintiffs are similarly distinguishable from the present case because they involved a physical alteration of or an imminent physical threat to the properties at issue. See *Hampton Foods, Inc.* v. *Aetna Casualty & Surety Co.*, 787 F.2d 349, 351 (8th Cir. 1986) (" 'direct physical loss' " was incurred when insured was required to remove personal property and inventory from building that was collapsing and to sell items for salvage, and when other personal property was destroyed when building was demolished); *National Ink & Stitch, LLC* v. *State Auto Property & Casualty Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) ("loss of use, loss of reliability, or impaired functionality [caused by a ransomware attack] demonstrate the required damage to a computer system, consistent with the physical loss or damage to language in the [p]olicy" (emphasis omitted; internal quotation marks omitted)); *Southeast Mental Health Center, Inc.* v. *Pacific Ins. Co., Ltd.*, 439 F. Supp. 2d 831, 838 (W.D. Tenn. 2006) ("physical damage is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality" caused when programming information and custom circuitry were damaged by electrical outage (internal quotation marks omitted)).

was not physically altered, from claim involving suspension of business operations during COVID-19 pandemic because, in each case in which physical loss was found, "some outside physical force . . . *induced* a detrimental change in the property's capabilities" (emphasis in original)).

We similarly disagree with the plaintiffs' reliance on several cases in which contamination of a property by harmful substances or bacteria was deemed to be a direct physical loss.[22] These cases are distinguishable

[22] See *Motorists Mutual Ins. Co.* v. *Hardinger*, 131 Fed. Appx. 823, 826, 827–28 (3d Cir. 2005) (concluding that physical loss of property occurs when "function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable," and holding that there was genuine issue of material fact as to whether contamination of residential well by e-coli bacteria that sickened residents constituted physical loss (emphasis omitted; internal quotation marks omitted)); *Gregory Packaging, Inc.* v. *Travelers Property Casualty Co. of America*, Docket No. 2:12-cv-04418 (WHW) (CLW), 2014 WL 6675934, *6 (D.N.J. November 25, 2014) (there was no genuine issue of material fact as to whether " 'direct physical loss' " occurred when "[an] ammonia release physically transformed the air within [the insured property] so that it contained an unsafe amount of ammonia . . . [and] render[ed] the [property] unfit for occupancy until the ammonia could be dissipated"); *TRAVCO Ins. Co.* v. *Ward*, 715 F. Supp. 2d 699, 701, 703 (E.D. Va. 2010) (insured suffered "direct physical loss" of residential property when property was rendered uninhabitable as result of defective sheet rock that emitted toxic chemicals that caused illness and corrosion of residence's metallic components), aff'd, 504 Fed. Appx. 251 (4th Cir. 2013); *Yale University* v. *Cigna Ins. Co.*, 224 F. Supp. 2d 402, 412–13 (D. Conn. 2002) ("the contamination of [the insured's] buildings by the presence of friable asbestos and non-intact lead-based paint" requiring removal and abatement constituted covered physical loss); *Western Fire Ins. Co.* v. *First Presbyterian Church*, 165 Colo. 34, 39, 437 P.2d 52 (1968) (when "the accumulation of gasoline around and under" insured property caused it to become "so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous," insured suffered direct physical loss); *Mellin* v. *Northern Security Ins. Co.*,167 N.H. 544, 546, 550, 115 A.3d 799 (2015) ("physical loss may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage," and included odor of cat urine emanating from neighboring condominium that created health problem and required remediation); *Largent* v. *State Farm Fire & Casualty Co.*, 116 Or. App. 595, 597–98, 842 P.2d 445 (1992) (when chemicals from production of methamphetamine permeated porous materials such as drapes, carpets, walls, and woodwork,

because it was the physical presence of the contaminants at the properties that caused the loss. The plaintiffs in the present case make no claim that their properties were actually contaminated by the coronavirus or that they closed their businesses during the pandemic because the actual presence of the virus made the buildings in which the businesses were located nonfunctional or inherently dangerous to persons who entered them.[23] Rather, they rely on the potential for person to person transmission of the virus within the building. Specifically, they claim that they suspended their business operations because "their properties, in their unrepaired state, had the capacity to cause illness and death by virtue of bringing people into proximity within an interior space, where the transmission of [the coronavirus was] significantly increased." In any event, even if the plaintiffs had claimed that their properties were actually contaminated by the coronavirus, we find persuasive the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants. See *Kim-Chee, LLC* v. *Philadelphia Indemnity Ins. Co.*, 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021) ("[u]nlike the cases of gasoline infiltration, cat urine, lead dust, and the other noxious substances [that] courts have found to constitute direct physical losses, there is no allegation of persistent contamination [by the coronavirus] rendering the structure unusable"), aff'd, Docket No. 21-1082-cv, 2022 WL 258569 (2d Cir. January 28, 2022); see also id. (noting that coronavirus poses "a mortal hazard to humans, but little or none to buildings which

insured suffered direct physical loss of property), review denied, 316 Or. 528, 854 P.2d 940 (1993).

[23] Accordingly, we need not consider whether losses caused by the actual presence of the coronavirus on their properties would be subject to the virus exclusion.

remain intact and available for use once the human occupants no longer present a health risk to one another").[24] Indeed, the plaintiffs have not alleged that the risk of transmission from a surface contaminated with the coronavirus is significant even before cleaning or the lapse of time.[25]

[24] See also *Kim-Chee, LLC* v. *Philadelphia Indemnity Ins. Co.*, Docket No. 21-1082-cv, 2022 WL 258569, *2 (2d Cir. January 28, 2022) ("[the] inability [of the coronavirus] to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants [the] presence [of which] could trigger coverage"); *Connecticut Children's Medical Center* v. *Continental Casualty Co.*, supra, 581 F. Supp. 3d 392 ("To the extent that [the plaintiffs] allege that [coronavirus] particles affix themselves temporarily to interior portions of their physical property, they do not explain how it is plausible to conclude that this amounts to damage to the property. Indeed, the plaintiffs are medical providers whose role is to treat sick people (including patients with COVID-19), not to file property damage claims every time a sick person coughs, sneezes, or otherwise respirates or expectorates at their premises." (Internal quotation marks omitted.)); *Inns by the Sea* v. *California Mutual Ins. Co.*, supra, 71 Cal. App. 5th 704 (coronavirus does not "cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos" (internal quotation marks omitted)); *State & 9 Street Corp.* v. *Society Ins.*, Docket No. 1-21-1222, 2022 WL 2379361, *8 (Ill. App. June 30, 2022) ("[although] the impact of the [coronavirus] on the world over the last year and a half can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days" (internal quotation marks omitted)); *AC Ocean Walk, LLC* v. *American Guarantee & Liability Ins. Co.*, Docket No. A-1824-21, 2022 WL 2254864, *13 (N.J. Super. App. Div. June 23, 2022) ("[w]hereas certain quantities of asbestos and ammonia in the air require extensive remediation before making a property fit for humans, the [coronavirus] can be eliminated from surfaces with household cleaning products and dissipates on its own"). But see *Huntington Ingalls Industries, Inc.* v. *Ace American Ins. Co.*, Docket No. 2021-173, 2022 WL 4396475, *3, *14 (Vt. September 23, 2022) ("under Vermont's extremely liberal pleading standards," allegation that property was contaminated with coronavirus adequately alleged direct physical damage for purposes of surviving motion for judgment on pleadings).

[25] We presume that this is because such an allegation would be inconsistent with now established guidance from the United States Centers for Disease Control and Prevention. See Centers for Disease Control and Prevention, Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments (April 5, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmis-

We finally address the plaintiffs' argument that this court's decisions in *Beach* v. *Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987), and *Karas* v. *Liberty Ins. Corp.*, 335 Conn. 62, 228 A.3d 1012 (2019), support their claim that the phrase "direct physical loss" is broad enough to include the losses that they incurred when they suspended their business operations during the COVID-19 pandemic. In *Beach*, this court considered whether the word " 'collapse,' " as used in a homeowners insurance policy, included the structural deterioration of a foundation caused by settling. *Beach* v. *Middlesex Mutual Assurance Co.*, supra, 247. The insurance company contended that the word " 'collapse' . . . unambiguously connotes a sudden and complete catastrophe." Id., 250. This court disagreed and concluded that the definition of "collapse" reasonably could be interpreted to include "a breakdown or loss of structural strength . . . ." Id., 251. The court further observed that, "[i]f the [insurance company] wished to rely on a single facial meaning of the term 'collapse' as used in its policy, it had the opportunity expressly to define the term to provide for the limited usage it . . . claims to have intended." Id.

Similarly, in the more recent *Karas* v. *Liberty Ins. Corp.*, supra, 335 Conn. 65, we considered whether the cracking and crumbling of concrete basement walls as the result of defective concrete constituted a " 'collapse' " under the plaintiffs' homeowners insurance policy. The insurance company contended that the policy at issue was materially different from the policy at issue in *Beach* because it expressly provided that "[c]ollapse does not include settling, cracking, shrinking, bulging

sion.html (last visited January 26, 2023) ("The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory droplets carrying infectious virus. It is possible for people to be infected through contact with contaminated surfaces or objects (fomites), but the risk is generally considered to be low." (Emphasis omitted.)).

or expansion." (Internal quotation marks omitted.) Id., 78. This court concluded that, although the policy clearly did not cover a loss caused by "*mere* settling"; (emphasis in original; internal quotation marks omitted) id., 79; the policy was ambiguous as to whether it covered "a far more serious structural infirmity culminating in an actual or imminent collapse" and, therefore, must be construed in favor of the insured. Id., 78. As in *Beach*, we observed that, "if the [insurance company] had wished to limit its collapse coverage to a sudden and catastrophic event, it very easily could have done so in plain and unambiguous terms." Id., 79.

The plaintiffs in the present case contend that, "[j]ust as in *Beach* and *Karas*, if the [defendants] had wished to limit their coverage obligations under the policies to 'tangible alteration,' they could have drafted the policies that way." Unlike the word "collapse," however, we have concluded that the phrase "direct physical loss of . . . [p]roperty" is unambiguous as applied to losses incurred as the result of the suspension of business operations during the COVID-19 pandemic.[26] See *ENT & Allergy Associates, LLC* v. *Continental Casualty Co.*, Docket No. 3:21CV00289 (SALM), 2022 WL 624628, *9 (D. Conn. March 3, 2022) ("Crucially . . . in [both

[26] The plaintiffs' contention that the phrase "direct physical loss" is ambiguous as applied to their claims because the insurance policies at issue are "all-risk" policies is unavailing. Although an all-risk policy "covers every kind of insurable loss except what is specifically excluded"; (internal quotation marks omitted) *Hair Studio 1208, LLC* v. *Hartford Underwriters Ins. Co.*, 539 F. Supp. 3d 409, 415 (E.D. Pa. 2021), appeal filed (3d Cir. June 15, 2021) (No. 21-2113); "[a]ll-risk is not synonymous with all loss," and an all-risk policy does not cover losses—such as those caused by suspension of business operations during the COVID-19 pandemic—that do not fall within the coverage clause merely because they also do not fall within any exception. (Internal quotation marks omitted.) Id., 416; see *Kim-Chee, LLC* v. *Philadelphia Indemnity Ins. Co.*, supra, 535 F. Supp. 3d 157, 161 ("[i]t has long been recognized . . . that all-risk does not mean all-loss," and risk of loss due to suspension of business operations during COVID-19 pandemic is not risk of "direct physical loss" (internal quotation marks omitted)).

Beach and *Karas*] the court found that the relevant contractual language was ambiguous before adopting the plaintiff's proposed interpretation. To the contrary . . . the term 'direct physical loss of or damage to property' is unambiguous under the [p]olicies [as applied to losses resulting from the suspension of business operations during the COVID-19 pandemic]." (Emphasis omitted.)), appeal filed (2d Cir. April 1, 2022) (No. 22-697).

In reaching this conclusion, we do not suggest that the plaintiffs' interpretation is entirely frivolous. Indeed, we are mindful that, given the limits and fluidity of language and the complexity of insurance policies, virtually any policy provision, at least considered in isolation, may be subject to multiple nonfrivolous interpretations. As we have indicated, however, "the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 391. Rather, ambiguity exists only when the term is susceptible to more than one reasonable interpretation after the contract is "viewed in its entirety, with each provision read in light of the other provisions . . . and every provision . . . given effect if it is possible to do so." (Internal quotation marks omitted.) *Enviro Express, Inc.* v. *AIU Ins. Co.*, supra, 279 Conn. 199. We conclude that, considered in light of the entire contract, the plaintiffs' interpretation that the coverage provision for "direct physical loss of . . . [p]roperty" applies to their claims—even though there has been no physical, tangible alteration of their properties, no persistent, physical contamination of the properties rendering them uninhabitable, and no imminent threat of physical damage to or destruction of the properties rendering them unusable or inaccessible—is not reasonable. We therefore conclude that there was no genuine issue of material fact as to whether the

insurance policies did not cover the plaintiffs' claims because the plaintiffs suffered no "direct physical loss of . . . [p]roperty . . . ." Accordingly, we affirm the judgment of the trial court on this alternative ground.

The judgment is affirmed.

In this opinion the other justices concurred.

HARTFORD FIRE INSURANCE COMPANY *v.* MODA, LLC, ET AL.
(SC 20678)

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

Syllabus

The plaintiff insurance company sought a judgment declaring that it was not obligated to cover certain business losses suffered by the defendants, related companies that sell footwear to retailers throughout the country, during the COVID-19 pandemic. Prior to the pandemic, the defendants purchased two insurance policies from the plaintiff, a package policy that covered specified premises and business personal property, and a marine policy that covered the defendants' inventories while in transit and storage. The package policy specifically provided coverage for "direct physical loss of or direct physical damage to . . . [c]overed [p]roperty" caused by or resulting from a covered cause of loss. It also included a provision obligating the plaintiff to pay for the loss of business income incurred by the defendant from "the necessary interruption of . . . business operations" and an exclusion for loss or damage caused by the presence, growth, proliferation, or spread of a virus. The marine policy, which was controlled by New York law pursuant to its choice of law provision, likewise insured "against all risks of direct physical loss or direct physical damage to" insured property, subject to specific exclusions. As a result of various governmental orders temporarily closing nonessential businesses at the beginning of the COVID-19 pandemic, the defendants' retail customers cancelled orders, causing the defendants' warehouses to overflow with inventories, which, due to the seasonal nature of the retail business, became effectively unsellable. After the plaintiff commenced the present action, the defendants filed a counterclaim, alleging, inter alia, breach of the package and marine policies and breach of the implied covenant of good faith and fair dealing. The plaintiff thereafter moved for summary judgment on the complaint and the counterclaim, arguing that neither the package policy nor the marine

policy covered the claimed business losses because the defendants had not suffered a "direct physical loss of or direct physical damage to" insured property. Alternatively, the plaintiff claimed that the claimed losses were subject to the package policy's virus exclusion. In opposing summary judgment, the defendants claimed to have suffered three forms of direct physical loss of or damage to property, namely, contamination of their property, loss of use of their property, and loss of value of their inventories. The trial court concluded that neither policy provided coverage. The court reasoned, with respect to the package policy, that the defendants' losses were subject to the virus exclusion and, therefore, exempted from coverage. With respect to the marine policy, the trial court reasoned that, under New York law, the words "direct" and "physical" in an insurance policy limited coverage obligations to physical damage to the property itself and, therefore, that the defendants' claims regarding the loss of use of and access to their property were unavailing. Finding no allegations in the counterclaim or evidence in the record that the defendants' shoes had somehow been infected with the coronavirus, the trial court also rejected the defendants' contamination claim. Accordingly, the trial court granted the plaintiff's motion for summary judgment and rendered judgment for the plaintiff on its claim and on the defendants' counterclaim, and the defendants appealed.

Held that the defendants' claimed business losses were not covered under either the package policy or the marine policy, and, accordingly, this court affirmed the trial court's judgment:

1. The defendants failed to establish a genuine issue of material fact as to whether they suffered a covered loss under the package policy, and, because the defendants' businesses losses were not covered by that policy, this court did not need to address whether those losses were subject to the policy's virus exclusion:

The defendants' claim that the package policy provided coverage for the loss of the value and use of their insured property when retailers were forced to close during the pandemic was resolved in the companion case of *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.* (346 Conn. 33), in which this court interpreted a policy with almost identical language and held that, under Connecticut law, the plain meaning of the phrase "direct physical loss of . . . property" did not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus, as the ordinary usage of that phrase clearly and unambiguously required some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible.

Moreover, with respect to the defendants' claim that their property sustained direct physical damage because it was contaminated with the coronavirus, the defendants did not explain how the alleged contamina-

tion contributed to their business losses, and, as this court explained in *Connecticut Dermatology Group, PC*, even if the defendants could prove that their property was contaminated with the coronavirus, that was not sufficient to establish that the property was physically lost or damaged within the meaning of the provisions of the package policy.

2. The trial court correctly concluded that, under New York law, the marine policy plainly and unambiguously did not cover the defendants' claimed business losses:

New York courts consistently have held that language providing coverage only for "direct physical loss or direct physical damage," like that in the marine policy, does not describe business income losses incurred as a result of COVID-19 related closures when the insured property itself was not alleged or shown to have sustained direct physical loss or physical damage, and there was no reason to disregard the substantial body of precedent, uniformly followed by New York courts and federal courts applying New York law, interpreting "direct physical loss" to require some fault in the physical substance of the insured property.

3. In deciding in favor of the plaintiff on the defendants' counterclaim, the trial court reasoned that, because the plaintiff had properly denied the defendants' insurance claims, the defendants' counterclaim failed as a matter of law, and the defendants did not ask this court to question that reasoning on appeal.

Argued September 15, 2022—officially released January 27, 2023*

Procedural History

Action for a judgment declaring that the plaintiff is not obligated to provide coverage under certain insurance policies for the defendants' alleged business losses as a result of the COVID-19 pandemic, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants filed a counterclaim; thereafter, the case was transferred to the judicial district of Waterbury, Complex Litigation Docket, where the court, *Bellis, J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendants appealed. *Affirmed.*

Christine A. Montenegro, pro hac vice, with whom were *Tony Miodonka* and, on the brief, *Joshua A. Siegel*

* January 27, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and *Jerold Oshinsky*, pro hac vice, for the appellants (defendants).

Jonathan M. Freiman, with whom were *Anjali S. Dalai*, pro hac vice, and, on the brief, *Mark K. Ostrowski*, *Sarah E. Dlugoszewski*, *Sarah D. Gordon*, pro hac vice, *James E. Rocap III*, pro hac vice, and *Johanna Dennehy*, pro hac vice, for the appellee (plaintiff).

Brian E. Spears and *John N. Ellison*, pro hac vice, filed a brief for United Policyholders as amicus curiae.

Wystan M. Ackerman and *Denis J. O'Malley* filed a brief for the American Property Casualty Insurance Association as amicus curiae.

Opinion

ECKER, J. This is one of two cases decided today in which we must determine whether business losses suffered during the COVID-19 pandemic are covered by insurance for "direct physical loss of or direct physical damage to . . . [p]roperty . . . ." See *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, 346 Conn. 33, A.3d (2023) (*Connecticut Dermatology*). The plaintiff is Hartford Fire Insurance Company (Hartford Fire). Before the pandemic, Hartford Fire sold two insurance policies to the defendants, Moda, LLC, and its affiliates (collectively, Fisher).[1] The parties brought their claim and counterclaim to determine whether those policies provide coverage for losses suffered by Fisher during the pandemic. We agree with the trial court that Fisher's losses are not covered by

[1] The defendants are Moda, LLC; Marc Fisher, LLC; Fisher International, LLC; MB Fisher, LLC; Fisher Footwear, LLC; MFKK, LLC; Unisa Fisher Wholesale, LLC; Fisher Licensing, LLC; Fisher Accessories, LLC; Fisher Sigerson Morrison, LLC; MBF Holdings, LLC (DE); Marc Fisher Holdings, LLC; Fisher Services, LLC; MBF Air, LLC; Unisa Fisher, LLC; MBF Licensing, LLC; MBF Invest, LLC; MBF Holdings, LLC (WY); Fisher Design, LLC; Marc Fisher Jr. Brand, LLC; Marc Fisher International, LLC; MF-TFC, LLC; Easy Spirit, LLC; MFF-NW, LLC; and MFF NW Investment, LLC.

the relevant policies, and we therefore affirm the granting of summary judgment in favor of Hartford Fire.

The record reflects the following facts. Fisher sells shoes to department stores and other retailers across the country. In the first months of 2020, disaster struck at Fisher, as it did around the world, in the form of the COVID-19 pandemic. To slow the spread of the SARS-CoV-2 virus, state governments issued orders temporarily closing all nonessential businesses. Fisher's "major retail customers . . . shuttered their storefronts [and] canceled . . . orders, placed months prior, from [Fisher's] spring lines." (Internal quotation marks omitted.) As a result, Fisher's warehouses "overflow[ed] with spring inventory, which, due to the seasonal nature of the retail business, [was] effectively unsellable." (Internal quotation marks omitted.) Fisher alleged that it has "suffered immense financial injuries" and may "have no choice but to liquidate" unless its losses are insured. (Internal quotation marks omitted.)

Before the pandemic, Fisher purchased two insurance policies from Hartford Fire, which were in effect from October, 2019, to October, 2020: (1) a multi-flex business policy (package policy), and (2) an ocean marine policy (marine policy). The package policy covers "direct physical loss of or direct physical damage to . . . [c]overed [p]roperty caused by or resulting from a [c]overed [c]ause of [l]oss." The policy defines a "[c]overed [cause] of [l]oss" as "direct physical loss or direct physical damage that occurs during the [p]olicy [p]eriod and in the [c]overage [t]erritory unless the loss or damage is excluded or limited [by the] policy." Covered property includes specified premises and "[b]usiness [p]ersonal [p]roperty," such as "[s]tock."

In addition to property loss or damage, the package policy covers the loss of business income incurred (1) "due to the necessary interruption of . . . business

operations during the [p]eriod of [r]estoration due to direct physical loss of or direct physical damage to property caused by or resulting from a [c]overed [c]ause of [l]oss at [s]cheduled [p]remises";[2] (2) "when access to . . . '[s]cheduled [p]remises' is specifically prohibited by order of a civil authority as the direct result of a [c]overed [c]ause of [l]oss to property in the immediate area of [the] '[s]cheduled [p]remises' "; and (3) in the event of an "interruption of . . . business operations . . . due to loss or damage to property caused by . . . [a] virus," if the virus "is the result of" a "[s]pecified [c]ause of [l]oss," which is defined to include "aircraft or vehicles . . . ." (Internal quotation marks omitted.)

Excluded from the package policy's coverage, however, is any "loss or damage caused directly or indirectly by" the "[p]resence, growth, proliferation, spread or any activity of . . . [a] virus." This virus exclusion is subject to an exception for loss or damage caused by a " '[s]pecified [c]ause of [l]oss,' " which includes "aircraft or vehicles . . . ."

The marine policy that Fisher purchased from Hartford Fire protects Fisher's shoes while they are in transit and storage. It "insures against all risks of direct physical loss or direct physical damage to [i]nsured [p]roperty from any external cause," subject to specific exclusions. "Insured [p]roperty" includes Fisher's "shoes and related accessories."

Hartford Fire initiated this action seeking a judgment declaring that Fisher's losses are not covered by the package policy.[3] Fisher filed an answer and counter-

[2] "Period of [r]estoration" is defined as "the period of time that: (1) [b]egins at the time the [c]overed [c]ause of [l]oss occurred; and (2) [e]nds on the earlier of: (a) [t]he date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (b) [t]he date when business is resumed at a new permanent location."

[3] Fisher first raised the coverage dispute relating to the marine policy as part of its counterclaim. Hartford Fire subsequently moved for summary judgment on the ground that there was no coverage under either policy.

claim, alleging (1) breach of the package and marine insurance policies, (2) breach of the implied covenant of good faith and fair dealing, and (3) violation of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., via the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., by, among other things, "refusing to pay claims without conducting a reasonable investigation based [on] all available information" and "failing to promptly settle claims, [when] liability has become reasonably clear . . . ."

Hartford Fire moved for summary judgment on its declaratory judgment complaint and Fisher's counterclaim, arguing that neither the package policy nor the marine policy covered Fisher's losses because Fisher had not suffered a "direct physical loss of or direct physical damage to" property. (Internal quotation marks omitted.) Alternatively, Hartford Fire claimed that the virus exclusion in the package policy "expressly exclude[s] coverage for any loss or damage caused by a virus, and [Fisher's] COVID-19 related business losses were caused by the . . . coronavirus . . . ." Fisher opposed Hartford Fire's motion for summary judgment, contending that it had suffered "three distinct forms of direct physical loss of or damage to property: contamination of its property, loss of use of its property, and loss of value of its inventory." (Emphasis omitted; internal quotation marks omitted.) Fisher further argued that the virus exclusion in the package policy was inapplicable because its business losses were not caused by the COVID-19 virus but, rather, by the "business interruption caused by orders of civil authority used to control a pandemic . . . ."

The trial court concluded that there was no coverage under either policy. With respect to the package policy, the court reasoned that Fisher's losses were exempted from coverage by the virus exclusion because "[t]here

[could] be no doubt that the cause of [Fisher's] damages [was] the [SARS-CoV-2] virus . . . ." With respect to the marine policy, the court reasoned that, "under New York law, the words 'direct' and 'physical' in an insurance policy limit an insurance company's coverage obligations to physical damage to the property itself." Fisher therefore could not "succeed on [its argument that it was] entitled to coverage based on loss of access to the property and the fact that [its] inventory became outdated or diminished in value." The court rejected Fisher's argument that its property had been " 'contaminated' " on the ground that "there [were] no allegations in the counterclaim or evidence in the record indicating that [its] shoes [had] somehow been infected with the . . . virus." Having determined that "the language of both the package policy and the marine policy clearly and unambiguously [did] not cover [Fisher's] alleged losses," the trial court concluded that Harford was "entitled to summary judgment" on its claim and Fisher's counterclaim. This appeal followed.[4]

Our review of a trial court's interpretation of an insurance contract is de novo; e.g., *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 88, 961 A.2d 387 (2009); as is our review of a trial court's decision to grant summary judgment. E.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 415, 195 A.3d 664 (2018). In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. E.g., *Heisinger* v. *Cleary*, 323 Conn. 765, 776, 150 A.3d 1136 (2016). Summary judgment is appropriate if "there [is] no genuine issue as to any material fact" and "the moving party

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

is entitled to judgment as a matter of law." (Internal quotation marks omitted.) Id.; see Practice Book § 17-49.

I

THE PACKAGE POLICY

It is well established that "any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 38, 84 A.3d 1167 (2014).[5] However, we "will not torture words to import ambiguity . . . ." (Internal quotation marks omitted.) Id. "If the terms of the policy are clear and unambiguous, then the language . . . must be accorded its natural and ordinary meaning." (Internal quotation marks omitted.) Id.

Coverage under the package policy is limited to cases of "direct physical loss of or direct physical damage to . . . [p]roperty . . . ." In the companion case that we decide today, *Connecticut Dermatology*, we interpreted a policy with almost identical language. See *Connecticut Dermatology, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 36–37. We held that "the plain meaning of the term 'direct physical loss of . . . [p]roperty' does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase 'physical loss of . . . [p]roperty' clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." Id., 51. Mere loss of use or access is not enough, unless that loss is caused by a physical alter-

[5] The parties appear to agree that the package policy is governed by Connecticut law.

ation of the property or the physical removal of the property.[6] See id., 53–58. There is no need to repeat that reasoning here.

Our holding in *Connecticut Dermatology* resolves most of the issues raised by Fisher with respect to the package policy. Fisher's main claim is that it lost the value and use of its insured property when stores were forced to close during the pandemic. That claim fails as a matter of law because the losses Fisher suffered did not result from any tangible physical alteration to Fisher's stock or real property. Rather, those losses resulted from "a transformation in governmental and societal expectations and behavior that had a seriously negative impact on [Fisher's] businesses." Id., 52. The plain language of the package policy does not provide coverage for such losses.

Fisher claims, without elaboration, that its property suffered direct physical damage because it was contaminated with the SARS-CoV-2 virus. It points to testimony in the record that "persons infected with or carrying [the virus] were present at Fisher's facilities . . . ." This testimony, Fischer claims, raises "an issue of fact [as to] whether Fisher's shoes themselves were contaminated . . . ."

Fisher has not explained how this alleged contamination contributed to its business losses. Fisher has not argued or provided evidence that it spent money to decontaminate its shoes or that the shoes could not be sold, or would need to be sold for less, because they were contaminated. Fisher claims that the shoes became "effectively unsellable" because they went out of season, not because they were contaminated. Moreover,

[6] For example, property that has been stolen or lost at sea may not be physically altered but has been physically removed from the owner's possession and rendered physically inaccessible. It is undisputed that Fisher's property was not lost, stolen, or rendered physically inaccessible.

as we explained in *Connecticut Dermatology*, "the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants." *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 59. Contamination with the SARS-CoV-2 virus, even if it could be proved, is not sufficient to establish that the shoes were physically lost or damaged within the meaning of the package policy.[7]

For these reasons, Fisher has failed to establish a genuine issue of material fact as to whether it suffered a covered loss under the package policy. As Fisher's business losses are not covered by the package policy,

[7] For the same reason, Fisher cannot establish direct physical loss or damage to premises other than its own. Two provisions of Fisher's business income coverage apply if there is direct physical loss or damage to other premises. First, the package policy provides "[d]ependent [p]roperties" coverage for lost business income if there is direct physical loss or damage at premises on which Fisher depends to "[d]eliver materials or services . . . [to] [a]ccept . . . [or] [m]anufacture products . . . [or to] [a]ttract customers . . . ." Second, "[c]ivil [a]uthority" coverage applies to lost business income if civil authority orders are issued in response to direct physical loss or damage at premises "in the immediate area" of Fisher's insured premises.

Fisher has not offered sufficient evidence to show that its dependent properties, or properties in Fisher's immediate area, suffered the kind of physical alteration that would constitute direct physical loss or damage under the package policy. Although nonessential businesses were forced to close during the pandemic, the evidence in the record suggests that these closures were preventative measures to prevent the spread of the SARS-CoV-2 virus. As we explained in detail in *Connecticut Dermatology*, the mere fact that proximity to an infected person while inside a building might be dangerous does not qualify as a risk of direct physical loss or damage to that building. See *Connecticut Dermatology, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 52. These preventative measures do not, therefore, constitute a covered cause of loss under the package policy.

In addition, we note that Fisher has coverage for losses of business income caused by a virus. This coverage is limited to viruses that are caused by a "specified cause of loss . . . ." (Internal quotation marks omitted.) We have considered Fisher's arguments and agree with the trial court that the SARS-CoV-2 virus was not a specified cause of loss, as defined in the package policy.

we do not need to address whether those losses are excluded from coverage by the virus exclusion contained in that policy.[8]

II

THE MARINE POLICY

We next address whether Fisher's losses are covered by the marine policy. Our interpretation of that policy is governed by New York law.[9] In New York, as in Connecticut, "[i]f the terms of a policy are ambiguous . . . any ambiguity must be construed in favor of the insured and against the insurer . . . ." (Citations omitted; internal quotation marks omitted.) *Antoine* v. *New York*, 56 App. Div. 3d 583, 584, 868 N.Y.S.2d 688 (2008). However, "[when] the contract is unambiguous on its face, it should be construed as a matter of law and summary judgment is appropriate . . . ." (Citations omitted.) *Niagara Frontier Transit Metro System, Inc.* v. *Erie*, 212 App. Div. 2d 1027, 1027, 623 N.Y.S.2d 33 (1995).

The marine policy, like the package policy, provides coverage only for "direct physical loss or direct physical

[8] For the same reason, we do not need to consider Fisher's claim that Hartford Fire should be estopped from relying on the virus exclusion.

[9] The choice of law provision in the marine policy directs us to apply federal maritime law or, in the absence of federal maritime law, the law of New York. The United States Supreme Court has declined to create a federal common law to govern maritime insurance contracts and, instead, has "[left] the regulation of marine insurance . . . [to] the [s]tates." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S. Ct. 368, 99 L. Ed. 337 (1955). Fisher nevertheless attempts to persuade us that federal maritime common law applies. It points us to only one case, *Northwestern Selecta, Inc.* v. *Guardian Ins. Co.*, 541 F. Supp. 3d 206 (D.P.R. 2021), in which the United States District Court for the District of Puerto Rico concluded that *Wilburn Boat Co.* was inapplicable because "the Puerto Rico legislature exclude[d] marine insurance contracts from the Insurance Code . . . ." Id., 211. Neither party in this case argues that there is no New York law for us to apply, and we see no grounds for pursuing the logic followed in *Northwestern Selecta, Inc.* We have considered Fisher's other choice of law arguments and find them similarly unconvincing.

damage to [i]nsured [p]roperty . . . ." New York precedent leads us to the same conclusion with respect to the marine policy that we reached under Connecticut law with respect to the policies at issue in *Connecticut Dermatology* and in part I of this opinion. New York courts consistently have held that such language does not describe business income losses incurred as a result of COVID-19 related closures "[when] the insured property itself was not alleged or shown to have suffered direct physical loss or physical damage." *10012 Holdings, Inc.* v. *Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 221 (2d Cir. 2021).

In *Roundabout Theatre Co.* v. *Continental Casualty Co.*, 302 App. Div. 2d 1, 2, 751 N.Y.S.2d 4 (2002), the court considered whether a theater was insured against the loss it suffered when a street closure prevented customers from reaching its doors. The theater's insurance covered "all risks of direct physical loss or damage to the [insured's] property . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 3. The court held that "[t]he plain meaning of the words 'direct' and 'physical' narrow[ed] the scope of coverage and mandate[d] the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy . . . ." (Citations omitted.) Id., 7. In other words, the theatergoers' inability to reach the theater because of the street closure did not constitute direct physical loss or damage to the theater. See id., 7–10.

This precedent has been uniformly followed by New York courts and federal courts applying New York law. See, e.g., *Visconti Bus Service, LLC* v. *Utica National Ins. Group*, 71 Misc. 3d 516, 523, 142 N.Y.S.3d 903 (2021) ("[t]he words 'direct' and 'physical' narrow the scope of coverage to physical damage to the property itself and foreclose [the] argument that the phrase 'loss of' includes mere 'loss of use of' the property"); see also, e.g., *Newman Myers Kreines Gross Harris, P.C.* v.

Great Northern Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("[t]he words 'direct' and 'physical' . . . ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves"). Hartford Fire claims "that *every* New York court addressing the issue—both state and federal—has held that property insurance policies like [the one at issue] do not cover losses sustained from [COVID-19] and related government[al] orders"; (emphasis in original; footnotes omitted); and Fisher has not provided any authority to contradict Hartford Fire's claim. See, e.g., *Island Gastroenterology Consultants, PC* v. *General Casualty Co. of Wisconsin*, Docket No. 604318-21, 2021 WL 3852967, *2 (N.Y. Sup. August 25, 2021) (decision without published opinion, 72 Misc. 3d 1221(A), 150 N.Y.S.3d 898 (2021)) ("the loss of use of premises due to COVID-19 related government[al] orders does not trigger business-income coverage based on physical loss to property"); *Mangia Restaurant Corp.* v. *Utica First Ins. Co.*, 72 Misc. 3d 408, 414, 148 N.Y.S.3d 606 (2021) ("[s]ince the appearance of the COVID-19 pandemic, courts have continued to posit that actual physical damage is required before business interruption insurance coverage is paid").

Fisher asks us to disregard these cases and, instead, to apply the reasoning employed by the Appellate Division of the New York Supreme Court in a different context in *Pepsico, Inc.* v. *Winterthur International America Ins. Co.*, 24 App. Div. 3d 743, 806 N.Y.S.2d 709 (2005). That case involved insurance coverage for losses caused by " 'off-tasting' soft drink products . . . resulting from faulty raw ingredients . . . ." (Citation omitted.) Id., 743. The court concluded that the plaintiff could prove the drinks were " 'physically damaged' " without showing that they "ha[d] gone from good to bad." Id., 744. In other words, the court reasoned that

the drinks could be " 'physically damaged' " simply by being made from faulty ingredients and suffering a loss in market value as a result. Id.

Fisher points to the court's statement in *Pepsico, Inc.*, that "[i]t is sufficient . . . that the product's function and value ha[d] been seriously impaired, such that the product [could not] be sold . . . ." (Citations omitted.) Id. In context, however, that statement merely reinforces the court's conclusion that the presence of faulty raw ingredients could be a "physical event" that " 'physically damaged' " the products.[10] Id. There does not appear to have been any doubt in *Pepsico, Inc.*, that the drinks contained faulty ingredients. Thus, the holding in *Pepsico, Inc.*, does not contradict the substantial body of New York precedent interpreting "direct physical loss or direct physical damage to [i]nsured [p]roperty" to require some fault in the physical substance of the insured property. We therefore agree with the trial court that the marine policy plainly and unambiguously does not cover Fisher's losses.[11]

[10] The court in *Pepsico, Inc.* v. *Winterthur International America Ins. Co.*, supra, 24 App. Div. 3d 744, relied on five cases, all of which involved physically contaminated products. See *National Union Fire Ins. Co. of Pittsburgh, P.A.* v. *Terra Industries, Inc.*, 216 F. Supp. 2d 899, 901 (N.D. Iowa 2002) (benzene contamination in carbon dioxide product), aff'd, 346 F.3d 1160 (8th Cir. 2003), cert. denied, 541 U.S. 939, 124 S. Ct. 1697, 158 L. Ed. 2d 360 (2004); *Zurich American Ins. Co.* v. *Cutrale Citrus Juices USA, Inc.*, Docket No. 5:00-CV-149-OC-10GRJ, 2002 WL 1433728, *1 (M.D. Fla. February 11, 2002) (juice adulterated with foreign substance); *Pillsbury Co.* v. *Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1397–98 (D. Minn. 1989) (use of cans with "tin free steel . . . ends" when processing cans of cream-style corn "result[ed] in [the] underprocessing of the product"); *Shade Foods, Inc.* v. *Innovative Products Sales & Marketing, Inc.*, 78 Cal. App. 4th 847, 862, 93 Cal. Rptr. 2d 364 (2000) (presence of wood splinters in diced roasted almonds); *General Mills, Inc.* v. *Gold Medal Ins. Co.*, 622 N.W.2d 147, 150 (Minn. App. 2001) (traces of unapproved chemical in oats), review denied, Minnesota Supreme Court (October 17, 2001), and review denied, Minnesota Supreme Court (April 17, 2001).

[11] We have considered Fisher's other arguments relating to the marine policy and find them unconvincing. Fisher's allegation that its shoes were contaminated with the SARS-CoV-2 virus is not enough to establish coverage under the marine policy for the same reason that it fails to establish coverage

III

CONCLUSION

Fisher's losses plainly and unambiguously are not covered by either the package policy or the marine policy. The trial court was therefore correct to render summary judgment on Hartford Fire's claim for declaratory relief.[12] The only remaining issue is the status of Fisher's counterclaim. The trial court reasoned that, because Hartford Fire had properly denied Fisher's

under the package policy. See part I of this opinion; see also *Mangia Restaurant Corp.* v. *Utica First Ins. Co.*, supra, 72 Misc. 3d 415 ("[e]ven had there been proof that the virus physically attached to the property . . . that would not have constituted the direct, physical loss or damage required to trigger the policy coverage, because such presence can be eliminated by routine cleaning and disinfecting" (internal quotation marks omitted)).

We also reject Fisher's argument that it did not need to prove direct physical loss or damage for coverage under the marine policy's "Ocean Cargo Choice Coverage Form." Fisher contend that, "when [§§] 19 and 25 [of the Ocean Cargo Choice Coverage Form] are read together, it is clear that coverage under [§] 25 can be triggered by showing the 'frustration, interruption or termination of the insured voyage,' with no requirement of a risk of direct physical loss or damage," because § 19 specifies that direct physical loss or damage only is required "[u]nless otherwise specified . . . ." Section 25 provides coverage for "all landing, warehousing, transshipping, forwarding and other expenses incurred . . . should same be incurred by reason of a risk insured against . . . ." Risks insured against are described in § 19 of the Ocean Cargo Choice Coverage Form. That section provides that, "[u]nless otherwise specified . . . this policy insures against all risks of direct physical loss or direct physical damage to [i]nsured [p]roperty . . . ." Fisher argues that, because § 19 applies only "[u]nless otherwise specified," it does not apply to § 25. We disagree.

Read as generously as reasonably possible in favor of the insured, § 19 applies to the subsequent sections unless they explicitly or implicitly specify otherwise. There is nothing in the language of § 25 to suggest that § 19 does not apply. In fact—although Fisher fails to mention it—the coverage provided by § 25 is expressly limited to expenses "incurred by reason of a risk insured against." That language is a clear reference back to the policy's definition of "a risk insured against," which is found in § 19. There is simply no basis in the text for Fisher's argument that § 25 rejects or modifies the definition of a risk insured against offered by § 19.

[12] Because there is no ambiguity in either the package or the marine policy, we need not address Fisher's claim that additional discovery is necessary to clarify alleged ambiguities in the policy provisions.

insurance claims, Fisher's counterclaim must fail as a matter of law. Fisher has not asked us to question that reasoning. Thus, having decided that Fisher's losses are plainly and unambiguously not covered by the policies, we affirm the judgment of the trial court.

The judgment is affirmed.

In this opinion the other justices concurred.

SHANE J. CARPENTER *v.* BRADLEY J. DAAR ET AL. (SC 20524)

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

Syllabus

Pursuant to statute (§ 52-190a (a)), a complaint sounding in medical malpractice must be accompanied by a good faith certificate and "a written and signed opinion of a similar health care provider, as defined in section 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

The plaintiff sought to recover damages from the named defendant, D, a dentist, and D's practice, P Co., for malpractice in connection with a root canal surgery D performed on the plaintiff. The plaintiff alleged that, during the surgery, D negligently failed to diagnose and treat an infection in the plaintiff's tooth and that, as a result, the plaintiff suffered a serious infection that required additional medical care, surgery, and dental treatment. The plaintiff attached to his complaint a good faith certificate and an opinion letter from S, an endodontist, along with a description of S's credentials in endodontics. In his complaint, the plaintiff alleged that S was a "similar health care provider," as defined by statute (§ 52-184c (c)), to D, who the plaintiff alleged had held himself out as a specialist in endodontics. In support of that allegation, the plaintiff quoted text from P Co.'s website indicating that D had completed hundreds of hours in training in endodontics, which the website described as dealing with tissues and structures inside the tooth. The defendants moved to dismiss the action on the ground that the opinion letter did not comply with §§ 52-190a (a) and 52-184c insofar as it failed to establish that S was a "similar health care provider" to D, who was a general dentist and not a specialist in endodontics. The defendants asserted that S was not a "similar health care provider" under the

definition of that term in § 52-184c (c) because D was not a specialist in endodontics and did not hold himself out to be one, or the definition of that term in § 52-184c (b), which applies to nonspecialists, because D was a practitioner of general dentistry and S had not practiced or taught general dentistry within the five years preceding the date of the incident giving rise to the plaintiff's claim. The defendants attached to their motion an affidavit from D, in which he attested that he is a general dentist and not a specialist in endodontics or holding himself out as such a specialist. The plaintiff objected to the motion to dismiss and reiterated the claim made in his complaint that D had held himself out to be a specialist in endodontics and that S was therefore a similar health care provider under § 52-184c (c). The plaintiff did not dispute the facts set forth in D's affidavit, and, rather than request leave to amend his complaint to attach a new or amended opinion letter, the plaintiff attempted to cure the allegedly defective opinion letter by submitting, as an exhibit to his objection to the motion to dismiss, a supplemental affidavit in which S further elaborated on his credentials. The trial court granted the motion to dismiss and rendered judgment for the defendants. The court concluded that, because the plaintiff had not disputed the facts in D's affidavit, the court was not required to conclusively presume the validity of the allegations in the complaint. The trial court also concluded that D was not a specialist, as that term was defined in § 52-184c (c), and, therefore, any opinion from a similar health care provider was required to come from a general dentist. In addition, the trial court rejected the plaintiff's alternative argument that S was qualified as a similar health care provider under the nonspecialist definition in § 52-184c (b). The Appellate Court affirmed the trial court's judgment, relying in part on *Morgan* v. *Hartford Hospital* (301 Conn. 388), which held that the failure to timely file a motion to dismiss, pursuant to § 52-190a (c), waives any objection to the adequacy of the opinion letter and that the opinion letter implicates the court's personal jurisdiction for purposes of the procedures governing the motion to dismiss. The Appellate Court reasoned that, because the opinion letter is a part of civil process for purposes of obtaining personal jurisdiction, the plaintiff could not cure any deficiencies in the purportedly defective opinion letter by way of a supplemental affidavit but, instead, was required to amend his complaint. The Appellate Court also agreed that the opinion letter itself did not contain sufficient information to demonstrate that S was a similar health care provider to D under § 52-184c (c) because D's affidavit indicated that D was a general dentist and that he performed the root canal in that capacity, rejecting the plaintiff's reliance on the statements on P Co.'s website about D's training in endodontics. In addition, the Appellate Court determined that the opinion letter did not establish that S was a similar health care provider to D under § 52-184c (b) and affirmed the trial court's judgment, from

which the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. This court determined that *Morgan* was incorrectly decided and, accordingly, overruled *Morgan* to the extent that it held that the opinion letter required by § 52-190a implicates a court's personal jurisdiction:

a. Nothing in the text or legislative history of § 52-190a suggested that the legislature contemplated that the opinion letter would affect a court's personal jurisdiction over a defendant:

The legislature's failure to use terms pertaining to jurisdiction, service, or process in subsection (c) of § 52-190a, which provides that dismissal is the remedy for failing to comply with the statute's opinion letter requirement, was strong textual evidence that the legislature did not intend for the opinion letter and good faith certificate to implicate a court's personal jurisdiction, especially when the legislature uses such terms in other statutes governing personal jurisdiction and the service of process in a wide variety of contexts.

Nothing in the legislative history of § 52-190a supported the conclusion that the statute implicates a court's personal jurisdiction, as that history demonstrated that the opinion letter requirement, enforced by way of a motion to dismiss, was intended to prevent frivolous medical malpractice actions by addressing the perceived problem that attorneys were misrepresenting the extent to which a factual basis existed for their good faith in bringing those actions, not to serve as a sword to defeat otherwise facially meritorious claims, and it also indicated that it was understood that any dismissal under the statute was to be without prejudice.

Moreover, in *Morgan*, this court relied on a false logical premise insofar as it assumed that, because this court previously had held that the good faith certificate did not implicate a court's subject matter jurisdiction, dismissal under § 52-190a necessarily related to a court's personal jurisdiction, as it failed to account for the numerous nonjurisdictional grounds on which a court may dismiss a malpractice case.

b. The doctrine of stare decisis did not counsel against overruling the holding in *Morgan* that the opinion letter required by § 52-190a implicates a court's personal jurisdiction:

There was not a strong case that the legislature had acquiesced in the construction of § 52-190a (a) expressed in *Morgan* because, in the more than eleven years since this court decided that case, the legislature had made only a single, minor amendment to § 52-190a, and that amendment was to a different subsection of the statute and was not germane to the opinion letter requirement.

Moreover, developments in the law since *Morgan* justified this court's departure from precedent and illustrated the extent to which the court's

holding as to personal jurisdiction had led to results that were at odds with the legislature's intent in enacting § 52-190a, as *Morgan* elevated the credentials of the opinion letter's author to a jurisdictional prerequisite and spawned a body of case law that imposed substantially greater burdens on plaintiffs than the legislature intended by allowing potentially curable, technical, prelitigation defects to defeat otherwise meritorious medical malpractice actions, sometimes after several years of litigation.

c. This court clarified that the rules of practice (§§ 10-30 and 10-31) governing motions to dismiss in civil matters and case law governing the pleading and proof of jurisdictional facts are not applicable to motions to dismiss filed under § 52-190a (c), the inquiry under § 52-190a is solely framed by the allegations in the complaint, the only question at the motion to dismiss stage is whether the author of the opinion letter is a similar health care provider to the defendant, in view of their respective qualifications as pleaded in the complaint and described in the opinion letter, to the extent that the opinion letter is legally insufficient or defective under § 52-190a, trial courts retain the authority to permit amendments to or supplementation of a challenged letter in response to a motion to dismiss, and this court's holding in *Morgan* that a motion to dismiss for failure to file an opinion letter pursuant to § 52-190a is waivable, including by inaction, remained good law.

2. The Appellate Court incorrectly concluded that the allegations in the plaintiff's complaint and the attached opinion letter were legally insufficient to establish that S was a similar health care provider to D within the meaning of § 52-184c (c), and, accordingly, that court improperly upheld the trial court's granting of the defendants' motion to dismiss:

Although the complaint did not use certain talismanic words to indicate that D was board certified or specialized in endodontics, a broad and realistic reading of the allegations in the complaint, including that D "held himself out as a practitioner" in the field of endodontics and the quoted language from P Co.'s website, as well as the opinion letter's recitation of S's board certification and extensive credentials as a practitioner and professor of endodontics, supported the conclusion that S was a "similar health care provider" to D, as that term was intended by the legislature when it amended § 52-190a to ensure that there are nonfrivolous factual bases for malpractice claims brought in this state's courts.

Argued May 2, 2022—officially released February 1, 2023*

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, brought to the Superior Court in

* February 1, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the judicial district of Middlesex, where the court, *Domnarski, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Keller*, *Elgo* and *Pellegrino, Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Kyle J. Zrenda, with whom was *Theodore W. Heiser*, for the appellant (plaintiff).

Beverly Knapp Anderson, for the appellees (defendants).

Alinor C. Sterling, *Jeffrey W. Wisner*, and *Sarah Steinfeld* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Liam M. West and *Ryan T. Daly* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

ROBINSON, C. J. This certified appeal requires us to consider the extent to which our case law, most significantly, *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 21 A.3d 451 (2011), has resulted in the deviation of Connecticut's good faith opinion letter statute, General Statutes § 52-190a,[1] from the legislature's intention that it "prevent frivolous [medical] malpractice actions" but

[1] General Statutes § 52-190a provides: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. *The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the appor-*

not "serve as a sword to defeat otherwise facially meritorious claims." *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 736 n.9, 104 A.3d 671 (2014). The plaintiff, Shane J. Carpenter, appeals, upon our grant of his petition for certification,[2] from the judg-

tionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and *shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate.* The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate.

"(b) Upon petition to the clerk of any superior court or any federal district court to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." (Emphasis added.)

[2] We initially granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly uphold the trial court's dismissal of the plaintiff's medical malpractice action for failure to comply with . . . § 52-190a?" *Carpenter* v. *Daar*, 335 Conn. 962, 239 A.3d 1215 (2020).

Following oral argument in this certified appeal, on July 5, 2022, pursuant to *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162–63, 84 A.3d 840 (2014), we ordered the parties and

ment of the Appellate Court upholding the dismissal of his dental malpractice action against the defendants, Bradley J. Daar and his business entity, Shoreline Modern Dental, LLC (Shoreline). *Carpenter* v. *Daar*, 199 Conn. App. 367, 369–70, 405, 236 A.3d 239 (2020). On appeal, the plaintiff claims that the Appellate Court incorrectly concluded that (1) because the opinion letter implicates the court's personal jurisdiction, the trial court should not have considered an affidavit filed by the plaintiff to supplement a potentially defective opinion letter (supplemental affidavit) as an alternative to amending the operative complaint, and (2) the author of the opinion letter, Charles S. Solomon,[3] an endodontist, was not a "similar health care provider," as defined by General Statutes § 52-184c,[4] to Daar, who is a general

invited the amici curiae—the Connecticut Defense Lawyers Association and the Connecticut Trial Lawyers Association—to file supplemental briefs, limited to the following issue: "Did this court properly conclude in *Morgan* v. *Hartford Hospital*, [supra] 301 Conn. 388 . . . that the good faith opinion letter required by . . . [§] 52-190a implicates the personal jurisdiction of the court over the defendant?" See, e.g., *State* v. *Peluso*, 344 Conn. 404, 413 n.7, 279 A.3d 707 (2022) (Supreme Court may modify certified question as necessary).

[3] "Although the opinion letter attached to the complaint in the present action had the name of the author redacted, which is authorized pursuant to § 52-190a (a), in their briefs, both the plaintiff and the defendants acknowledge that Solomon was the author." *Carpenter* v. *Daar*, supra, 199 Conn. App. 369 n.1.

[4] General Statutes § 52-184c provides: "(a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

"(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school

dentist. Our review of the plaintiff's claims leads us to confront a more fundamental issue under § 52-190a, namely, whether this court correctly concluded in *Morgan* that the opinion letter requirement implicates the court's personal jurisdiction for purposes of the procedures attendant to the motion to dismiss. See *Morgan* v. *Hartford Hospital*, supra, 401–402. Having received supplemental briefing on this issue; see footnote 2 of this opinion; we conclude that *Morgan* was wrongly decided on this point. We now hold that the opinion letter requirement is a unique, statutory procedural device that does not implicate the court's jurisdiction in any way. We further conclude that, consistent with this court's decision in *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 12 A.3d 865 (2011), for purposes of the motion to dismiss pursuant to § 52-190a (c), the sufficiency of the opinion letter is to be determined solely on the basis of the allegations in the complaint and on the face of the opinion letter, without resort to the jurisdictional fact-finding process articulated in, for

of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

"(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider'.

"(d) Any health care provider may testify as an expert in any action if he: (1) Is a 'similar health care provider' pursuant to subsection (b) or (c) of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

example, *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009). Because the opinion letter in the present case established that Solomon was a similar health care provider to Daar under the broadly and realistically read allegations in the complaint, we conclude that the plaintiff's action should not have been dismissed. Accordingly, we reverse the judgment of the Appellate Court.

We briefly summarize the facts and procedural history of this case, much of which is aptly described in the opinion of the Appellate Court.[5] "On February 21, 2018, the plaintiff commenced the present action against the defendants[6] . . . . As to dental malpractice, the plaintiff alleged that, on June 16, 2015, during root canal surgery, Daar negligently failed to diagnose and treat an infection in the plaintiff's tooth and that, as a result, the plaintiff suffered an infection in his mouth, throat, face and neck that required additional emergency medical care, hospitalization, oral and neck surgery and continuing dental treatment. The plaintiff named Shoreline as a defendant on the basis of vicarious liability for Daar's negligent treatment.

"Pursuant to § 52-184c (c), the plaintiff further alleged that Daar held himself out as a specialist in endodontics on Shoreline's website by indicating that he had completed hundreds of hours of training in endodontics and by providing a general explanation of the nature of that dental specialty.

"The plaintiff attached to his complaint a good faith certificate and what he alleged in the complaint to be

[5] The Appellate Court's opinion sets forth a more detailed recitation of the facts and procedural history. See *Carpenter* v. *Daar*, supra, 199 Conn. App. 370–78.

[6] We note that the plaintiff brought the present action pursuant to General Statutes § 52-592, the accidental failure of suit statute, following the dismissal of a previous action against the defendants for failure to provide an opinion letter that complied with § 52-190a. See *Carpenter* v. *Daar*, supra, 199 Conn. App. 370.

a 'written and signed opinion from a similar health care provider stating that there appears to be evidence of negligence by the defendants, a violation of the standard of care, and providing [a] detailed basis for the formation of that opinion, along with a supplemental correspondence outlining that similar health care provider's qualifications.' . . . The 'supplemental correspondence' attached to the complaint, dated August 10, 2017, contained information regarding Solomon's qualifications to establish that he was a similar health care provider to Daar.[7] The supplemental correspondence, also authored by Solomon, indicated that he is a graduate of Columbia University College of Dental Medicine (Columbia), had been licensed to practice dentistry in the state of New York, 'with credentials that would satisfy the requirement of any other state,' and received his 'specialty [b]oards in [e]ndodontics' in 1970. It also stated that Solomon practiced endodontics in New York for more than forty years, and that for the past eight years he has been a full-time clinical professor of endodontics at Columbia, 'teaching clinical and didactic [e]ndodontics.' " (Citation omitted; footnote added; footnote altered.) *Carpenter* v. *Daar*, supra, 199 Conn. App. 370–72.

"On April 5, 2018, the defendants moved to dismiss the present action on the ground that the opinion letter did not comply with §§ 52-190a (a) and 52-184c because it failed to demonstrate that Solomon is a similar health care provider to Daar, who is a general dentist, not a specialist in endodontics. They argued that, as an endodontist, Solomon is not a similar health care provider under § 52-184c (b) because Daar is not a specialist in endodontics and was not holding himself out to be one. They further argued that Solomon also was not a similar

[7] Hereinafter, we refer to the opinion letter and the supplemental correspondence, both of which were attached to the complaint, as the "opinion letter."

health care provider under § 52-184c (c) because Daar is a practitioner of general dentistry and Solomon had not practiced or taught general dentistry within the five years preceding June 16, 2017 [i.e., the date of the incident giving rise to the claim]. In addition to submitting a memorandum of law in support of the motion to dismiss, the defendants attached an affidavit from Daar with other related exhibits.

"In his affidavit, Daar attested that he is a general dentist and has been licensed by the state of Connecticut to practice dentistry since November, 1982. He indicated that, as a general dentist, he provides such services as fillings, inlay and onlays, crowns and bridges, dentures, veneers, root canal treatments, simple extractions, teeth whitening, certain types of orthodontics, mouth guards, and some periodontal treatments. Daar stated that he performed the root canal treatment on the plaintiff's tooth in 2015 in his capacity as a general dentist. He further indicated that a quotation from Shoreline's website, on which the plaintiff relied in his complaint to support his allegations that Daar was holding himself out as a specialist in endodontics, was only a partial excerpt of a sentence, which stated in full: '[Daar] has completed hundreds of hours of training in [e]ndodontics, [o]rthodontics, [p]eriodontics, [d]ental [i]mplants, [s]leep [a]pnea and more.'

"In support of his allegation that Daar held himself out to be a specialist in endodontics, the plaintiff also relied on information found on the website related to Daar's practice, in particular, information related to endodontics that was accessed in a portion of the website related to 'Patient Education' and 'Services.' In his affidavit, Daar attested that, in the same portion of the website, eleven additional links appeared. These included links to the following subjects: educational videos, cosmetic and general dentistry, emergency care, implant dentistry, oral health, oral hygiene, oral surgery,

orthodontics, pediatric dentistry, periodontal therapy and technology.

"The plaintiff filed an objection to the motion to dismiss on June 5, 2018. The plaintiff continued to argue that, as alleged in his complaint and on the basis of the statements on Shoreline's website, Daar had held himself out to be a specialist in endodontics, and, thus, Solomon, a specialist in endodontics, was a similar health care provider to Daar pursuant to § 52-184c (c). The plaintiff did not submit any evidence to dispute the facts set forth in Daar's affidavit, which sought to establish that, at the time of the root canal procedure, Daar was a general dentist, not a specialist in endodontics or someone holding himself out to be a specialist in endodontics. The plaintiff did not request leave to amend his complaint [pursuant to Practice Book § 10-60] to attach a new or amended opinion letter. Instead, the plaintiff attempted to cure the alleged defects in the opinion letter, which the defendants claimed mandated a dismissal, by submitting, as an exhibit to his objection to the motion to dismiss, [the] supplemental affidavit, executed by Solomon on May 30, 2018, which further elaborated on his qualifications as a similar health care provider. In his supplemental affidavit, Solomon attested in relevant part that he is a clinical professor of dentistry at Columbia, served as the Director of the Division of Endodontics from 2009 and continued in that position to 2017, is a Diplomate of the American Board of Endodontics, past President of the New York Section of the American College of Dentists and past President of the New York Academy of Dentistry. He further attested that (1) he teaches both undergraduate and postgraduate students in endodontics at Columbia and that his 'lectures to undergraduate students involve general dentistry and the performance of endodontic procedures, including root canals, by general dentists'; (2) '[t]he present case involves an endodontic proce-

dure performed by a general dentist'; (3) 'the proper standards, procedures, and care to be followed is the subject of my teaching to undergraduate dental students and has been for more than the last five years'; and (4) '[t]he standard of care with respect to the treatment provided by a general dentist in the scenario presented in this case and an endodontist is the same.'

"The plaintiff did not withdraw the allegation in his complaint that, he maintained, alleged that Daar held himself out to be a specialist. On the basis of the opinion letter, alone or together with the supplemental affidavit, the plaintiff argued that, even if Daar is a nonspecialist, Solomon is a similar health care provider to Daar because, pursuant to § 52-184c (b), Solomon's teaching involved instruction in endodontics as it pertains to the practice of general dentistry, specifically relevant to root canals, during the requisite five year period." (Footnotes omitted.) Id., 372–75.

Following oral argument, the trial court issued a memorandum of decision and granted the defendants' motion to dismiss. See id., 376–78. "The [trial] court . . . analyzed the sufficiency of the opinion letter as amended by the filing of the supplemental affidavit."[8] Id., 376. The trial court determined that the allegations in the complaint rendered applicable "the nonspecialist definition in subsection (b) of § 52-184c, rather than the specialist definition in subsection (c), as alleged by

[8] The trial court "rejected the defendants' argument . . . that the plaintiff could not cure any deficiencies in the opinion letter attached to his complaint with Solomon's supplemental affidavit because it was filed after the statute of limitations had expired." *Carpenter* v. *Daar*, supra, 199 Conn. App. 375. In so concluding, the trial court relied on the "[effective]" modification and extension of the applicable statute of limitations; id., 376; see General Statutes § 52-584; by the accidental failure of suit statute; see General Statutes § 52-592; but "did not find any facts or provide any analysis as to why, under the circumstances of this case, the plaintiff was entitled to the benefit of the saving provisions of the accidental failure of suit statute . . . ." *Carpenter* v. *Daar*, supra, 376.

the plaintiff in his complaint." Id., 377. Citing *Labissoniere* v. *Gaylord Hospital, Inc.*, 182 Conn. App. 445, 453, 185 A.3d 680 (2018), the trial court observed that "the plaintiff had not provided an affidavit disputing the facts contained in the defendants' affidavit in support of their motion to dismiss and that, under such circumstances, the court 'need not conclusively presume the validity of the allegations in the complaint.' The court concluded that Daar was not a specialist as that term is defined in § 52-184c (c), and therefore any opinion from a similar health care provider must come from a general dentist." *Carpenter* v. *Daar*, supra, 199 Conn. App. 377. After "reject[ing] the plaintiff's alternative argument that Solomon was qualified as a similar health care provider under the nonspecialist definition in § 52-184c (b)"; id.; the trial "court granted the motion to dismiss as to Daar. Because the alleged liability of Shoreline was derivative of the cause of action brought against Daar, the court . . . granted the motion as to that defendant as well, and rendered judgment in favor of both defendants." Id., 378.

The plaintiff appealed from the judgment of dismissal to the Appellate Court. Id., 369, 378. On appeal, the plaintiff claimed that the trial court incorrectly "determin[ed] that his certificate of good faith, specifically, the accompanying opinion letter, as supplemented by [the supplemental affidavit], failed to meet the requirements of . . . § 52-190a because the author of the opinion letter and supplemental affidavit, [Solomon], was not a 'similar health care provider' as defined in . . . § 52-184c." Id., 369. The Appellate Court decided the case on the basis of two "interrelated," alternative grounds for affirmance raised by the defendants. Id., 389; see id., 405. Specifically, the Appellate Court "agree[d] with the defendants' first alternative ground for affirmance that the plaintiff, in lieu of amending his complaint, [could not] cure a § 52-190a (a) defect in the opinion

letter attached to the complaint with information contained in a subsequently filed supplemental affidavit of the opinion author [when] the plaintiff continue[d] to maintain that his complaint properly alleged that Daar was 'holding himself out as a specialist,' and the supplemental affidavit attempted to provide information that allegedly qualified Solomon as a 'similar health care provider' pursuant to the nonspecialist definition set forth in § 52-184c (b)." Id., 389–90. On this point, the Appellate Court emphasized that this court's decision in *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 388, rendered the "opinion letter . . . part of civil process" for purposes of obtaining personal jurisdiction; *Carpenter* v. *Daar*, supra, 199 Conn. App. 399; and followed its decision in *Gonzales* v. *Langdon*, 161 Conn. App. 497, 517–19, 128 A.3d 562 (2015), in agreeing with the defendants' argument that the plaintiff could not use the supplemental affidavit to cure the deficiencies in the process. See *Carpenter* v. *Daar*, supra, 398–403. Considering the amendment procedures set forth in Practice Book §§ 10-59 and 10-60, the Appellate Court reasoned that the "essentially unrestricted" filing of the supplemental affidavit "avoids the limitations a court must consider before it allows the filing of an amendment to a complaint." Id., 403; see id., 404 (noting that § 52-190a does "not include any savings clause relative to defective opinion letters, which suggests that the statutory requirements must be more strictly construed").

Second, the Appellate Court agreed with the defendants' argument that "the opinion letter attached to the complaint did not contain sufficient information to demonstrate that Solomon is a similar health care provider to Daar under the specialist definition of a similar health care provider in § 52-184c (c)," meaning that the Appellate Court "necessarily address[ed] and disagree[d] with the plaintiff's claim that the [trial] court erred in determining that the author of the opinion letter was

not a similar health care provider as defined in § 52-184c (c)." Id., 390. The Appellate Court observed that "the affidavit of Daar submitted in connection with the defendants' motion to dismiss supported the conclusion that he is a general dentist and that the root canal treatment he performed on the plaintiff was performed in his capacity as a general dentist." Id., 392. The Appellate Court rejected the plaintiff's reliance on the " 'hundreds of hours' [of] training" in endodontics as "alleged to be stated on Daar's website" because "it [could not] be specifically determined from this promotional website the exact amount of hours of training [Daar] may have had in endodontics. The allegation that there is a statement on the website that Daar completed hundreds of hours of training in endodontics does not support a finding that Daar held himself out as an endodontic specialist. The website actually states that Daar 'has completed hundreds of hours of training' in many subjects. There is a distinction between a general dentist's training and experience, including continuing education and a postdoctoral specialty residency program required to become a specialist in a recognized dental specialty."[9]

[9] The Appellate Court further observed: "General Statutes § 20-106a prohibits any licensed or registered dentist from designating that his practice is limited to a specialty recognized by the American Dental Association unless the dentist has completed two or more years of advanced or postgraduate education in the area of the specialty. The completion of hours of continuing education over the years when Daar has been practicing as a general dentist in Connecticut since 1982, is not synonymous with being a specialist. Dentists in Connecticut are prohibited from renewing their practice licenses unless they take a requisite number of continuing education credits. See General Statutes § 20-126c (b) (requiring all licensed dentists to have minimum of [twenty-five] contact hours of continuing education within twenty-four months preceding their application for renewal). The plaintiff's theory that hours of continuing education [contribute] to holding oneself out as a specialist would result in treating all physicians and dentists, regardless of whether they are trained and experienced in a specialty, as health providers holding themselves out as specialists merely because they have completed required continuing education." *Carpenter* v. *Daar*, supra, 199 Conn. App. 393.

Id., 392–93. Thus, the Appellate Court "conclude[d] that the defendants' informative and promotional website references did not equate to Daar's holding himself out as a specialist in endodontics."[10] Id., 394. The Appellate Court then determined that the opinion letter did not establish that Solomon was a similar health care provider to Daar under § 52-184c (b) because it established that Solomon "taught endodontics for the past eight years" but did not "demonstrat[e] that [Solomon] had any active involvement in the practice or teaching of *general dentistry* during the requisite five year period." (Emphasis in original.) Id., 396.

On the basis of these conclusions, the Appellate Court affirmed the trial court's judgment dismissing the complaint. Id., 405. This certified appeal followed. See footnote 2 of this opinion.

On appeal, the plaintiff claims that the Appellate Court improperly upheld the dismissal of his action for lack of personal jurisdiction. He contends that the opinion letter was legally sufficient under § 52-190a because the "contents of the complaint adequately allege that . . . Daar held himself out as a specialist endodontist . . . Daar's affidavit failed to adequately refute those allegations, and the opinion letter establishes that . . . Solomon," himself a professor of endodontics, "is a similar health care provider to an

[10] The Appellate Court also noted that "the plaintiff took no steps [pursuant to Practice Book § 10-3 (c)] to counter the contents of Daar's affidavit, which indicated that he has been engaged in the practice of general dentistry since 1982 and refuted the plaintiff's mischaracterization of the content of his website." *Carpenter* v. *Daar*, supra, 199 Conn. App. 394. The Appellate Court held that the trial "court was not bound to presume the validity of only the facts alleged in the complaint. Furthermore, [the trial court] noted that the complaint itself failed to sufficiently allege [that] Daar was holding himself out as a specialist. The indeterminate complaint, as well as the undisputed facts alleged in Daar's affidavit, justified the [trial] court's conclusion that Daar was neither a specialist . . . nor holding himself out to be one . . . ." Id., 395.

endodontic specialist." In response, the defendants contend that the Appellate Court properly relied on Daar's affidavit to establish that the plaintiff selected the wrong health care provider to author the opinion letter because Daar is—as a factual matter—a general dentist and not an endodontist.[11]

Our review of a trial court's decision to grant a motion to dismiss pursuant to § 52-190a is plenary. See, e.g., *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 718.

I

WHETHER THE *CONBOY* JURISDICTIONAL FACT ANALYSIS IS APPLICABLE TO THE § 52-190a INQUIRY

The defendants' arguments, which rely in substantial part on factual claims that go beyond the allegations on the face of the complaint and the opinion letter, beg the question whether the well established jurisdictional fact analysis implementing Practice Book §§ 10-30 and 10-31, as articulated in *Conboy* v. *State*, supra, 292 Conn. 651–52[12] applies in the context of conducting the similar

[11] The defendants contend that the plaintiff misquoted Shoreline's website out of context in elevating Daar's continuing education to claims of specialty training. They emphasize the "distinction between a general dentist's continuing education and the postdoctoral specialty residency program to become a specialist in a recognized dental specialty such as endodontics"; (footnote omitted); given the statutory requirements for board certification under General Statutes § 20-106a. See footnote 9 of this opinion.

[12] In *Conboy*, a sovereign immunity case, this court considered the various factual circumstances under which trial courts can consider motions to dismiss for lack of subject matter jurisdiction under Practice Book §§ 10-30 and 10-31, namely, "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; internal quotation marks omitted.) *Conboy* v. *State*, supra, 292 Conn. 651.

"The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-31 (a) (1)] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . .

When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, 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. . . . The motion to dismiss . . . admits all facts [that] are well pleaded, invokes the existing record and must be decided [on] that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . .

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book] § 10-31 (a) (1) may encounter different situations, depending on the status of the record in the case. As summarized by a federal court discussing motions brought pursuant to the analogous federal rule, [l]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, 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. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss; Practice Book § 10-31 (a); [and/or] other types of undisputed evidence . . . taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant's motion to dismiss conclusively establish[es] that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits; see Practice Book § 10-31 (b); or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint . . . but may rest on the jurisdictional allegations therein. . . .

"Finally, [when] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based

health care provider inquiry under § 52-190a. See *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 56, 459 A.2d 503 (1983) (observing that "a determination of whether sufficient minimum contacts with Connecticut exist is a fact question" in concluding that due process requires "a trial-like" evidentiary hearing when "issues of fact are necessary to the determination of a court's jurisdiction"). Thus, with the aid of supplemental briefs submitted by the parties and the amicus curiae, the Connecticut Trial Lawyers Association (trial lawyers); see footnote 2 of this opinion; we consider, as a threshold matter, the extent to which the opinion letter requirement is jurisdictional in nature. This inquiry raises the question of the continuing vitality of this court's decision in *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 401–402, in which this court held that, pursuant to Practice Book

on memoranda and documents submitted by the parties." (Citations omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521–24, 98 A.3d 55 (2014); see *Conboy* v. *State*, supra, 292 Conn. 650–54; see also *Conboy* v. *State*, supra, 653 n.15 ("[a] preliminary evidentiary hearing ordinarily will suffice [when] the jurisdictional issue is distinct and severable from the merits of the action, for example, when personal jurisdiction is called into question").

Although *Conboy* itself concerned subject matter jurisdiction, the substance of its analysis has been applied to consider claims in personal jurisdiction cases. See, e.g., *North Sails Group, LLC* v. *Boards & More GmbH*, 340 Conn. 266, 269–70, 264 A.3d 1 (2021). This includes challenges to personal jurisdiction arising under § 52-190a, as interpreted by *Morgan*. See, e.g., *Barnes* v. *Greenwich Hospital*, 207 Conn. App. 512, 518–19 and n.12, 262 A.3d 1008, cert. denied, 340 Conn. 904, 263 A.3d 100 (2021); *Caron* v. *Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 563–64, 202 A.3d 1024, cert. denied, 331 Conn. 922, 206 A.3d 187 (2019). This analysis is consistent with the extension of the due process aspects of the hearing required by *Standard Tallow Corp.*, which involved the issue of minimum contacts in the personal jurisdiction context; see *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 56, 459 A.2d 503 (1983); to issues of subject matter jurisdiction. See, e.g., *Bank of New York Mellon* v. *Tope*, 345 Conn. 662–63, 682, A.3d (2022) (plaintiff's standing to bring foreclosure action); *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 443, 195 A.3d 664 (2018) (*D'Auria, J.*, dissenting) (proof of agency relationship between Commissioner of Transportation and state employee for purposes of waiver of sovereign immunity under General Statutes § 13a-144); *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 393 n.8, 973 A.2d 1229 (2009) (prior pending action doctrine).

§ 10-32,[13] the failure to file a timely motion to dismiss waives any objection to the adequacy of the opinion letter.

A

Review of *Morgan*

In concluding in *Morgan* that the failure to file a timely motion to dismiss waives any objection to the adequacy of the opinion letter, this court held that the opinion letter affects personal jurisdiction. See *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 401–402. This court determined that the opinion letter necessarily implicated personal jurisdiction, given its previous conclusion in *LeConche* v. *Elligers*, 215 Conn. 701, 702–703, 714, 579 A.2d 1 (1990), that the good faith certificate requirement, later supplemented by the opinion letter, is not subject matter jurisdictional.[14] See *Morgan* v.

[13] Practice Book § 10-32 provides: "Any claim of lack of jurisdiction over the person or insufficiency of process or insufficiency of service of process is waived if not raised by a motion to dismiss filed in the sequence provided in Sections 10-6 and 10-7 and within the time provided by Section 10-30."

[14] In *LeConche*, this court considered whether the failure of a medical malpractice complaint to include a good faith certificate deprived the court of subject matter jurisdiction. See *LeConche* v. *Elligers*, supra, 215 Conn. 707–709. In concluding that it did not, and that the trial court therefore should have permitted the plaintiffs to amend their complaint to include the certificate; see id., 715; this court observed that, although "the general purpose of § 52-190a is to discourage the filing of baseless lawsuits against health care providers . . . the good faith certificate is [not] so central to that purpose that it is 'of the essence of the thing to be accomplished,' " thus rendering it subject matter jurisdictional in nature. Id., 710–11. The court emphasized that the "purpose of the certificate is to evidence a plaintiff's good faith derived from the precomplaint inquiry. It serves as an assurance to a defendant that a plaintiff has in fact made a reasonable precomplaint inquiry giving him a good faith belief in the defendant's negligence. In light of that purpose, the lack of a certificate does not defeat what would otherwise be valid jurisdiction in the court. The purpose is just as well served by viewing the statutory requirement that the complaint contain a good faith certificate as a pleading necessity akin to an essential allegation to support a cause of action. Viewed through that prism, the absence from the complaint of the statutorily required good faith certificate renders the complaint subject to a motion to strike . . . for failure to state a claim [on] which relief can be granted, and to render that absence curable by timely amendment . . . ." (Footnote omitted.) Id., 711.

Hartford Hospital, supra, 397–98. This court observed "that the written opinion letter, prepared in accordance with the dictates of § 52-190a, like the good faith certificate, is akin to a pleading that must be attached to the complaint in order to commence properly the action." Id., 398. The court also observed in *Morgan* that, in its then recent decision in *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 31, which had held that dismissal was the mandatory remedy for failure to comply with the opinion letter statute, this court had "cited favorably [to] *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 583–84, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009), in which the Appellate Court held that the failure to follow the statutory attachment requirements does not implicate a plaintiff's right to bring a medical malpractice action . . . [or] affect the court's power to hear such actions. Thus, the court in *Votre* concluded that such a failure does not implicate the subject matter jurisdiction of the court. . . . In *Votre*, the Appellate Court also held that a defendant may waive the statutory requirements of § 52-190a." (Citation omitted.) *Morgan* v. *Hartford Hospital*, supra, 398–99. In *Morgan*, however, the court went a step further and read *Votre*'s conclusion as to subject matter jurisdiction necessarily to "[support] the proposition that the failure to attach a sufficient written opinion letter of a similar health care provider involves *in personam* jurisdiction" because it is "fundamental that jurisdiction over a person can be obtained by waiver."[15] (Emphasis in original; internal quotation marks omitted.) Id., 399.

In so concluding, this court observed in *LeConche* that the pre-2005 version of § 52-190a did "not address the consequences of a failure to file a certificate" but did "address the consequences of filing of what is later deemed to be a false certificate," with that determination to be made after the completion of discovery. Id., 712. The court observed: "Assuming without deciding that 'an appropriate sanction' for filing a false certificate includes dismissal, it is clear that such a dismissal would be discretionary, rather than required due to lack of subject matter jurisdiction." Id.

[15] In concluding in *Morgan* that the opinion letter and good faith certificate did not pertain to subject matter jurisdiction, this court cited to *Plante* v.

In *Morgan*, the court also observed that "the legislature did not establish a mandatory time limit in § 52-190a for the filing of a motion to dismiss. It did, however, establish a mandatory attachment to the complaint in the form of a written opinion letter from a similar health care provider. This certificate, therefore, serves as a precondition to effective service of process for the initiation of a medical malpractice action." Id., 400–401; see id., 402 ("constru[ing] the term 'process' to include . . . the summons, the complaint and any requisite attachments thereto"). The court then cited case law concerning the failure to establish personal jurisdiction because of noncompliance with statutory service requirements and stated: "Likewise, the attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court."[16] Id., 401; see id., 402 ("[T]he failure to attach

Charlotte Hungerford Hospital, 300 Conn. 33, 46–47, 12 A.3d 885 (2011), which held that, " 'when a medical malpractice action has been dismissed pursuant to § 52-190a (c) for failure to supply an opinion letter by a similar health care provider required by § 52-190a (a), a plaintiff may commence an otherwise time barred new action pursuant to the matter of form provisions of [General Statutes] § 52-592 (a) only if that failure was caused by a simple mistake or omission, rather than egregious conduct or gross negligence attributable to the plaintiff or his attorney.' Consequently, we recognized that the written opinion letter, much like the good faith certificate in *LeConche* [v. *Elligers*, supra, 215 Conn. 701], involved a matter of form [the] deficiencies [of which], at least in the case of simple mistake or omission, could be remedied by the failure of form provisions of the accidental failure of suit statute." *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 399–400.

[16] Significantly, the court in *Morgan* squarely rejected the argument that "the statutory remedy of dismissal does not invoke the court's jurisdiction in *any* manner and that any conclusion to the contrary would lead to bizarre, unworkable results." (Emphasis added.) *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 403. In particular, the court determined that the defendant's reading of § 52-190a as not relating to personal jurisdiction would excuse compliance with the deadlines set by Practice Book §§ 10-30 and 10-32 and lead to absurd results by (1) presuming that experienced defense attorneys

a proper written opinion letter pursuant to § 52-190a constitutes insufficient service of process and, therefore, Practice Book § 10-32 and its corresponding time and waiver rule [apply] by [their] very terms. Because we conclude that the absence of a proper written opinion letter is a matter of form, it implicates personal jurisdiction." (Footnote omitted.)).

B

Whether *Morgan* Was Correctly Decided

1

Statutory Analysis of § 52-190a

In determining whether *Morgan* correctly concluded that the opinion letter required by § 52-190a implicates the court's personal jurisdiction, our analysis begins with the governing statutory text, as required by General Statutes § 1-2z.[17] Section 52-190a (a), which is set forth in footnote 1 of this opinion, provides in relevant part: "To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain

would miss the thirty day dismissal deadline and allow a frivolous case to proceed, and (2) allowing motions to dismiss to be filed many months into the litigation, perhaps at the nineteenth hour after the expense of depositions. See id., 403–404.

[17] "[W]hen the legal issue presented in connection with a motion to dismiss is one of statutory construction, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . Further, in construing statutes, we presume that there is a purpose behind every sentence, clause or phrase used in an act, and that no part of a statute is superfluous." (Citation omitted; internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 718–19.

a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . ." Subsection (c) of § 52-190a then provides: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

In reading the statute, we bear in mind that, doctrinally, personal jurisdiction relates to the court's authority to render judgment against a particular defendant who has been haled before it, such as by compliance with statutorily prescribed methods for serving process, consistent with constitutional due process guarantees.[18] See, e.g., *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 576, 953 A.2d 868 (2008); *Lombard Bros., Inc.* v. *General Asset Management Co.*, 190 Conn. 245, 250, 460 A.2d 481 (1983); see also, e.g., *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 195–96, 629 A.2d 1116 (1993) ("[a]lthough the Superior Court has general subject matter jurisdiction . . . it may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction

[18] This is in contrast to subject matter jurisdiction, which "is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Internal quotation marks omitted.) *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 31, 848 A.2d 418 (2004).

of the court or has waived any objection to the court's exercise of personal jurisdiction" (citations omitted)).

Nothing in the text of § 52-190a suggests that the legislature contemplated that the opinion letter would affect the court's personal jurisdiction over a defendant. The statute does not use terms pertaining to jurisdiction, service, or process when it provides in subsection (c) that dismissal is the remedy for failing to comply with the opinion letter requirement set forth in subsection (a). See General Statutes § 52-190a (c); see also *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 28 ("dismissal is the mandatory remedy" for failure "to file an opinion letter that complies with § 52-190a (a)"). As the plaintiff and the trial lawyers point out, the absence of jurisdictional language puts § 52-190a in stark contrast to other statutes governing personal jurisdiction and the service of process in a wide variety of contexts, including those, like § 52-190a, that are codified in title 52 of the General Statutes, which specifically concerns civil actions.[19] See, e.g., General Statutes

[19] Examples abound in title 52 of the General Statutes. See, e.g., General Statutes § 52-59b (a) through (c) (long arm statute setting forth numerous bases for acts committed "in person or through an agent," over which "a court may *exercise personal jurisdiction* over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association," emphasizing that, "[w]here *personal jurisdiction is based solely upon this section*, an appearance does not confer personal jurisdiction with respect to causes of action not arising from an act enumerated in this section," and describing method by which "any process in any civil action brought against the nonresident . . . may be served upon the Secretary of the State and shall have the same validity as if served . . . personally" (emphasis added)); General Statutes § 52-102b (a) (apportionment action may be commenced by service of "a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability," and "such writ, summons and complaint, [i.e.] the apportionment complaint, *shall be served* within one hundred twenty days of the return date specified in the plaintiff's original complaint" (emphasis added)).

Beyond title 52, other titles in the General Statutes also have provisions that refer specifically to personal jurisdiction and the service of process.

§ 52-45a ("[c]ivil actions shall be commenced by *legal process* consisting of a writ of summons or attachment," which "shall be accompanied by the plaintiff's complaint" (emphasis added)). In contrast to these other statutes, the absence of the terms "process," "service" or "personal jurisdiction" in § 52-190a is significant because we have described them as "express[ly]" implicating the court's "personal jurisdiction," insofar as "the legislature frequently employs the term 'service' when dictating the necessary procedures by which a court may gain jurisdiction over a person." *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 32–33, 848 A.2d 418 (2004); see id., 33 (concluding that 120 day period for commencement of apportionment action implicates personal jurisdiction, rather than subject matter jurisdiction, given multiple references to "the term 'service' "); *Commissioner of Transportation* v. *Kahn*, 262 Conn. 257, 273–74, 811 A.2d 693 (2003) (concluding that trial court's failure to provide notice to Commissioner of Transportation, as required by General Statutes § 13a-76, did not implicate court's personal jurisdiction over commissioner in condemnation proceeding because "absent from the statute is any reference to 'service' or 'process,' terms commonly used in our statutes to dictate the necessary procedure by which the court obtains jurisdiction over the person"); see also *Ahrens* v. *Hartford Florists' Supply, Inc.*, 198 Conn. App. 24, 38–40, 232 A.3d 1129 (2020) (concluding

See, e.g., General Statutes § 1-101oo (a) and (c) (prescribing that, "[i]n addition to its jurisdiction over persons who are residents of this state, the Office of State Ethics may exercise personal jurisdiction over any nonresident person, or the agent of such nonresident person, who makes a payment of money or gives anything of value to a public official or state employee in violation of section 1-101nn, or who is, or is seeking to be, prequalified under section 4a-100," and setting forth method for "service of process" on either such nonresident's "registered agent" or "the Secretary of the State"); General Statutes § 7-137c ("the owner of any property so assessed may appeal to the superior court . . . from the valuation of his assessment, by service of process made in accordance with the provisions of section 52-57").

that General Statutes § 52-577a (b), setting forth procedure for third-party product liability claim, implicates court's personal jurisdiction because it provides particular procedure for service of process).

The legislature's failure to use the terms "personal jurisdiction" or "service of process" in § 52-190a, when it so readily uses those terms in other statutes in the same title governing civil actions, provides strong textual evidence that the legislature did not intend the opinion letter and good faith certificate to implicate the court's personal jurisdiction. See, e.g., *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 205, 3 A.3d 56 (2010); see also *Commissioner of Transportation* v. *Kahn*, supra, 262 Conn. 273 ("[i]n light of the frequency with which the legislature expressly employs such terms to dictate the means by which notice must be given, we presume from their absence that neither service of process nor an order of notice is required under the statute"). Although we find strong support in the text of § 52-190a indicating that the opinion letter and good faith certificate requirements do not implicate a court's personal jurisdiction, we nevertheless assume that this court's contrary interpretation of the statute in *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 401–402, is reasonable for purposes of determining ambiguity in connection with the § 1-2z analysis. Accordingly, we now turn to extratextual sources, namely, the legislative history of § 52-190a. See, e.g., *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 718–19.

The legislative history of § 52-190a does not support *Morgan*'s construction of the statute as implicating the court's personal jurisdiction. The legislature added the opinion letter requirement to § 52-190a in 2005 as No. 05-275, § 2, of the 2005 Public Acts (P.A. 05-275), which was part of a comprehensive tort reform effort to address a perceived crisis resulting from skyrocketing

medical malpractice insurance premiums in high-risk specialties, in part by deterring frivolous medical malpractice actions. See id., 728. Supporters of the opinion requirement letter viewed it, in the words of then Senator Andrew J. McDonald, as "mak[ing] substantial improvements" over the statute's existing good faith certification requirement[20] in the screening of frivolous medical malpractice actions because it would demand a detailed explanation of the requisite good faith basis for the medical malpractice action. 48 S. Proc., Pt. 14, 2005 Sess., p. 4411; see id., pp. 4410–11; see also *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 728–30. The opinion letter provision, with enforcement via a motion to dismiss, addressed the perceived problem that attorneys were misrepresenting—often " 'innocently' "—the extent to which a factual basis existed for their good faith in bringing the action. *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 730.

The only legislative history concerning the nature of the dismissal for failure to provide a compliant opinion letter appears in an exchange during a Judiciary Committee hearing between Senator Edward Meyer and Attorney Michael D. Neubert, who spoke on behalf of the Connecticut State Medical Society in support of the

[20] "Section 52-190a originally was enacted as part of the Tort Reform Act of 1986. See Public Acts 1986, No. 86-338, § 12. The original version of the statute required the plaintiff in any medical malpractice action to conduct 'a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the [plaintiff]' and to file a certificate 'that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant.' General Statutes (Rev. to 1987) § 52-190a (a). The original statute did not require the plaintiff to obtain the written opinion of a similar health care provider that there appeared to be evidence of medical negligence, but permitted the plaintiff to rely on such an opinion to support his good faith belief. The . . . purpose of the original version of § 52-190a was to prevent frivolous medical malpractice actions." *Dias* v. *Grady*, 292 Conn. 350, 357, 972 A.2d 715 (2009).

bill. Attorney Neubert did not mention jurisdiction but, instead, confirmed his understanding that any dismissal would be *without* prejudice, given the lack of any express language in the bill stating that dismissal would be *with* prejudice, although he did observe that "the [s]tatute of [l]imitations is always an issue." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 18, 2005 Sess., p. 5552. Significantly, he observed that it would be easy for plaintiffs to fix potentially noncompliant opinion letters, observing: "Let's say [someone] were to file a case. The letter doesn't state what he says it says and the court agrees . . . and dismisses it. I guess clearly he could have another bite at the apple and submit another complaint with another letter *or possibly respond by attaching the letter that met the requirements of the* [s]*tatute*." (Emphasis added.) Id. In response to Senator Meyer's observation that the provision "doesn't have a lot of teeth," Attorney Neubert opined that this provision was envisioned as affecting only "the cases on the margins," in which "attorneys, based on their own judgment and maybe in good faith have misread what an expert's told them" about the merits of their case. Id., p. 5553.

Beyond its lack of support in the statutory text or the legislative history, *Morgan*'s conclusion that the opinion letter requirement implicates the court's personal jurisdiction also relies on a false logical premise. Specifically, *Morgan* assumed that, because, in *LeConche* v. *Elligers*, supra, 215 Conn. 702–703, 714, the court held that the good faith certificate was not subject matter jurisdictional, the dismissal provided by § 52-190a (c) *necessarily* had to relate to personal jurisdiction. See *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 397–99. As the plaintiff and the trial lawyers observe, this either/or assumption fails to recognize that a case may be dismissed on nonjurisdictional grounds in a variety of situations, some of which implicate the merits

of the case. For example, the legislature has made a "special motion to dismiss" available under certain circumstances to dispose of strategic lawsuits against public participation (SLAPP lawsuits). General Statutes § 52-196a (b); see, e.g., *Lafferty* v. *Jones*, 336 Conn. 332, 380–82, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). It similarly fails to account for the concept of dismissal as a disciplinary sanction. See, e.g., *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 70–71, 176 A.3d 1167 (2018); *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16–17, 776 A.2d 1115 (2001); see also, e.g., General Statutes § 52-549t (b) (discretionary dismissal when party fails to appear before fact finder); Practice Book § 14-3 (dismissal for lack of diligence in prosecuting action). Indeed, numerous other examples of nonjurisdictional dismissals can be cited, such as certain prudential doctrines. See, e.g., Practice Book § 23-29 (providing for dismissal of habeas corpus actions on numerous substantive and jurisdictional grounds); *Durkin* v. *Intevac, Inc.*, 258 Conn. 454, 480, 782 A.2d 103 (2001) (forum non conveniens); *Halpern* v. *Board of Education*, 196 Conn. 647, 652 and n.4, 495 A.2d 264 (1985) (prior pending action doctrine is "a rule of justice and equity" that may be raised by motion to dismiss, as successor procedure to "a plea in abatement" (internal quotation marks omitted)); see also *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 582, 583–84 (observing that "motions to dismiss are not limited to jurisdictional challenges" and holding that "[a] plaintiff's failure to comply with the requirements of § 52-190a (a) does not destroy the court's subject matter jurisdiction over the claim," rendering "[d]ismissal pursuant to this section . . . a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading");

Rios v. *CCMC Corp.*, 106 Conn. App. 810, 821 n.8, 821–22, 943 A.2d 544 (2008) (observing that "motions to dismiss are [not] limited to jurisdictional challenges" in concluding that plain language of § 52-190a (c) made motion to dismiss, rather than motion to strike, proper procedural vehicle to challenge medical malpractice complaint filed without written opinion letter).

The legislature's focus on preventing frivolous medical malpractice litigation, and the suggestion proffered by Attorney Neubert in his testimony before the Judiciary Committee that some plaintiffs' attorneys had stretched the results of their precomplaint investigations when signing good faith certificates, indicates that the dismissal prescribed by § 52-190a is a statutory device that, like some of these other examples, plays a nonjurisdictional, merits related, gatekeeping function. Indeed, a conclusion to the contrary is inconsistent with the maxim that the legislature is presumed to be aware of this court's interpretation of statutes when it acts; see, e.g., *State* v. *Ashby*, 336 Conn. 452, 493, 247 A.3d 521 (2020); because, by adding subsection (c) to § 52-190a, P.A. 05-275 made clear the necessity of dismissal as the remedy for failure to file a proper certificate, which had been a subject of considerable discussion in *LeConche* without changing the existing statutory language providing that challenges to the good faith underlying the certificate were not considered until " '*after the completion of discovery*,' " on which the court had relied in determining that the good faith certificate did *not* implicate the court's jurisdiction. (Emphasis added.) *LeConche* v. *Elligers*, supra, 215 Conn. 711–13; see footnote 14 of this opinion. Although the legislature acted decisively by making dismissal mandatory in the event of noncompliance, its decision to continue to defer considerations of good faith until after the discovery process suggests that it did not consider

that dismissal to contemplate the court's jurisdictional power to hale a health care provider before it.

2

Stare Decisis Concerns

Although there is no support in the text or legislative history of § 52-190a for *Morgan*'s holding that it implicates the court's personal jurisdiction, and ample support exists for a conclusion that it is a statutory device intended only to weed out frivolous medical malpractice suits by requiring plaintiffs to obtain a corroborating expert opinion prior to commencing a lawsuit, our inquiry does not end there. "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Ashby*, supra, 336 Conn. 487. "[Although] stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." (Internal quotation marks omitted.) *State* v. *Petion*, 332 Conn. 472, 503, 211 A.3d 991 (2019). "When a prior decision is seen so clearly as error that its enforcement [is] for that very reason doomed . . . the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision." (Internal quotation marks omitted.) Id., 503–504; see *Conway* v. *Wilton*, 238 Conn. 653, 659–60, 680 A.2d 242 (1996).

"[I]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates,

our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determination, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417–18, 195 A.3d 664 (2018); accord *Spiotti* v. *Wolcott*, 326 Conn. 190, 201–202, 163 A.3d 46 (2017).

a

Considerations of Legislative Acquiescence

The legislative acquiescence doctrine does not necessarily foreclose reconsideration of a decision interpreting a statute. This is because "the legislative acquiescence doctrine requires *actual acquiescence* on the part of the legislature. [Thus] [i]n most of our prior cases, we have employed the doctrine not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not to amend the specific provision of the statute at issue. . . . In other words, [l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Stuart* v. *Stuart*, 297 Conn. 26, 47, 996 A.2d 259 (2010); see, e.g.,

State v. *Ashby*, supra, 336 Conn. 492–93; *Spiotti* v. *Wolcott*, supra, 326 Conn. 202; *State* v. *Salamon*, 287 Conn. 509, 525–26, 949 A.2d 1092 (2008).

Legislative acquiescence is not particularly strong in the present case because the legislature has made only a single minor amendment to § 52-190a in the more than eleven years since this court decided *Morgan*, and that amendment was to a different subsection of the statute and not germane to the opinion letter requirement at issue in *Morgan* and the present case.[21] See *State* v. *Salamon*, supra, 287 Conn. 525–26 (concluding that there was no actual acquiescence to interpretations of second degree kidnapping statute, General Statutes § 53a-94, when, "with the exception of a 1993 amendment . . . affecting only its penalty provisions, neither that section nor the pertinent definitional section . . . ha[d] been subject to any substantive amendments since it first was enacted in 1969" (footnote omitted)); *Conway* v. *Wilton*, supra, 238 Conn. 678 ("[w]e have . . . frowned [on] the use of legislative inaction regarding one section of a statute as a reliable indicator of legislative intent when the legislature has undertaken to amend other sections of the same statute").

b

Practical Effects of *Morgan*

Moving beyond concerns of legislative acquiescence, "[a]mong the factors that may justify overruling a prior

[21] Specifically, in 2019, the legislature amended § 52-190a when it enacted No. 19-64, § 16, of the 2019 Public Acts (P.A. 19-64), which is the annual court operations bill. Section 16 of P.A. 19-64 made a minor change to subsection (b), which extends the limitation period upon petition to the clerk of court to allow for the completion of the good faith inquiry, by replacing the phrase "the court where the civil action will be filed," with "any superior court or any federal district court . . . ." That amendment of subsection (b) of § 52-190a pertains only to the extension of the statute of limitations for purposes of the good faith inquiry, which is a provision that preexisted the enactment of the opinion letter requirement in 2005. Moreover, there is no recorded legislative history with respect to the enactment of § 16 of P.A. 19-64 that could potentially indicate any relationship

decision interpreting a statute are intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, supra, 330 Conn. 421. "In addition, a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . ." (Internal quotation marks omitted.) *Spiotti* v. *Wolcott*, supra, 326 Conn. 202–203; see *Conway* v. *Wilton*, supra, 238 Conn. 661. As a procedural rule in a tort case, § 52-190a cannot reasonably be deemed to have determined the litigants' conduct. See, e.g., *George* v. *Ericson*, 250 Conn. 312, 326–27, 736 A.2d 889 (1999); *Conway* v. *Wilton*, supra, 661–62; see also *Corley* v. *United States*, 11 F.4th 79, 86–87 (2d Cir. 2021) (rejecting government's "contention that § 52-190a is substantive" for purposes of Federal Tort Claims Act proceeding because, despite its "substantive goal . . . to deter frivolous medical malpractice claims," it is "[a] rule that regulates pleading and service of process, and that has been expressly construed . . . [in *Morgan*] as having no effect on the standard for substantive liability" (internal quotation marks omitted)).

Developments in the law since *Morgan* illustrate the extent to which its holding as to personal jurisdiction has led to results that, in our view, are wholly unjustifiable in light of the legislature's intent in enacting § 52-190a. First, given this court's contemporaneous conclusion in *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 21, that "the author of an opinion letter pursuant to § 52-190a (a) must be a similar health care provider as that term is defined by § 52-184c (c), regardless of his or her potential qualifications to testify at trial

between the opinion letter requirement and the 2019 amendment of § 52-190a (b).

pursuant to § 52-184c (d)," *Morgan*'s holding elevates the qualifications of the opinion letter's author to a jurisdictional factual prerequisite that is flatly inconsistent with the substantive law of medical malpractice. Under this regime, a plaintiff may prevail on the merits of a medical malpractice claim at trial on the basis of the opinion of an expert witness who would fail to qualify as a "similar health care provider" under § 52-184c and, thus, could not be used to establish that the claim was nonfrivolous for gatekeeping purposes under § 52-190a.[22] See General Statutes § 52-184c (d).

Second, in the wake of *Morgan* and *Bennett*, a voluminous body of case law[23] has developed to flesh out the proper procedures under § 52-190a. Although the defendants argue that this body of law demonstrates the extent to which *Morgan*'s conclusion as to personal jurisdiction has become "black letter law," the plaintiff and the trial lawyers contend that these cases demonstrate how far we have deviated from the purpose of § 52-190a, insofar as they require the dismissal of potentially nonfrivolous actions due to curable technical flaws unrelated to the actual merits of the claim. Accordingly, we now review the body of Appellate Court cases expand-

[22] Jurisdiction aside, for purposes of authoring an opinion letter, this court observed in *Bennett* that "strictly adhering to the legislature's articulation of who is a similar health care provider may be harsh to would-be plaintiffs, but [it] is not absurd or unworkable. . . . Specifically, the text of the related statutes and the legislative history support the . . . determination that, unlike § 52-184c (d), which allows for some subjectivity as it gives the trial court discretion in determining whether an expert may testify, § 52-190a establishes objective criteria, not subject to the exercise of discretion, making the prelitigation requirements more definitive and uniform and, therefore, not as dependent on an attorney or self-represented party's subjective assessment of an expert's opinion and qualifications." (Citation omitted; internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 21.

[23] See, e.g., *Peters* v. *United Community & Family Services, Inc.*, 182 Conn. App. 688, 689–90, 690 n.1, 191 A.3d 195 (2018) ("extensive litigation since [the] enactment" of opinion letter requirement has resulted in "[a] computer search for Connecticut cases citing § 52-190a yield[ing] almost [one] thousand results").

ingon *Morgan* and the procedural incongruities that have arisen because of the jurisdictional nature of its holding.[24]

[24] By way of background, we go beyond procedure and briefly discuss the series of cases expanding on *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1, insofar as their explication of what the opinion letter must include substantively governs the motion to dismiss and illustrates the potential pitfalls in complying with the statute. This line of cases is significant because it demonstrates the numerous substantive reasons that might result in dismissal under § 52-190a.

First, to ensure that the plaintiff has complied with § 52-190a (a) by procuring an opinion authored by a "similar health care provider," the Appellate Court has held that the opinion letter must include "adequate information that could be used to determine whether the author is a similar health care provider," such as his or her professional qualifications. *Lucisano* v. *Bisson*, 132 Conn. App. 459, 466–67, 34 A.3d 983 (2011); see *Bell* v. *Hospital of Saint Raphael*, 133 Conn. App. 548, 561 n.6, 36 A.3d 297 (2012) (declining "to require that the letter 'contain a complete exposition of the health care provider's bona fides,' but [requiring] merely that it disclose that the health care provider possesses the qualifications set forth in § 52-184c"). We note that the trial lawyers specifically ask us to overrule the *Lucisano* line of cases as inconsistent with the text of § 52-190a (a); we leave this request for another day in a case in which the issue is squarely presented by the parties. See, e.g., *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550–51 n.35, 93 A.3d 1142 (2014).

Turning to the specifications of negligence, we note that an opinion letter complies with "the 'detailed basis' requirement of § 52-190a (a) if it sets forth the basis of the similar health care provider's opinion that there appears to be evidence of medical negligence by express reference to what the defendant did or failed to do to breach the applicable standard of care. In other words, the written opinion must state the similar health care provider's opinion as to the applicable standard of care, the fact that the standard of care was breached, and the factual basis of the similar health care provider's conclusion concerning the breach of the standard of care" because "a blanket requirement mandating a more onerous or stringent standard would serve to deter not only frivolous lawsuits but some meritorious ones, as well, a result that the legislature did not intend to achieve." *Wilcox* v. *Schwartz*, 303 Conn. 630, 643–44, 37 A.3d 133 (2012); see *Dias* v. *Grady*, 292 Conn. 350, 359, 972 A.2d 715 (2009) (concluding that "the phrase 'medical negligence,' as used in § 52-190a (a)," requires only that author explain breach of standard of care and does not require author to opine as to causation).

Finally, the Appellate Court more recently explained the extent to which a plaintiff must undertake a "reasonable inquiry" into the credentials of the defendant health care provider to secure the appropriate similar health care provider to author the opinion letter. See *Doyle* v. *Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 497, 179 A.3d 249 (2018). In concluding that a general dentist could not author a letter against an oral and maxillofacial surgeon, the Appellate Court rejected the plaintiff's reliance on the defendant's profile on the Department of Public Health website, which did not

These cases demonstrate that the combined force of the case law construing § 52-190a imposes substantially greater burdens on a plaintiff than intended by the legislature in enacting the statute to require the substantiation of the precomplaint investigation. This is particularly so when coupled with case law requiring the plaintiff to prove the existence of personal jurisdiction in response to a motion to dismiss pursuant to § 52-190a. See, e.g., *LaPierre* v. *Mandell & Blau, M.D.'s, P.C.*, 202 Conn. App. 44, 49 n.3, 243 A.3d 816 (2020); *Young* v. *Hartford Hospital*, 196 Conn. App. 207, 211, 229 A.3d 1112 (2020); see also *Standard Tallow Corp.* v. *Jowdy*, supra, 190 Conn. 53–54. One significant line of cases holds that the case law governing motions to dismiss under Practice Book §§ 10-30 and 10-31, such as *Dorry* v. *Garden*, 313 Conn. 516, 522–23, 98 A.3d 55 (2014), and *Conboy* v. *State*, supra, 292 Conn. 651–52, allows for courts deciding motions to dismiss under § 52-190a to consider "supplementary undisputed facts" in affidavits to "conclusively establish that jurisdiction is lacking," rather than to "conclusively presume the validity of the allegations in the complaint." (Internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 453; see id., 452 (rejecting plaintiff's argument that trial court should *not* have "consider[ed] the affidavits that the defendants attached to their motions because the issues . . . *do not* involve factual issues concerning personal jurisdiction that are not determinable on the face of the record" (emphasis added; internal quotation marks omitted)); see also *Lab-*

indicate the defendant's board certification, and her argument that "there was no authentic public record by which to determine or verify that [the defendant] had training as an oral and maxillofacial surgeon and she could verify only that the defendant was a licensed general dentist." (Internal quotation marks omitted.) Id., 494; see id., 494–95. The Appellate Court held that "a reasonable inquiry as permitted by the circumstances" would go beyond the department's website to "other methods for ascertaining a defendant health care provider's credentials," such as simply asking the defendant or his employer, or filing an independent action for a bill of discovery. (Emphasis omitted; internal quotation marks omitted.) Id., 496–97.

issoniere v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 279–81, 235 A.3d 589 (trial court was not "obligated to accept as true [the plainitiffs'] allegations that the diagnosis and treatment of the decedent's postsurgical complications were within the specialty of general surgery and outside the specialty of internal medicine"), cert. denied, 335 Conn. 968, 240 A.3d 284, and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020); *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 78, 31 A.3d 810 (2011) (relying on affidavit submitted in connection with motion to dismiss to establish that defendant was board certified in emergency medicine, rendering pulmonologist who authored opinion letter not "similar health care provider" for purposes of § 52-190a, given lack of "an express allegation" in complaint that defendant was practicing outside of his specialty), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).

Another series of Appellate Court decisions explains the restricted curative options—beyond resort to the accidental failure of suit statute following dismissal; see General Statutes § 52-592; *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 46–47, 12 A.3d 885 (2011)—that are available to plaintiffs given the jurisdictional implications of defective opinion letters under § 52-190a, as interpreted by *Morgan*. The leading decision of *Gonzales* v. *Langdon*, supra, 161 Conn. App. 518–19 and n.9, holds that the amendment of the complaint and opinion letter under General Statutes § 52-128 and Practice Book §§ 10-59 and 10-60 is available only when the request for leave to amend—whether discretionary or as of right within thirty days of the return day—is filed prior to the running of the applicable statute of limitations. To this end, the Appellate Court has also held that plaintiffs should not be permitted to use the amendment process to provide a missing opinion letter in the first instance, even during the thirty day period in which amendments are permitted as of

right pursuant to Practice Book § 10-59. See *Barnes* v. *Greenwich Hospital*, 207 Conn. App. 512, 523–25, 262 A.3d 1008, cert. denied, 340 Conn. 904, 263 A.3d 100 (2021).

Two decisions illustrate how restrictive *Gonzales* is in its application, given its roots in the personal jurisdiction aspect of *Morgan*. The upshot is that, "[r]egardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52-190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise, the sole remedy available will be to initiate a new action, if possible, pursuant to [the accidental failure of suit statute] § 52-592." *Peters* v. *United Community & Family Services, Inc.*, 182 Conn. App. 688, 706, 191 A.3d 195 (2018). Consistent with this principle, the Appellate Court has held that the jurisdictional implications of the opinion letter preclude the use of the relation back doctrine to render timely amendments to complaints that are intended to cure legally insufficient opinion letters. See *Ugalde* v. *Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, 9–13, 188 A.3d 787, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); see id., 12–13 (noting that permitting use of relation back doctrine to save actions supported by insufficient opinion letters would "[circumvent]" accidental failure of suit procedure and "would be *fundamentally inconsistent with* [*the approach*] *taken by the legislature in mandating the dismissal of such actions for lack of personal jurisdiction*" (emphasis added)). Further, the Appellate Court has held that an explanatory or clarifying affidavit may not be used to address defects in the opinion letter itself, after the expiration of the limitation period, rejecting an attempt to limit *Gonzales*' application "only [to] those cases in which a plaintiff has sought to cure a defective opinion letter by way of an amendment of the pleadings

. . . ."[25] *Peters* v. *United Community & Family Services, Inc.*, supra, 703; see id., 705 ("[i]t simply would be illogical and an unwarranted circumvention of our decision in *Gonzales* to conclude that a plaintiff could avoid dismissal by submitting an affidavit in lieu of an amendment").

Tying it all together, the Appellate Court's recent decision in *Kissel* v. *Center for Women's Health, P.C.*, 205 Conn. App. 394, 258 A.3d 677, cert. denied, 339 Conn. 917, 262 A.3d 137, and cert. granted, 339 Conn. 917, 262 A.3d 138 (2021), and cert. granted, 339 Conn. 916, 262 A.3d 139 (2021), illustrates the extreme result of considering the opinion letter to implicate personal jurisdiction. Although the plaintiff in *Kissel* had obtained an opinion letter from a similar health care provider, she neglected to attach it to the complaint out of "inadvertence or oversight." (Internal quotation marks omitted.) Id., 409; see id., 421–22. When the action was brought in 2012, the trial court denied the defendant's motion to dismiss for lack of "personal jurisdiction on the basis of the plaintiff's failure (1) to attach an opinion letter from a similar health care provider to her medical malpractice complaint and (2) to cure that defect within the applicable two year statutory limitation period."[26]

[25] Because it would have been time barred in any event, the Appellate Court deemed it unnecessary to reach the plaintiff's broader attempt in *Peters* "to establish that the use of an explanatory or supplemental affidavit to cure a defect in an opinion letter in response to a motion to dismiss comports with language in Practice Book § 10-31 (a) permitting supporting affidavits to establish facts necessary for the adjudication of the motion to dismiss." *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 704; see id., 703–704 (observing that "certain Superior Court decisions provide some authority for permitting a plaintiff to cure a defective opinion letter by [a] supplemental affidavit rather than by following the amendment procedures set forth in Practice Book §§ 10-59 and 10-60").

[26] The trial court in *Kissel* had denied the 2012 motion to dismiss, following dictum from the Appellate Court's 2009 decision in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585, and determining that it had the discretion to permit the plaintiff to amend her complaint to include the opinion letter given the unchallenged attestations of the plaintiff's attorney that the letter existed prior to the commencement of the action,

Id., 400; see id., 401. Five years later, in 2017, the case was tried to a jury, which returned a verdict for the plaintiff. Id., 409. After trial, the trial court denied the defendant's motion for reconsideration of the denial of the motion to dismiss. See id., 409–10.

On appeal in *Kissel*, the Appellate Court reversed the judgment of the trial court, concluding that the trial court had improperly relied on equitable and public policy grounds in denying reconsideration of its denial of the motion to dismiss. See id., 397, 406, 410. The court first emphasized that, under *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 27–29, and *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 399, "in a medical malpractice action, a plaintiff must comply with § 52-190a by including an opinion letter from a similar health care provider with the complaint to establish personal jurisdiction, and a timely challenge to the failure to include a legally sufficient opinion letter will result in a dismissal." *Kissel* v. *Center for Women's Health, P.C.*, supra, 205 Conn. App. 416. Discussing *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 1, and *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, the Appellate Court then observed that, during "the time period between the denial of the 2012 motions and the second motion for reconsideration filed in 2018, the law concerning § 52-190a developed in our appellate courts. . . . Significantly, our jurisprudence shifted from consideration of whether the opinion letter had existed at the time the plaintiff commenced the malpractice action to a focus on whether the elected procedure to remedy a defective opinion letter had begun prior to the expiration of the statute of limitations." (Citations omitted.) *Kissel* v.

with the failure to attach it to the complaint having been an "oversight." *Kissel* v. *Center for Women's Health, P.C.*, supra, 205 Conn. App. 408; see id., 407–409.

Center for Women's Health, P.C., supra, 422–23. The Appellate Court then afforded that body of case law retroactive effect, despite the "extended time period" at issue in the case, given the timely personal jurisdictional challenge raised by the defendant in 2012. Id., 429; see id., 428–30.

Acknowledging its "pragmatic nature"; id., 431; the Appellate Court nevertheless rejected the "plaintiff's contention [in *Kissel*] that, as a result of the jury's verdict, the purpose of § 52-190a, preventing frivolous medical malpractice actions, was served . . . and, therefore, to dismiss the medical malpractice action at [that] juncture would elevate form over substance to an unreasonable degree." Id., 430. The Appellate Court stated: "Consistent with established precedent, an appellate determination that the trial court [incorrectly] concluded that personal jurisdiction existed has resulted in the dismissal or vacatur of the subsequent proceedings before the trial court. . . . For these reasons, we are not persuaded by the plaintiff's argument that a jury verdict in a medical malpractice action would insulate a defect in the required opinion letter from appellate review." (Citations omitted.) Id., 432; see *Barnes* v. *Greenwich Hospital*, supra, 207 Conn. App. 524 ("this court's holding in *Kissel* leaves no room for doubt that [when] a plaintiff in a medical malpractice action fails to attach an opinion letter to the initial complaint and [curative efforts] are not initiated prior to the expiration of the statute of limitations, the court lacks personal jurisdiction over the defendant and the action is subject to dismissal pursuant to § 52-190a (c)"). The Appellate Court's recent decision in *Kissel*, which is wholly consistent with its post-*Morgan* body of case law with respect to addressing flawed or absent opinion letters, reveals the danger of *Morgan*'s conclusion that the opinion letter implicates personal jurisdiction. By elevating the opinion letter to a jurisdictional

prerequisite of any kind, it allows a potential prelitigation defect to defeat a medical malpractice action that a jury has deemed meritorious after several years of litigation.

C

Conclusion and Other Procedural Issues Attendant to Overruling *Morgan*

For all of the foregoing reasons, we agree with the plaintiff and the trial lawyers that *Morgan* is clearly wrong and should be overruled to the extent that it holds that the opinion letter implicates the court's personal jurisdiction.[27] Particularly with respect to the difficulty of amending flawed opinion letters, the jurisdictional body of case law spawned by *Morgan* has created roadblocks for otherwise meritorious cases that are squarely at odds with the legislature's limited goal of ensuring an adequate, good faith investigation and eliminating only frivolous cases. Put differently, categorizing the opinion letter in any way as jurisdictional has had the effect of elevating the credential of the authoring health care provider to a jurisdictional prerequisite and turned what the legislature intended to be a simple prelitigation documentation of the plaintiff's good faith inquiry into, in essence, a trap under which even meritorious suits are subject to dismissal. Instead, we conclude that the legislative history and text indicate that dismissal under § 52-190a is a unique statutory remedy

[27] Swinging for the fences, the trial lawyers also challenge several aspects of *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1, as inconsistent with the focus of § 52-190a on "good faith" and "reasonableness," in particular focusing on (1) the difficulty of obtaining an exact match in credentials between the defendant and authoring health care providers, given the multiplicity of overlapping medical specialties, and (2) the extent to which dismissal is, or should be, the mandatory remedy for failure to supply a compliant opinion letter. As with their challenge to the Appellate Court's decision in *Lucisano* v. *Bisson*, 132 Conn. App. 459, 466–67, 34 A.3d 983 (2011); see footnote 24 of this opinion; we leave these arguments about *Bennett* for another day.

intended to strengthen the existing good faith inquiry and to expedite the disposition of obviously frivolous medical malpractice actions.

We recognize that this conclusion renders inapplicable to the § 52-190a motion to dismiss the rules of practice and applicable case law governing the pleading and proof of jurisdictional facts, as explicated by *Conboy* v. *State*, supra, 292 Conn. 650–52, and set forth in footnote 12 of this opinion. See *Durkin* v. *Intevac, Inc.*, supra, 258 Conn. 464, 480 (thirty day deadline provided by Practice Book §§ 10-30 and 10-32 was not applicable to motion to dismiss on ground of forum non conveniens, which is principle of deference rather than jurisdiction). Accordingly, we provide two more points of procedural clarification as to the adjudication of motions to dismiss under § 52-190a that guide our analysis of the motion to dismiss in the present case.

First, we agree with the argument of the trial lawyers and clarify that, as stated in *Bennett*, the inquiry under § 52-190a is squarely and solely framed by the allegations in the complaint, rendering the only question at the motion to dismiss stage whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint and described in the opinion letter. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 23–24 (general surgeon was not similar health care provider when complaint alleged "that the defendant 'specialize[d] in the field of emergency medicine' "); see also *Gonzales* v. *Langdon*, supra, 161 Conn. App. 506 (relying on *Bennett* for proposition that "the actual board certification of the defendant is not what matters; the appropriate similar health care provider is defined by the allegations in the complaint"). Thus, contrary to the Appellate Court's decision in *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 452–53, there simply is no place in the § 52-190a inquiry

for the consideration of affidavits or other materials intended to inject factual disputes beyond the adequacy of the pleadings and the annexed letter. Because the opinion letter is not itself process, to the extent that the opinion letter itself is legally insufficient or defective under § 52-190a, trial courts retain the authority to permit amendments or supplementation of a challenged letter in response to a motion to dismiss, as the legislature itself evidently contemplated.[28] See Conn. Joint Standing Committee Hearings, supra, p. 5552.

Second, we emphasize that our ultimate holding in *Morgan*, namely, that a motion to dismiss for failure to file an opinion letter pursuant to § 52-190a remains waivable, including by inaction, remains good law. See *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 391. Specifically, we agree with the trial lawyers that, consistent with the legislature's intent of screening out frivolous malpractice actions early in the litigation process, the order of the pleadings provided by Practice Book §§ 10-6 and 10-7[29] continues to render dismissal under § 52-190a waivable for failure to file a timely motion to dismiss; see id.; and requires that the motion to dismiss be filed early in the action, as the legislature envisioned in enacting the statute.[30] See, e.g., *Wilkins* v. *Connecti-*

[28] If a defendant intends to raise the issue whether the plaintiff acted in good faith with respect to the selection of the similar health care provider for purposes of the opinion letter, that topic may be taken up at the conclusion of discovery, as § 52-190a (a) has provided both before and after the addition of the opinion letter requirement in 2005. See General Statutes § 52-190a (a); see also *LeConche* v. *Elligers*, supra, 215 Conn. 708 ("The statute . . . clearly requires a factual inquiry by the court regarding the sufficiency of the precomplaint investigation. That inquiry is to be undertaken after the completion of discovery.").

[29] Practice Book § 10-6 provides that a motion to dismiss shall be filed after the complaint, and Practice Book § 10-7 provides that, unless otherwise ordered by the court, "the filing of any pleading provided for by [Practice Book § 10-6] will waive the right to file any pleading which might have been filed in due order and which precedes it in the order of pleading provided in that section."

[30] To the extent that additional elaboration may be helpful as to more specific procedures governing motions to dismiss under § 52-190a, the legis-

cut Childbirth & Women's Center, supra, 314 Conn. 729–30.

II

REVIEW OF THE FACIAL SUFFICIENCY OF THE OPINION LETTER AND THE ALLEGATIONS IN THE COMPLAINT

We now turn to the plaintiff's claim that the opinion letter was legally sufficient under § 52-190a because the "contents of the complaint adequately allege that . . . Daar held himself out as a specialist endodontist . . . Daar's affidavit failed to adequately refute those allegations, and the opinion letter establishes that . . . Solomon," a professor of endodontics, "is a similar health care provider to an endodontic specialist." Relying on well established case law holding that pleadings should be read "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019); the plaintiff argues that his complaint adequately alleged that Daar held himself out as a specialist in endodontics "by virtue of advertising [on Shoreline's website] that he received substantial additional training in endodontics."[31] The plaintiff then argues that Solo-

lature is free to provide such guidance, as it has done in similar contexts. See General Statutes § 52-196a (c), (d) and (e) (prescribing procedure for special motion to dismiss under anti-SLAPP statute, including thirty day extendable deadline for motion, stay of discovery upon filing of motion, and expedited hearing and decision procedure). Thus, the legislature, along with the Rules Committee of the Superior Court, remains best suited to consider the views of the relevant stakeholders as to the resolution of any remaining procedural lacunae or ambiguities with respect to § 52-190a. See, e.g., *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 686 n.7, 142 A.3d 1095 (2016); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550, 93 A.3d 1142 (2014).

[31] The plaintiff argues that the term "holds himself out as a specialist," as used in § 52-184c (c), is undefined and a question of fact. The plaintiff emphasizes that "[h]ealth care providers [who] attempt to present their continuing education coursework as particularized training, as . . . Daar did, should be deemed to have held themselves out as specialists, rather than those [who] simply adhere to their professional responsibilities."

mon's statement in the opinion letter that "he received his specialty boards," read in context with Solomon's credentials as a professor of endodontics at Columbia and his practice of endodontics in New York City, establishes that he is a "similar health care provider" by supporting the reasonable inference that his board certification is in endodontics, as defined by the American Association of Endodontists. We agree with the plaintiff and conclude that a broad and realistic reading of the face of the complaint and opinion letter establishes their compliance with § 52-190a.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. *Rather,* [*t*]*he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically.* . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis added; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 299–300, 94 A.3d 553 (2014); see, e.g., *Doe* v. *Cochran*, supra, 332 Conn. 333–34; *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002). "As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient

to allow recovery." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 300.

The challenged portions of the operative pleadings support the plaintiff's position. Quoting from Shoreline's website in support of the allegation, the operative complaint alleges that Daar "held himself out as a practitioner of [e]ndodontics, stating on [Shoreline's] website that 'he has completed hundreds of hours of training in [e]ndodontics.' " The complaint then states that Shoreline's website "describes [e]ndodontics, in part, as . . . 'the dental specialty that deals with tissues and structures located inside the tooth' " and explains root canal therapy.[32]

A broad and realistic reading of the allegation that Daar "held himself out as a practitioner" in the specific field of endodontics, with the accompanying description of the field of endodontics and his extensive training in that field, triggers the applicability of § 52-184c (c) with respect to the selection of a similar health care provider to author the good faith opinion letter required by § 52-190a. The plain meaning of the word "practitioner" suggests one who has elected to make a chosen professional field his or her occupation, in this case, endodontics. See American Heritage College Dictionary (4th Ed. 2007) p. 1093 (defining "practice" as "[t]o work at, [especially] as a profession," and "practitioner" as "[o]ne who practices something, [especially] an occupation, profession, or technique"). One widely regarded dictionary, which defines "practitioner" as "a person engaged in the practice of a profession, occupation,

[32] The complaint avers: "One of the most common endodontic treatments is root canal therapy, a procedure [that] effectively eases the pain associated with a bacterial infection deep within the pulp of the tooth. Of course, root canal treatment doesn't just relieve pain—it also stops the infection by removing dead and dying tissue from the tooth's pulp. Plus, it helps to save the tooth, which is in danger of being lost if left untreated." (Internal quotation marks omitted.)

etc.," specifically identifies "doctor," "master," and "*specialist*" as related words. (Emphasis added.) Dictionary.com, available at https://www.dictionary.com/browse/practitioner (last visited January 31, 2023).

Although the complaint does not use certain talismanic words to indicate that Daar is board certified, "specializes" in endodontics, or "held himself out" as such a "specialist," a reasonable reading of the complaint, accompanied by the opinion letter reciting Solomon's board certification and extensive academic credentials in endodontics, supports the conclusion that Solomon is a "similar health care provider" to Daar, as that term was intended by the legislature when it amended § 52-190a to ensure that there are nonfrivolous factual bases for medical malpractice claims brought in Connecticut's courts. See, e.g., *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 728–30. A conclusion to the contrary runs afoul of the "well settled" principle that our "courts do not interpret pleadings so to require the use of talismanic words and phrases." *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 90, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021); see *State* v. *Elson*, 311 Conn. 726, 752–53, 91 A.3d 862 (2014) (emphasizing "this court's refusal in a variety of contexts to attach talismanic significance to the presence or absence of particular words or phrases" (internal quotation marks omitted)); see also, e.g., *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 303–304 ("[a]lthough it would have been a far better practice for the plaintiff to use the words 'continuing course of conduct' in his pleading in avoidance, the record demonstrates that the defendant was sufficiently apprised of the plaintiff's intent to rely on that doctrine and suffered no prejudice as a result of the plaintiff's lapse in pleading"); *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 778, 905 A.2d 623 (2006) (rejecting "the defendants' contention

that the plaintiffs' allegations referring to 'renewals,' rather than 'renewal commissions,' and 'insurance agent' or 'Nationwide agent,' rather than 'producer,' are dispositive"); *Travelers Ins. Co.* v. *Namerow*, supra, 261 Conn. 800–801 (insurer was not required to plead special defense using words "civil arson" given detailed nature of allegations in answer, which alleged intentional act by insured and described fire as " 'incendiary' " in nature); *Antonio A.* v. *Commissioner of Correction*, supra, 90 (conclusion that petitioner did not raise claim of actual innocence in habeas petition was "based on the lack of material facts contained therein in support of a claim of actual innocence; it [was] not the result of the petitioner's failure to use the specific phrase 'actual innocence' "). Thus, we conclude that that a broad and realistic reading of the complaint suggests that it is pleading that Daar held himself out as a specialist in endodontics, rendering Solomon, a professor of endodontics, a similar health care provider.[33] The Appellate Court, therefore, improperly upheld the trial court's granting of the defendants' motion to dismiss.

[33] We disagree with the defendants' claim that the opinion letter itself is inadequate because Solomon's statement that he " 'received [his] specialty [b]oards in [e]ndodontics in 1970' . . . does not lead to the conclusion that the author is *American board* certified in the specialty of endodontics." (Citation omitted; emphasis in original.) They contend that the "reference to *plural* 'specialty [b]oards in [e]ndodontics' also is indeterminate and ambiguous. There simply is no way for a court to determine from the opinion letters attached to the complaint whether [Solomon's] reference to 'specialty [b]oards' included board certification by the American Board of Endodontics . . . [or] any basis to find that [Solomon] had maintained his board certification since it was obtained in 1970." (Emphasis in original.) They further argue that, although Solomon adequately stated that he "teaches endodontics, there is no specific information as to his training in the specialty of endodontics," citing General Statutes § 20-106a, which governs when a Connecticut licensed dentist may designate himself or herself as a specialist. See footnote 9 of this opinion. We disagree. Although the plaintiff likely would have benefited had Solomon stated his qualifications more specifically in the opinion letter, Solomon's failure to use talismanic words does not preclude us from reading it broadly and realistically—given his statements about receiving his specialty boards and academic career teaching endodontics—to deem him the requisite similar health care provider.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court with direction to deny the defendants' motion to dismiss and for further proceedings according to law.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JUAN A. G.-P.*
(SC 20164)

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

Syllabus

Convicted of aggravated sexual assault of a minor and risk of injury to a child in connection with his alleged sexual abuse of his stepdaughter, J, and stepniece, B, and his alleged conduct in showing them pornographic videos on an iPad, the defendant appealed to this court. Following the disclosure of the sexual abuse, J and B were interviewed by a child forensic interviewer and physically examined by a pediatrician. The physical examinations revealed no signs of sexual abuse. Prior to trial, the defendant sought the disclosure of J's and B's psychiatric records and filed a motion seeking an in camera review. During a hearing on the defendant's motion, the guardian ad litem for J and B indicated that she had reviewed the records, that she was not opposed to the court's reviewing them, and that J's records predated the disclosures of the sexual abuse by nearly three years, whereas B's records were more recent. At trial, C and D, who are sisters and the mothers of J and B, respectively, testified for the state. The defense requested permission to cross-examine C and D about their applications for U visas, which

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

allow eligible, undocumented immigrants who are the victims of a crime to lawfully remain in the United States if they assist in the investigation and prosecution of the crime. Defense counsel specifically sought to use this information to show that both witnesses had a personal interest in the outcome of the case. After a proffer outside the presence of the jury, during which defense counsel questioned C and D, the trial court denied the request, concluding that counsel had failed to establish a nexus between the U visa applications and any possible interest that C and D might have had in the outcome of the case. The court reasoned that the proffered testimony was irrelevant insofar as it credited C's and D's testimony that they were unaware of the U visa program prior to J's and B's disclosures, and, therefore, their desire to obtain U visas could not have motivated them to report the abuse or to fabricate their testimony. After the state rested its case, the trial court informed the parties that it had found no exculpatory evidence in either J's or B's psychiatric records upon its review of those records and, therefore, determined that the records were not subject to disclosure. On appeal from the judgment of conviction, the defendant claimed that the trial court had violated his federal constitutional right to confrontation by not ordering the disclosure of J's and B's psychiatric records to the defense and requested that this court conduct an independent review of those records to determine whether the trial court had correctly determined that they contained no exculpatory or relevant impeachment material. The defendant further claimed that the trial court had violated his right to confrontation by preventing defense counsel from cross-examining C and D about their U visa applications and raised two unpreserved claims of instructional error. *Held*:

1. After reviewing J's and B's psychiatric records, this court concluded that the trial court improperly failed to order that the exculpatory and relevant impeachment material contained therein be turned over to the defense, and, because this court could not conclude that that error was harmless beyond a reasonable doubt, it reversed the trial court's judgment and remanded the case for a new trial:

a. The information in J's and B's psychiatric records was probative of their ability to know and relate the truth concerning the events in question:

The information in J's psychiatric records related to behavioral, cognitive, and emotional issues, which could have could have affected J's ability to observe, understand, and accurately narrate the events in question, and indicated the existence of a conflict between J and C regarding each other's reporting of the events, and the information in B's psychiatric records concerned mental health and behavioral issues, as well as a history of untruthfulness.

Moreover, because J's psychiatric records predated the disclosures of sexual abuse by nearly three years and, thus, included a period of time

during which the alleged abuse was occurring but had not yet been disclosed, any information or lack thereof pertaining to the defendant during that time period was necessarily relevant insofar as it may have served to elucidate the victims' relationship with the defendant prior to the disclosures.

Furthermore, even inculpatory material contained in psychiatric records was relevant information and should have been turned over to the defense because such information may have differed from the evidence presented at trial or may have been inconsistent with the victims' other statements, thereby calling into question the reliability of the state's version of events.

b. The trial court's failure to order the disclosure of exculpatory and relevant impeachment material contained in J's and B's psychiatric records was not harmless error:

The defense was denied access to information that was compiled by trained professionals and was relevant to and probative of J's and B's ability to know and relate the truth in a case that depended on the credibility and reliability of their version of events, and J's and B's testimony was extremely important to the outcome of the case, as it was not cumulative of other evidence, there was no physical evidence of abuse, and there was an absence of corroborating evidence because C apparently inadvertently erased the data from the family's iPad following the disclosures.

Although the forensic interviews of J and B provided the strongest evidence in the state's case, this court disagreed with the state's argument that those interviews presented consistent, detailed accounts of the relevant events and, therefore, constituted compelling evidence of the defendant's guilt, as the answers that each child gave to the interviewer's questions were generally vague and nonresponsive, and this court was not persuaded with the state's argument that J and B provided idiosyncratic details that strongly indicated that they were sexually abused by the defendant.

2. The trial court violated the defendant's right to confrontation by precluding defense counsel from questioning C and D about their U visa applications and thereby preventing him from exposing the jury to prototypical impeachment evidence showing that a witness or witnesses were promised or stood to gain some type of benefit from the state in return for their cooperation:

The U visa status carries with it important benefits to immigrants, including protections against deportation and work authorization, U visas are awarded only if the applicant has been, is being, or is likely to be helpful to a government agency investigating or prosecuting criminal activity, and that duty to remain helpful to law enforcement personnel is an ongoing responsibility that exists even after a U visa has been granted.

In the present case, the trial court took an overly narrow view with respect to the relevance of C's and D's testimony about the status of their U visa applications because, to lay a foundation for the admission of impeachment evidence, the defendant was required to show only that the U visa evidence was relevant to C's and D's motive to testify in a certain manner, and, even if the jurors believed C's and D's testimony that they did not learn about the U visa program until after discovering the sexual abuse, that would not render the U visa evidence irrelevant, insofar as the structure of the U visa program and its requirement that the applicant be helpful to law enforcement personnel could create an incentive to a witness hoping to have his or her visa granted.

Moreover, this court previously has concluded that a witness' immigration status is a relevant subject of inquiry when there is a demonstrated link between it and the witness' bias, interest, or motive for testifying, and it agreed with the reasoning of other courts that have considered the admissibility of evidence of U visas and have held that a witness' efforts to obtain one is necessarily relevant to the jurors' assessment of the witness' bias, interest, or motive for testifying.

Because this court determined that the defendant was entitled to a new trial on the basis of the trial court's failure to disclose relevant portions of J's and B's psychiatric records, a harmless error analysis in connection with the U visa claim was not necessary.

3. This court directed trial courts to refrain from instructing jurors, as the trial court did in this case, that, when the evidence is subject to two possible interpretations, jurors are not required to accept the interpretation consistent with innocence or to accept the interpretation that is consistent with guilt:

Such an instruction could potentially mislead or confuse jurors with respect to the state's burden of proof because it introduces into the jurors' deliberations a standard of proof at odds with the beyond a reasonable doubt standard applicable to the charged offenses and is inconsistent with the principle that, if jurors can, in reason, reconcile all of the facts proven with any reasonable theory consistent with the innocence of the accused, then they cannot find the defendant guilty.

Moreover, with respect to subsidiary facts that are not subject to the beyond a reasonable doubt standard, it is sufficient for the trial court simply to instruct the jurors that they may find such facts proven if it is reasonable and logical to do so.

4. This court strongly recommend that, in cases involving multiple charges, multiple victims, or both, trial courts instruct jurors, in accordance with instruction 2.6-11 of Connecticut's model criminal jury instructions, that the jurors must consider each count separately and return a separate verdict for each count, and that a verdict reached on one count does

not bind their decision on another count, and the trial court should so instruct jurors regardless of whether the court is asked to do so.

Argued September 14, 2022—officially released February 6, 2023**

Procedural History

Substitute information charging the defendant with two counts of the crime of aggravated sexual assault of a minor and four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Russo*, *J.*; verdict of guilty; thereafter, the court vacated the conviction as to two counts of risk of injury to a child and rendered judgment thereon, from which the defendant appealed to this court. *Reversed*; *new trial.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom were *Sharmese Walcott*, state's attorney, and, on the brief, *Stephen J. Sedensky III*, former state's attorney, and *Matthew A. Weiner*, former assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. Following a jury trial, the defendant, Juan A. G.-P., was convicted of two counts of aggravated sexual assault of a minor in violation of General Statutes § 53a-70c (a) (5) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1).[1] On appeal,[2] the defendant claims that the trial court violated his right to confrontation under the sixth

** February 6, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The defendant also was found guilty of two counts of risk of injury to a child in violation of § 53-21 (a) (2). At sentencing, the trial court vacated these convictions, as they were lesser included offenses of the two counts of aggravated sexual assault of a minor.

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

amendment to the United States constitution[3] by not ordering disclosure of the victims' psychiatric records to the defense. The defendant asks this court to conduct an independent review of those records to determine whether they contain exculpatory or relevant impeachment material. The defendant further claims that the trial court violated his confrontation rights by preventing him from questioning the victims' mothers about their U visa applications.[4] Lastly, the defendant raises two unpreserved claims of instructional error. Specifically, he claims that the trial court improperly (1) instructed the jury that, if the evidence was subject to two different interpretations, the jury was "not required to accept the interpretation consistent with innocence," and (2) failed to instruct the jury, in accordance with instruction 2.6-11 of Connecticut's model criminal jury instructions, that it must consider each count separately and that a verdict reached on one count does not control the verdict on any other count.

We conclude that the trial court improperly failed to order that exculpatory and relevant impeachment material contained in the victims' psychiatric records be turned over to the defense. Because we cannot conclude that this error was harmless beyond a reasonable doubt, we reverse the judgment of conviction and remand the case for a new trial. We also address the defendant's remaining confrontation clause claim because it is likely to arise again at a new trial and conclude that the trial court improperly precluded cross-exam-

[3] The right to confrontation guaranteed by the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[4] As we explain more fully in part II of this opinion, a U visa allows eligible undocumented immigrants who are victims of crime, and their qualifying family members, to lawfully remain in the United States if they assist in the investigation and prosecution of the perpetrator of that crime. See 8 U.S.C. § 1101 (a) (15) (U) (i) (2018).

ination of the victims' mothers concerning their U visa applications. Finally, we agree with the defendant's claims of instructional error.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. C and D, who are sisters, emigrated to the United States from Brazil in 2004. Thereafter, C gave birth to two daughters, J and S, and D gave birth to one daughter, B. C and the defendant began dating in 2011. In 2012, they moved in together, and, in 2013, they married and had a son.

On the evening of February 11, 2015, B was spending the night at C's house. J was then nine years old, B was about to turn nine, and S was six years old. At around 3 a.m., C went into the girls' bedroom to check on them.[5] She noticed that all three girls were sleeping in the same bed and that the clothes they were wearing were different from the ones they had worn to bed. Suspicious, C pulled back the covers and discovered that B's pajama bottoms were pulled down to her knees. "[S]hocked" by what she saw, C shook the girls awake and instructed B to pull her pajama bottoms up. She then returned to her bedroom and woke the defendant, asking him "if he had anything that he needed to tell [her]." The defendant asked her "why [she] was asking him that . . . ." C replied, "because I went to the girls' bedroom, and [B] had her pajama bottoms around her knees . . . ." The defendant responded, "well, you should ask her about that" and "went back to sleep . . . ." Too upset to sleep, C "spent the rest of the [early] morning thinking about what might have happened."

At around 7:30 a.m., C confronted the girls and demanded that they tell her why B's pajama bottoms

[5] The facts and circumstances pertaining to the victims' initial disclosures of sexual abuse are taken directly from C's trial testimony, which was admitted into evidence pursuant to the tender years exception to the hearsay rule. See Conn. Code Evid. § 8-10.

had been around her knees. B responded, "oh . . . we were playing with this bear." C asked them where they "learn[ed] to play like that" with the bear, stating that "something strange [was] happening" and that she needed to know immediately where they learned to play like that. C could see that the girls were "getting nervous," so she told them that, if they did not answer her, she would "call the police because something [was] very strange." At this point, J "started shaking, saying, no, no." B then turned to J and said, "tell her," and J responded, "it's [the defendant]. He shows us videos on the iPad."[6]

By then, C "was getting very upset" and took J to another room to talk privately with her. There, she asked J about the videos and whether the defendant had done to her "what [she] saw in the videos . . . ." When J answered, "yes," C told her that she was going to call the police. Both J and B shouted for her not to do so, but C insisted.

The defendant woke up before the police arrived, unaware of what was happening. When he came out of his bedroom, he asked C whether she had received an answer from B about why her pajama bottoms were down. C responded that B "didn't tell [her] anything." The defendant told C that she was acting "strange" and went to prepare a bottle for their son.

Danbury Police Officer Jonathan Contreras arrived at the house a short time later. The first thing he did was gather everyone in the living room. Because C does not speak English, she instructed J to tell Contreras what had happened. J informed him that the defendant had sexually abused her and B. Until that moment, J had not mentioned that B had also been abused. When

[6] Evidence adduced at trial indicated that the iPad in question was registered to C but used by the entire family and referred to within the family as S's iPad because S's father had paid for it.

J finished speaking, the defendant appeared "confused" and asked J, "love, why would you say that? Why . . . would you lie?" Given the nature of the complaint, police protocol required Contreras to summon a detective from the police department's special victims unit. He then separated the defendant from the rest of the family and waited for the detective to arrive. When Detective Kevin Zaloski arrived, the defendant was permitted to gather his belongings and to leave. The defendant never returned to the family home.

A week after J's disclosure, J and B were interviewed separately by Donna Meyer, a child forensic interviewer and consultant to the multidisciplinary investigation team assigned to investigate J's accusations. Video recordings of the interviews were entered into evidence at the defendant's trial and played for the jury. Transcripts of the interviews were also entered into evidence. During the interviews, Meyer gave the girls drawings of a naked male and a naked female for them to indicate where on their bodies the defendant had touched them.

During J's interview, Meyer asked J, "[s]o, what did you come here to talk to me about today?" J asked Meyer whether she was referring to "what happened at [her] house . . . ." J then stated, "um, [the police] . . . came to my house . . . one day because, um, because . . . my mom woke up . . . and found that . . . [B's] pants were down. . . . But I didn't . . . so, um . . . I told her a story . . . but it's actually true." Meyer asked J what story she had told her mother, and J responded that one day, while her mother was at the store, the defendant "grabbed [her] on the hips and . . . put [her] on [her mother's] bed . . . ." Meyer then reassured J that she was "doing a good job," and J continued, "he . . . took out his thing . . . [b]ut, so then he did it and then um, I ran away to my room because I didn't want to see him anymore. . . . And then he said for me . . . to not tell my mom." Meyer

asked J whether "this thing that happened with [the defendant happened] one time or more than one time . . . ." J responded, "[m]ore." Meyer later asked J, "what was the first thing [the defendant did] when he brought you to your mom's room?" J answered, "[h]e stuck his thing out."

Meyer continued, "so he took his thing out and then what was the next thing he did?" J replied, "he didn't put it on me but like, he put it like on my pants . . . [but] I got away, so then, um, um, I ran away like, to my bedroom." Meyer responded, "before you got away, did [the defendant] ever make you touch his thing or do [something] to his thing? Did he ever do anything to his thing?" J replied, "[n]o." When Meyer responded, "[n]o? OK," J stated, [o]h! Yea, yea, yea, he would get his saliva like this and then put it on . . . [h]is thing. . . . And he said it felt good . . . and he said it . . . would be hard so, but sometimes . . . he told me secrets but and then he told me something if like if I was telling secrets with him, but I said yes, but actually I was lying." Meyer later asked J to tell her more about the time "when [the defendant] put the saliva on [his thing] . . . ." J responded, "I don't think he did it. . . . He told me [about it]. He said he does it in the bathroom, I think." Meyer asked J whether the defendant had ever made or wanted her "to do that to him," and J responded, "[n]ope." When Meyer replied, "[n]o? OK," J stated, "[o]h yea! He said for me like, to touch his thing. . . . But I didn't want to . . . so I didn't." Meyer then continued, "OK. Was there ever a time that he made you touch it?" J responded, "[n]ope." When Meyer said, "[n]o? OK," J stated, "he said for me to . . . touch his thing, but, um, but I didn't. I said no."

When asked to describe "a time that something happened in the living room," J responded, "like, me and [B] . . . were . . . at my house . . . [a]nd then my mom and my sister went to take a bath . . . so then,

um, [the defendant] called us and said come here, so he stuck his thing on us." When asked to indicate where he stuck his thing, J responded, "on the back and on the front [indicating her vagina and buttocks]." J continued, "he did it once with [B] and then me and . . . then he did it like in my baby brother's room . . . [but] when my mom was about to get out . . . of the bathroom, um, he said for us to watch TV or else my mom would figure out . . . so we did but like . . . there was a movie that we liked, so we wanted to finish it, so then, um, and he would show us to, um, um, um, one boy and two girls or one [girl] doing the thing together." Meyer then asked J, "where would he show you that stuff?" J responded that he had shown it to them on the family's iPad.

Meyer also asked J whether the defendant had ever wanted her "to do the things that were in the videos . . . ." J responded, "[h]e said let's do the thing in the video[s], but I didn't want to and, um, so one day he did it, but sometimes . . . he would call me, but sometimes I said no and sometimes I said yes and . . . sometimes I just went so uh, um, I didn't like, actually say yes, but I just went so then, um, so then he, he, he . . . he got me in my mom's bed . . . and one time he just grabbed me and put it in here [indicating her vagina], and, when I tried to get out, he would hold me and not let me get out." Meyer asked J whether the defendant had "ever put his [thing] inside part of [her] body . . . ." J responded, "[h]e put [it] like, um, here and right there [indicating her vagina and buttocks]." When asked, "how did that feel," J responded, "[b]ad."

Meyer began her interview of B by asking her whether "something happened recently . . . ." B responded, "I don't remember, I think it was last week um, um . . . I was sleeping at [J's] and, in the morning, [J's] mom asked us a question and then, um, we told her it, and, um, she had to . . . call the police, and they did that,

then, um, the police came, and she called the school and said we weren't going to school . . . and . . . well the reason she called was because [the defendant], um, touched me and her and, um, yeah, and that was pretty much it." When asked whether she could remember the last time the defendant touched her, B responded, "[n]o, not really." When asked if she remembered the first time, B responded, "like, maybe, yeah, I don't remember." Meyer asked B where she was the first time it happened. B replied that she was in J's baby brother's bedroom. When asked what the defendant did to her, B responded, "first, he did it to [J]." When asked what that was, B replied, "[l]ike he put his thing in her um hands . . . and then [started] shaking her."

Meyer then asked her, "after he did that to [J], then what happened?" B replied, "[t]hen he did it to me, but he did it the exact same way." When asked whether she saw the defendant's "thing," B replied that she had not seen it because her eyes were closed. Meyer asked B, "what did he do with his thing . . . did he put it on your skin, your clothes or something else?" B responded that he put it on her skin, pointing to her vagina and buttocks. With respect to her vagina, Meyer asked B whether the defendant put it "on the inside, on the outside, or something else . . . ." B replied, "[i]nside." When asked how it felt, B stated, "[i]t felt bad . . . [a]nd it hurt a little." Meyer then asked B whether, when he put his thing on her buttocks, "he put [it] . . . on the inside, the outside, or something else . . . ." B replied, "[i]nside." When asked how it felt, B stated that it "hurt a little more."

When asked about the second instance of abuse, B stated that the defendant "took out his thing and . . . put it in [J] . . . [while] J was standing up on [a] chair," and, when he was done, "he did the exact same thing [to her]." When asked to describe exactly what the defendant had done, B stated that "he put his thing in

our pants inside us and then he started shaking us like, um, the same . . . in the [bed]room."

Following the forensic interviews, J and B were referred to Veronica Ron-Priola, a pediatrician at Danbury Hospital and the medical consultant for the multidisciplinary investigation team investigating J's and B's allegations. Ron-Priola examined both girls and determined that there were no physical signs of sexual abuse. In her reports, which were entered into evidence at the defendant's trial, Ron-Priola noted a "small area of fusion" on J's labia minora, which she characterized as a normal variant. During the interview portion of J's examination, J informed Ron-Priola that the defendant had put his penis inside her vagina and anus "many, many times."

Ron-Priola asked each girl a series of questions during the examinations, including whether they had ever seen blood in their underpants after the defendant abused them, whether it ever hurt to go to the bathroom after, and whether they ever saw or felt anything wet come out of the defendant's penis. Both girls answered no to each question. She also asked them whether they ever experienced pain when the defendant put his penis in them. J replied, "it hurt a little in my front and my butt." B replied, "[y]es, a little." Ron-Priola noted in both reports that a normal physical examination does not confirm or negate child sexual abuse and that the girls' oral histories were consistent with having been abused.

Approximately one week after the sexual abuse was reported, Zaloski asked C to bring the family's iPad to the police station so it could be forensically examined. When C arrived, she informed Zaloski that she inadvertently had reset the device while attempting to remove an application from her iPhone. C stated that she had wanted to remove the application because she feared

that the defendant could use it to locate her. Officer David Antedomenico, a member of the crime scene unit of the Danbury Police Department, examined the iPad and determined, consistent with C's statements, that the device had been reset. He further determined that any evidence the device may have contained was lost as a result. Because the iPad was perceived to be of no evidentiary value, Zaloski returned it to C at that time.

The defendant was subsequently arrested and charged with two counts of aggravated sexual assault of a minor in violation of § 53a-70c (a) (5),[7] two counts of risk of injury to a child in violation of § 53-21 (a) (1) based on the defendant's "showing adult videos" to J and B and "telling [them] to simulate the behavior [seen in the videos] and to keep the incidents a secret," and two counts of risk of injury to a child in violation of § 53-21 (a) (2).[8]

J and B were twelve years old at the time of the defendant's trial. On direct examination, J testified that she was seven or eight years old when the defendant sexually abused her for the first time. When asked if she could "tell the jury about a time that this happened when [B] was there," J responded: "Well, um . . . he took me and [B] to the [corner of the] living room . . . when my mom and my sister were taking a shower . . . . He pulled our pants down and then started to abuse us." When asked to describe what he did, J

[7] General Statutes § 53a-70c (a) provides in relevant part: "A person is guilty of aggravated sexual assault of a minor when such person commits a violation of subdivision (2) of subsection (a) of section 53-21 . . . and the victim of such offense is under thirteen years of age, and . . . (5) there was more than one victim of such offense under thirteen years of age . . . ."

[8] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

replied, "[h]e put his penis in my behind and on my vagina." When asked, "did anything happen to [B]," J replied, "[h]e did the same thing to her." J was also asked whether the defendant "ever show[ed] [her] things . . . ." She replied that he showed her videos of people having sex. When asked why she did not tell her mother about the abuse when it started, J replied, "[bec]ause [the defendant] told me not to tell her." When asked whether the defendant told her why she should not tell her mother, J responded, "[h]e said that . . . he would tell her that it was all a lie and that she wouldn't believe me." During cross-examination, J testified that she sometimes used her family's iPad to search the Internet on her own. She also testified that she had not seen the defendant or spoken to him since the day she reported the abuse.

B testified that the defendant abused her on two occasions, once in J's baby brother's bedroom and once in the dining room. When asked to describe what happened in the bedroom, B stated, "[the defendant] would tell us to go in the room, and then he would put his thing in our pants and . . . would, like, since we were little, he would, like, shake us up and down." When asked to "describe for the jury how it felt," B responded, "[i]t didn't feel very good, it felt weird." When asked what she meant by "weird," B stated, "[i]t felt weird because it, like, his thing went inside of [me]." When asked whether it hurt "a lot, a little, or something else," B responded, "[i]t hurt . . . a little bit more than a little bit, but it didn't hurt that much." B was also asked whether the defendant "ever . . . show[ed] [her] what he wanted [her] to do . . . ." B responded, "I remember him getting an iPad and showing us things. I just don't remember the videos."

B was then asked about the time the defendant abused her in the dining room. B responded, "he would tell us to stand on a chair because we were small, and

then he would put his thing inside our pants and then shake us up and down." The questioning continued as follows:

"[The Prosecutor]: And he would have you, you said . . . stand on a chair?

"[B]: Well, he would have [J] stand on a chair, and I would stand on my knees because I was very tall.

"[The Prosecutor]: And I . . . just want to make sure I heard you say, you said you would stand on your knees?

"[B]: Yes. . . .

"[The Prosecutor]: You're taller than [J]?

"[B]: Yes.

"[The Prosecutor]: So, I just want to make sure I heard you [correctly], [J] would stand on a chair, and you would kneel on the chair?

"[B]: Yes.

"[The Prosecutor]: Okay. And when this happened—so if [J's] standing on the chair, where were you? . . .

"[B]: Well . . . we would get scared, so we would hold each other's hands.

"[The Prosecutor]: Okay. So, you were right there next to her?

"[B]: Yes.

"[The Prosecutor]: And then when you were kneeling on the chair, where was [J]?

"[B]: She was holding my hand.

"[The Prosecutor]: And where was [C] when this happened?

"[B]: She . . . would be out of the house or, sometimes, she would be, like, taking a shower."

Ron-Priola also testified at the defendant's trial. During her testimony, she emphasized that, although J's and B's physical examinations revealed no signs of sexual abuse, "[a] normal physical exam . . . does not mean that nothing happened. You can have a child that's been abused and the physical exam is going to be normal most of the time." During cross-examination, Ron-Priola confirmed that J's hymen was nonestrogenized at the time of the abuse, meaning that "her hymen was thinner" and typically would have been "very sensitive . . . to pain" and "more sensitive to injury, if there [had been] . . . an assault of some kind . . . ." She also confirmed that B "had a very small opening through the hymen" and that there were no transections in the hymen of either girl. Ron-Priola stated that, "if there [had been transections in their hymens] that would indicate . . . forceful penetration into the vagina." When asked "under what circumstances would you expect to see scarring," Ron-Priola replied, "usually, we see that in girls that have not reached puberty, when there is forceful penetration into the vagina, there will be cuts through the hymen, and those are . . . transections, and usually we can see that."

During cross-examination of C, defense counsel asked her whether the defendant ever returned to the family home after February 12, 2015. C replied, "[n]ot that I know of." He also asked her why she had erased the family's iPad immediately following J's disclosures. C answered that she had done it inadvertently while attempting to reset her iPhone. When asked whether she ever used the iPad after the police returned it to her in 2015, she replied, "[n]o. No, it didn't work nothing. . . . I didn't use it for anything nor my children."

D testified that, on the morning of February 12, 2015, C called and told her to come right over but did not

tell her why. When asked to describe her reaction when she learned of the defendant's conduct, D replied, "I was very shocked because I thought that it would be anything else. I thought someone had broken into the home, burglarized the home, [or] robbed the home. I never thought that [the defendant] was capable of something like that." During cross-examination, defense counsel asked D how often B slept at J's house prior to the disclosures. She responded, "once or twice a week . . . ." When asked whether B had ever resisted going to J's house before the disclosures, or whether B ever appeared frightened to go there, D responded, "[B] was always happy and comfortable going over to that house, and [J] would always ask her to come over."

After the state rested its case, the defendant moved for a judgment of acquittal, and the court denied the motion. The defense then presented its case, starting with the testimony of Anthony Coppola, a recently retired emergency medicine physician from Yale New Haven Hospital with experience treating child victims of sexual abuse. Coppola reviewed Ron-Priola's medical reports and testified, consistent with the testimony of Ron-Priola, that there were no physical signs of sexual abuse of either J or B. He further testified that, with children as young as J and B, whose hymens are nonestrogenized, he would expect to see scarring or lesions from any trauma or injury to the vaginal openings. He also agreed that he would expect to see "some kind of lesion . . . scarring . . . fissures [or] things of that nature" in the rectal area had there been forced penetration. Coppola stated that "[y]ou can see scars on the . . . anus very easily" and that, even "if something had time to heal . . . you should [still] be able to see it . . . ."

The defense next presented the testimony of James Oulundsen, a private investigator with Iris, LLC, a company that specializes in digital forensics. Oulundsen testified that, shortly before trial, he went to the Dan-

bury Police Department to examine the family's iPad but found the device to be "locked," which happens when someone repeatedly attempts to unlock it with an incorrect passcode. Subsequently, the trial court granted the defendant's request to have the iPad examined by Cellebrite, a company that specializes in electronic data recovery. Cellebrite was able to unlock the iPad and to extract more than 9900 pages of data from it. Oulundsen testified that the browsing history revealed that someone had used the iPad to access pornographic websites on multiple occasions between March, 2015, and January, 2016, a period of time when the defendant was no longer living with the family. No data was recovered from the period when the defendant was alleged to have used the device.

The defense also presented the expert testimony of Nancy Eiswirth, a clinical psychologist with experience conducting forensic interviews for the Department of Children and Families. Eiswirth explained to the jury the concepts of suggestibility and reinforcement as they relate to forensic interviews, noting in particular that the younger and less intelligent a child is, the more suggestible he or she tends to be. Eiswirth further testified that how the interviewer responds to a child's answers can affect the accuracy of the information obtained from the child. By way of example, Eiswirth stated that, if the child answers "no" to a particular question and the interviewer answers, "no . . . [in the form of] a question, then . . . the child may then [think that they] did . . . not get [the answer] right . . . ." Eiswirth explained that "[interviewers] have to be very careful about inflections and . . . reinforcing certain types of information over other types of information. You don't want to reinforce [the child when she says] yes, he touched me, but . . . when the child says no, he didn't touch me, ignore that [answer]."

During her closing argument, the prosecutor argued that the jury could find the defendant guilty solely on the basis of J's and B's testimony, stating: "The testimony of each of these children alone is enough to convict. The testimony of each of these children alone is direct evidence of child sexual abuse. The testimony of these two kids together is overwhelming. . . . If you find these kids credible, then [the state] ask[s] for a verdict of guilty on all counts . . . ."

During his closing argument, defense counsel argued that inconsistences in J's and B's statements—to Meyer and Ron-Priola and at trial—should create reasonable doubt as to the defendant's guilt. He also asked the jury to scrutinize "how the forensic interviews were conducted. Were leading questions used during the interviews? Were [some] answers . . . reinforced while other bad answers were not?" To explain "how . . . two nine year olds [could] make this up" or "become sexualized to know the things that they [talked about]," defense counsel asserted that it was clear that someone in the family had used the iPad to visit pornographic websites between March, 2015, and January, 2016, a period of time when the defendant no longer lived with the family, and when C claimed the device did not work. He also questioned why, if C believed that the defendant had used the iPad to show J and B pornographic videos, she "reset the [device] and remove[d] that evidence [from it] before turning it over to the police . . . ." Finally, defense counsel argued the inherent unlikelihood that the defendant would sexually abuse his stepdaughter and stepniece "while his wife was in the shower only steps away . . . ." Defense counsel also questioned why B "would . . . continue to go over [to J's house] for sleepovers . . . after [the defendant] had [done] what [is] claimed to have occurred . . . ."

During her rebuttal argument, the prosecutor argued that the defendant had presented no evidence that it was C or any of her children who had used the iPad to visit the pornographic websites between March, 2015, and January, 2016. She further argued that the strength of the state's case was underscored by the "idiosyncratic details" J and B had provided about the sexual abuse, details she argued J and B could not have made up given their ages, including J's memory of the defendant's telling her that he used saliva to get his penis hard, and B's recollection of "holding hands while the abuse happen[ed] . . . ." Finally, the prosecutor argued that, although Ron-Priola testified that the fusion on J's labia minora was a normal variant in girls her age, she also testified that it could have been caused by a prior irritation or by a penis rubbing against it.

The jury subsequently found the defendant guilty on all counts. The trial court sentenced the defendant to concurrent twenty-five year terms of imprisonment on the aggravated sexual assault of a minor counts and consecutive four year terms of imprisonment on each of the remaining risk of injury to a child counts, for a total effective sentence of thirty-three years of imprisonment.

I

We begin with the defendant's request, which the state does not oppose, that we review J's and B's psychiatric records to determine whether the trial court correctly determined that they contain no exculpatory or relevant impeachment material. The following facts are relevant to our resolution of this issue. Before trial, the defendant filed a motion seeking an in camera review of J's and B's psychiatric records. The state thereafter subpoenaed the records from Family and Children's Aid, and the records were then turned over to the children's guardian ad litem, Attorney Rebecca Mayo Good-

rich. At a hearing on the defendant's motion, Goodrich indicated that she had reviewed the records and was not opposed to the court's review of them in camera. She further indicated that the records for J went back to mid-2012, whereas the records for B were more recent, beginning in 2015. Finally, she apprised the court that, although J's records were more voluminous, three quarters of them concerned "an issue that ha[d] nothing to do with this criminal proceeding."

After the state rested its case, the court informed the parties that it had reviewed J's psychiatric records and "found that there was absolutely no exculpatory information that would be of value to anybody. In fact, [if] the court had to pass judgment on the documents it reviewed, there were probably more passages that were quite inculpatory rather than exculpatory, [of] which there [was] none." The court further stated that it had not reviewed B's records because none was provided. After the trial, the defendant filed a motion for rectification of the record, which the trial court granted, and the psychiatric records related to J (three envelopes) were marked as court exhibit VI and the records related to B (one envelope) were marked as court exhibit VII. At that time, the court clarified for the record that, contrary to what it had stated at trial, the court had reviewed B's records but did not realize it had done so at the time because they were mixed in with J's records. The court further stated that it had found no exculpatory evidence in B's records.

The following principles guide our analysis of this issue. "The need to balance a witness' statutory privilege to keep psychiatric records confidential against a defendant's rights under the confrontation clause is well recognized. . . . The test and the associated burdens imposed on a defendant are equally well chronicled. If, for the purposes of cross-examination, a defendant believes that certain privileged records would disclose

information especially probative of a witness' ability to comprehend, know or correctly relate the truth, he may, out of the jury's presence, attempt to make a preliminary showing that there is a reasonable ground to believe that the failure to produce the records would likely impair his right to impeach the witness. . . . If in the trial court's judgment the defendant successfully makes this showing, the state must then obtain the witness' permission for the court to inspect the records in camera. A witness' refusal to consent to such an in camera inspection entitles the defendant to have the witness' testimony stricken. . . .

"Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. . . . If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. . . .

"Access to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records. . . . [T]he linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . .

so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Slimskey*, 257 Conn. 842, 855–57, 779 A.2d 723 (2001).

Having reviewed the psychiatric records in question, we conclude that the defendant was denied access to information probative of J's and B's ability to know and relate the truth with respect to the events in question. With respect to J, the information relates to behavioral, cognitive, and emotional issues that could affect her ability to observe, understand, and accurately narrate the events in question. J's records also indicate the existence of a conflict between J and C regarding each other's reporting of these events. With respect to B, the information concerns mental health and behavioral issues, as well as a history of untruthfulness.

One other aspect of J's psychiatric records is noteworthy in this context. As the guardian ad litem indicated, J's psychiatric records predate the disclosures of abuse in this case by nearly three years and, thus, include a period of time during which the alleged abuse was occurring but had not yet been disclosed. The absence of any report of abuse to the treating psychiatrist during that period may require disclosure to the defense because, depending on the facts of a case, what is not contained in such records may be as probative as what is contained in them. Furthermore, any reference or information pertaining to the defendant is necessarily relevant insofar as it may serve to elucidate the victims' relationship with the defendant prior to the disclosures.

Finally, we observe that even inculpatory material contained in psychiatric records is relevant information and should be turned over to the defense. This is so because the inculpatory information may differ from

the evidence presented at trial, or be inconsistent with the victims' other statements, thereby calling into question the reliability of the state's version of events.

"Although the confrontation right is not absolute and is subject to reasonable limitation . . . there is, nevertheless, a minimum level of cross-examination that must be afforded to the defendant into matters affecting the reliability and credibility of the state's witnesses." (Citation omitted.) Id., 858. In the present case, the defendant was denied access to information compiled by trained professionals that was relevant to and probative of J's and B's ability to know and relate the truth. When this type of information is withheld from the defense in a case that depends on the credibility and reliability of the victims' version of events, the failure to disclose it is not harmless error.

We have explained that "[t]he correct inquiry for identifying harmless constitutional error is to ask whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. . . . Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) Id., 859.

J's and B's testimony was extremely important to the outcome of this case. As the prosecutor argued during closing argument: "The testimony of each of these children alone is enough to convict. . . . The testimony of these two kids together is overwhelming. . . . If you

find these kids credible, then [the state] ask[s] for a verdict of guilty on all counts . . . ." J's and B's testimony was not cumulative of other evidence. There was an absence of corroborating evidence due to C's erasure of the data from the family's iPad, and, as previously indicated, there was no physical evidence of abuse.

In its appellate brief, the state argues that "the nearly forty minute [forensic] interviews of each child, disclosing consistent, detailed accounts [of the defendant's abuse] with manifest sincerity," was compelling evidence of the defendant's guilt. The state further argues that this evidence was strengthened by "[t]he idiosyncratic details [J and B] related in response to follow-up questions [such as] the defendant's use of saliva to harden his penis, the girls' holding hands out of fear while being penetrated, [and B's] kneeling in a position she knew from prayer . . . ."

We agree with the state that the forensic interviews were the strongest evidence given that they were conducted in close temporal proximity to the events in question. We have studied them carefully—both the video recordings and the written transcripts—and disagree that they present "consistent, detailed accounts" of those events. The answers each child gave to Meyer's questions were generally vague and nonresponsive. Although we agree that idiosyncratic details given by a child about sexual abuse can be a strong indicator that the child actually experienced what he or she is describing, we find it significant that one of the idiosyncratic details alluded to by the state—that the defendant put his penis inside J's and B's anus and vagina in the dining room while each girl stood (J) or knelt (B) on a chair, holding hands—was not mentioned in any of J's accounts of the assaults.

As for the defendant's putting saliva on his penis, J disclosed this information when Meyer asked her, "[d]id

he ever do anything to his thing?" J initially replied "[n]o." When Meyer responded, "[n]o?," J stated, "[o]h! Yea, yea, yea, he would get his saliva like this and then put it on . . . [h]is thing. . . . And he said it felt good . . . and he said it . . . would be hard . . . ." Later, however, when Meyer asked J to tell her more about the saliva incident, J replied that it had not really happened and that it was just something the defendant had told her about.

Contrary to the state's assertion, we do not believe that the only way J could have known about a man putting saliva on his penis is if the defendant told her about it. The evidence established that the family's iPad was accessible to all members of the household and was used to access pornographic websites, even after the defendant no longer lived in the home.

In light of the foregoing, we cannot conclude that the trial court's failure to turn over J's and B's psychiatric records was harmless error. The defendant is entitled to a new trial at which, if a waiver is obtained from J and B, defense counsel would be permitted to review the impeachment and other relevant information contained in their psychiatric records and to use that information in his cross-examination of the witnesses.

II

Because the issue is likely to arise again at a new trial, we next address the defendant's claim that the trial court deprived him of his right to confrontation by preventing him from questioning C and D about their U visa applications. Before addressing the merits of this claim, it is important to understand the U visa program and how it works.

"Congress created the [U visa] through the passage of the Victims of Trafficking and Violence Protection Act of 2000 . . . 8 U.S.C. § 1101 (a) (15) (U) [2012].

The [a]ct created a new nonimmigrant visa classification that permits [undocumented] immigrants who are victims of serious crimes and who assist law enforcement to apply for and receive a nonimmigrant visa called a [U visa]. . . . The [U visa] provides legal status to petitioners and qualifying family members to apply for work authorization and [to] remain in the United States." (Citations omitted.) *Calderon-Ramirez* v. *McCament*, 877 F.3d 272, 274 (7th Cir. 2017). "The U visa program [which is administered by United States Citizenship and Immigration Services (USCIS), a division of the United States Department of Homeland Security (DHS)] is intended to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute [certain crimes] . . . against [undocumented immigrants], while offering protection to victims of such offenses . . . .

"To be eligible for a U visa, a petitioner must establish that he or she: (1) has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity; (2) possesses information about qualifying criminal activity; and (3) has been helpful, is being helpful, or is likely to be helpful to an authority investigating or prosecuting qualifying criminal activity. 8 U.S.C. § 1101 (a) (15) (U) (i) [2018]." (Citations omitted; internal quotation marks omitted.) *Perez Perez* v. *Wolf*, 943 F.3d 853, 856–57 (9th Cir. 2019). As a practical matter, a petitioner applies for a U visa by filing a federal Form I-918 with USCIS. See 8 C.F.R. § 214.14 (c) (1) (2022) ("USCIS has sole jurisdiction over all petitions for U nonimmigrant status"). If the USCIS determines that the petitioner meets the eligibility criteria, it "will approve [the] Form I-918." Id., § 214.14 (c) (5) (i); see also *Gonzalez* v. *Cuccinelli*, 985 F.3d 357, 363 (4th Cir. 2021) ("[w]hen a petitioning [undocumented immigrant] has satisfied the statutory criteria (and complied with the requisite procedures),

the agency has committed to approve the [U visa] petition and [to] grant a [U visa] (along with the immigration protections and work authorization) subject to the annual statutory cap set by Congress").

"[U visa] status carries with it important benefits, including protections against deportation[9] and work authorization. [Because] Congress capped the number of [U visas] at 10,000 per year—meaning not all eligible [U visa] applications can be approved . . . [USCIS] created a waiting list for applicants whose applications have been approved and who would have been granted a [U visa] but for the statutory cap. Once on this waiting list, the [undocumented immigrant] is provided [deferred action] status and may be granted work authorization." (Emphasis omitted; footnote added; internal quotation marks omitted.) *Gonzalez* v. *Cuccinelli*, supra, 985 F.3d 361. Thus, "if USCIS decides that the principal petitioner qualifies for a [U visa] but cannot be granted the visa solely because of the [10,000 person] cap, USCIS approves the application and the applicant 'must be placed on [the] waiting list' per DHS regulations. [See] 8 C.F.R. § 214.14 (d) (2) [2021]. When a principal petitioner is placed on the [waiting list], they and their qualifying family members 'will' be accorded [deferred action] status, and USCIS maintains 'discretion' to grant them work authorization."[10] *Barrios Garcia* v. *United*

[9] "For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary [of Homeland Security], the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918." 8 C.F.R. § 214.14 (c) (5) (i) (2022).

[10] We note that "[c]ertifying officials may sign [a] Form I-918B for a noncitizen family member as the indirect victim regardless of whether the direct victim is a [United States] citizen or a noncitizen (such as a noncitizen parent of a [United States] citizen child who is the direct victim)." Dept. of Homeland Security, U Visa Law Enforcement Resource Guide (2022) p. 7, available at https://www.dhs.gov/sites/default/files/2022-05/U-Visa-Law-Enforcement-Resource-Guide-2022_1.pdf (last visited January 31, 2023). We further note that the Department of Children and Families (department) requires that clients be informed of their eligibility for a U visa and offered assistance in applying for one. See 2 Dept. of Children & Families, Policy Manual

States Dept. of Homeland Security, 25 F.4th 430, 437 (6th Cir. 2022). "[D]eferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable [undocumented immigrant] . . . ." (Emphasis omitted; internal quotation marks omitted.) *Texas* v. *United States*, 809 F.3d 134, 167 (5th Cir. 2015), aff'd, 579 U.S. 547, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016). "As of [2021], there were 161,708 pending [U visa] applications and 108,366 pending derivative petitions." *Barrios Garcia* v. *United States Dept. of Homeland Security*, supra, 436; see id., 436–37 (describing "deluge" of U visa applications and efforts to accommodate them). "An individual can apply for lawful permanent resident status once [he or she has] possessed a [U visa] for three years. See 8 U.S.C. § 1255 (m) [2012]; see also 8 C.F.R. § 245.24 (a) (1) [2017]." *Taylor* v. *McCament*, 875 F.3d 849, 851 (7th Cir. 2017). With this background in mind, we turn to the defendant's claim that the trial court violated his right to confrontation by preventing him from cross-examining C and D about their U visa applications.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant filed a motion for discovery, in which he requested that the state be required to turn over "copies of all applications and other reports and records pertaining to the [U visa] applications . . . [of C and D]." The defendant argued that he needed these documents

(effective January 2, 2019) § 21-13, available at https://portal.ct.gov/-/media/DCF/Policy/Chapters/21-13.pdf (last visited January 31, 2023) ("The [s]ocial [w]orker shall assist undocumented adult clients with issues related to their immigration status. . . . If the [s]ocial [w]orker believes that an adult or child client may qualify for a U visa as a victim of domestic violence or other specific crime identified by the federal government, the [s]ocial [w]orker shall consult with the [department] [a]rea [o]ffice [a]ttorney. The [s]ocial [w]orker shall forward the request to the . . . designee [of the Commissioner of Children and Families] for certification of the federal form [I-918B]."

for effective cross-examination of C and D. At a hearing on the motion, the prosecutor informed the court that the state was not in possession of the requested documents. Specifically, she stated that the witnesses' U visa applications were "not . . . done through the state's attorney's office. It's not something that we participated in, cooperated in, or asked to participate or cooperate in." The prosecutor agreed, however, "that it's something that the defense can cross-examine on [at trial]." As for the documents themselves, however, the prosecutor stated that the defense would have to request them from the federal government. At the conclusion of the hearing, the court denied the defendant's motion, stating that it could not compel the state to turn over something it did not have.

During the trial, the defendant filed a motion in limine, requesting permission to engage in "comprehensive cross-examination" of both C and D with respect to their U visa applications. The motion stated that, "through investigations in preparation of trial, [the defense] received information from parties with knowledge that [C] and [D] met the requirements of eligibility for a [U visa] at the time of the complaint leading to the defendant's arrest on March 18, 2015. This information was supported by the investigations [of] the public defender's investigator leading . . . [defense counsel] to believe that [C] and [D] may be supporting false allegations against the defendant in the hopes of securing [U visas]. In order to obtain a [U visa], [C] and [D] must cooperate with the state's prosecution of the defendant." The motion further stated that, during the initial cross-examination of D, "[defense counsel] attempted to lay [a] foundation to develop this line of questioning [with] respect to the witness' knowledge and eligibility for a [U visa]. The [prosecutor] raised an objection as to relevance. The court called for a recess to discuss the legal issues before defense counsel would

be permitted to continue cross-examination [with] respect to the witness' interests. Due to the time of day, the court excused the jury for the day, and the witness was permitted to step down from the [witness] stand to retake [it] on the following day."

The motion concluded that "[the defendant] drafted this motion in limine in the interim to support [defense counsel's] desire to continue cross-examination along these lines. . . . The intent of engaging in this line of question[ing] is not for the truth of the matter but, rather, to show the jury that both witnesses have an interest in the outcome of the case in addition to their interests as [the witnesses'] mothers . . . . The defendant has the right to confront the state's witnesses [with] respect to these interests."

Contrary to the position she had taken before trial that the defendant could cross-examine C and D on the issue, the prosecutor opposed the defendant's motion, arguing that the defendant had failed "to set forth a foundation for the requested cross-examination." Specifically, the prosecutor argued that there was no evidence that C and D ever discussed J's and B's testimony with them or encouraged them to testify falsely. The prosecutor further argued that the entire line of questioning was irrelevant in the absence of evidence that C and D were aware of the U visa program prior to J's and B's disclosures.

The next day, outside the presence of the jury, the trial court allowed defense counsel to question D about her U visa application. Defense counsel began by stating, "[i]n this case, [B] is considered to be the victim of a crime, correct?" D responded, "[y]es. The whole family [is]." Defense counsel then asked D whether she was "aware that there [is] a program for . . . family members of [crime victims] that . . . enable[s] them to become citizens of the United States . . . ." D

responded, "I learned through the Women's Center [of Greater Danbury (women's center)] that there is a program that protects families like us." When asked when she learned about the program, D responded, "[m]uch later after I started therapy . . . at the women's center. . . . I think I was in therapy for a long time when [the therapist] told me that there was a visa that would protect family members that suffered abuse." When asked whether she had applied for a U visa, D replied, "my lawyer . . . [is] doing it. The papers are with her. . . . I want to protect [B]. She needs me here. I don't want to leave this country."

After D finished testifying, the court denied the defendant's motion with respect to D, stating that it "found credible and unchallenged" D's testimony that she learned about the U visa program through the women's center and that "it was [an attorney affiliated with the women's center] that prompted her to [apply for the program] . . . some years after the reported criminal event . . . . In the court's view, that defeats almost entirely any claim that this witness had an improper intent or . . . interest in the outcome of the case [or] any measurable motivation to fabricate anything [including] her testimony. . . . As a result, there will be no questions asked of this witness with respect to her [immigration] status or . . . the [U visa] program."

Defense counsel later questioned C about her U visa application, again, outside of the jury's presence. Like D, C testified that she learned about the U visa program "after [her] family had gone through everything" and that it "was people that were working with [her] . . . that told [her] about the [U visa]." When asked whether she had applied for a U visa, C responded, "[d]o I need to answer that?" When told that she must, C stated that she had applied but could not remember when. When asked whether she ever spoke to anyone from the Danbury Police Department about applying for a U visa, C

responded that she had but that she could not remember when she had those discussions. When asked whether anyone beside her attorney had ever shared information with her about the U visa program, or assisted her in applying for a visa, C responded, "[y]es. . . . Friends and the people who are working with me . . . throughout the case who wanted to help me."

After C finished testifying, the court ruled: "Much like the other individual who testified earlier today, the [U visa] was brought to this witness' attention through folks, some of [whom are] involved in the women's center . . . . As a result, the court finds that . . . the [U visa] . . . was not an incentive [for this witness] to report the crime . . . ." The court further stated that it found "no nexus" between C's U visa application "and any possible interest [in] the outcome of the case," and, further, that C "lack[ed] any improper intent or . . . motivation to fabricate [her testimony]." Thus, the court did not allow defense counsel "to ask in front of the jury any questions regarding [C's] status . . . in the United States or in connection with any [U visa] application."

On appeal, the defendant argues that the trial court's rulings deprived him of his constitutional right to confrontation and to have the jury decide questions related to C's and D's credibility. The defendant contends that the trial court's rulings were "especially egregious" because the evidence established that C and D had applied for U visas, and "the state had previously acknowledged that this was an area that the defendant could cross-examine [them] about." The defendant argues that the rulings were harmful because they prevented him from presenting to the jury a plausible theory as to why C and D would falsely implicate him in the alleged crimes, and why they would manipulate their children to do so.

The state responds that the trial court properly exercised its discretion in excluding the proffered testi-

mony. Specifically, the state argues that the trial court simply "fulfilled its gatekeeping function" when it prohibited the requested cross-examinations due to defense counsel's "[failure] to establish a foundation to connect the [U visa] applications to a motive to fabricate." The state argues that, in the absence of any "temporal and logical connection between the . . . applications and a motive to fabricate," the trial court correctly determined that the applications were irrelevant to C's and D's credibility. The state contends that "[t]here was no evidence that [C and D] knew about the [U visa] program before their daughters revealed the abuse to [the] police, a forensic interviewer, and a doctor. What [they] did not know on February 12, 2015, could not have given them a motive to fabricate [the] revelations that occurred on that date and [in their] immediate aftermath."

The following principles guide our analysis of this claim. "The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted." (Internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 817–18, 135 A.3d 1 (2016). "The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitu-

tional requirements . . . of the sixth amendment." (Internal quotation marks omitted.) Id., 818. This court has held repeatedly that "[e]vidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. It may be . . . the very key to an intelligent appraisal of the testimony of the [witness]." (Internal quotation marks omitted.) *State* v. *Jose G.*, 290 Conn. 331, 345 n.11, 963 A.2d 42 (2009); see also *State* v. *Jordan*, 305 Conn. 1, 27, 44 A.3d 794 (2012) ("inquiry into prototypical forms of bias is by its very nature relevant to a witness' testimony" (internal quotation marks omitted)). "The range of matters potentially giving rise to bias, prejudice or interest is virtually endless." Conn. Code Evid. § 6-5, commentary.

"[A] criminal defendant states a violation of the [c]onfrontation [c]lause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . ." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). "[W]hether . . . limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause . . . is a question of law [that is] reviewed de novo." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 11, 1 A.3d 76 (2010).

It bears emphasis that, although restrictions on the scope of cross-examination are within the trial court's sound discretion, "this discretion comes into play only *after* the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment." (Emphasis added; internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 511, 131 A.3d 1132 (2016); see also *State* v. *Santiago*, 224 Conn. 325, 331, 618 A.2d 32 (1992) ("[a]lthough it is axiomatic that the scope of cross-examination generally rests within the discretion of the trial court, [t]he denial of all meaningful cross-

examination into a legitimate area of inquiry fails to comport with constitutional standards under the confrontation clause" (internal quotation marks omitted)). "[A] claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and, if so, whether the court nonetheless abused its discretion . . . ." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 511–12. "Constitutional concerns are at their apex when the trial court restricts a defendant's ability to cross-examine a key government witness." (Internal quotation marks omitted.) *State* v. *Jordan*, supra, 305 Conn. 27.

Applying these principles, we conclude that the trial court violated the defendant's right to confrontation by prohibiting defense counsel from asking C and D any questions about their U visa applications in the presence of the jury. As a result, the defense was prevented from exposing jurors to prototypical impeachment evidence showing that a witness was promised or stood to gain some type of benefit from the government in return for his or her cooperation. See *Cazorla* v. *Koch Foods of Mississippi, LLC*, 838 F.3d 540, 559 (5th Cir. 2016) ("U visa applicants are analogous to [any witnesses who stand to gain a benefit from testifying] in criminal trials, and in that context, as one court has pithily observed, [a]ny competent lawyer would . . . [know] that . . . special immigration treatment by [law enforcement agencies] [is] highly relevant impeachment material" (internal quotation marks omitted)); *Romero-Perez* v. *Commonwealth*, 492 S.W.3d 902, 907 (Ky. App. 2016) ("The value of [U visa] status for those living in immigration limbo cannot be overstated. The ability to transform oneself from illegal immigrant, to legal visa holder, to permanent legal resident in a relatively short amount of time without ever having to leave the United States,

could provide a strong motive for fabrication or embellishment." (Emphasis omitted.)).

The Fifth Circuit Court of Appeals' comparison of U visas to cooperation agreements is an apt one. See *Cazorla* v. *Koch Foods of Mississippi, LLC*, supra, 838 F.3d 559. U visas are awarded only if the applicant "has been helpful, is being helpful, or is likely to be helpful" to a governmental agency investigating or prosecuting criminal activity. 8 U.S.C. § 1101 (a) (15) (U) (i) (III) (2018). " 'Helpful' [in this context] means the [applicant] has been, is being, or is likely to assist law enforcement, prosecutors, judges, or other government officials in the detection, investigation, prosecution, conviction, or sentencing of the qualifying criminal activity of which he or she [or a family member] is a victim. This includes providing assistance when reasonably requested. This also includes an ongoing responsibility on the part of the [applicant] to be helpful. Those who unreasonably refuse to assist after reporting a crime will not be eligible for a U visa. The duty to remain helpful to law enforcement exists even after a U visa is granted, and those . . . who unreasonably refuse to provide assistance after the U visa has been granted will not be eligible to obtain lawful permanent residence and may have the visa revoked by USCIS." Dept. of Homeland Security, U and T Visa Law Enforcement Resource Guide (2016) p. 7, available at https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf (last visited January 31, 2023).

In denying defense counsel's request to cross-examine C and D about their U visa statuses, the trial court reasoned that the proffered testimony was irrelevant because of C's and D's testimony that they were not aware of the U visa program prior to J's and B's disclosures. Having credited C's and D's testimony, the trial court reasoned that their desire to obtain U visas could not have been the motivating force behind their daugh-

ters' disclosures. The court therefore concluded that the defendant had failed to establish a "nexus" between C's and D's U visa applications "and any possible interest [they could have in] the outcome of the case." We agree with the defendant that the trial court should not have made findings concerning C's and D's credibility. See *State* v. *Porter*, 241 Conn. 57, 120, 698 A.2d 739 (1997) ("forming impressions and intuitions regarding witnesses is the quintessential jury function"), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). We further conclude that the trial court's view of what was relevant in this context was too narrow.

To lay a foundation for the admission of impeachment evidence, the defendant was required to show that the evidence was relevant to the witness' motive to testify in a certain manner. See Conn. Code Evid. § 6-5 ("[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely"). "Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.) *State* v. *Patrick M.*, 344 Conn. 565, 600, 280 A.3d 461 (2022). We do not agree that the U visa evidence was irrelevant simply because C and D testified that they did not learn about the U visa program until after J and B had accused the defendant. It is well established that jurors are free to believe some, all, or none of a witness' testimony. See *State* v. *Padua*, 273 Conn. 138, 185, 869 A.2d 192 (2005). Even if the jury believed C's and D's testimony, it would not render the U visa evidence irrelevant. "One can readily see how the [U visa] program's requirement

of 'helpfulness' and 'assistance' by the [witness] to the prosecution could create an incentive to [witnesses] hoping to have their [U visas] granted. Even if the [witness] did not outright fabricate the allegations against the defendant, the structure of the program could cause a [witness] to embellish [his or] her testimony in the hopes of being as 'helpful' as possible to the prosecution." *Romero-Perez* v. *Commonwealth*, supra, 492 S.W.3d 906.

The Oregon Court of Appeals' analysis of the issue in *State* v. *Valle*, 255 Or. App. 805, 298 P.3d 1237 (2013), is fully applicable in the present case: "[The] defendant laid a sufficient foundation for the admission of evidence that [the witness] had applied for a U visa on the ground that she had been abused. . . . [A]ll [the] defendant had to do to lay a sufficient foundation was show that the evidence was relevant, and, to do that, all he had to show was that the evidence had a tendency, however slight, to demonstrate that [the witness] had a personal interest in testifying against him. He did that. He presented information, in the form of [the witness'] own testimony, that [she] had applied for a U visa on the ground that she was a victim of abuse. From that testimony alone, a jury could infer that [the witness] had a personal interest in testifying [against the defendant]. Simply put, [the witness] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity. Thus, [the] defendant's proffered impeachment evidence was relevant, and . . . the trial court erred in excluding it."[11] (Footnote omitted.) Id., 814–15.; see also

[11] In arguing to the contrary, the state relies on the principle that "the jury may not infer the opposite of a witness' testimony solely from its disbelief of that testimony." *State* v. *Hart*, 221 Conn. 595, 605, 605 A.2d 1366 (1992). The state then argues that, "[r]egardless of how the jury might assess [C's and D's] credibility, based on [the defendant's] proffer, it could not have found that [their daughters'] allegations arose from [C's and D's desire

State v. *Zapata-Grimaldo*, Docket No. 117,831, 2018 WL 6071478, *5 (Kan. App. November 21, 2018) (decision without published opinion, 430 P.3d 491) ("[although the victim] applied for a [U visa] well after reporting [the defendant] to law enforcement . . . a jury could conclude [that she] believed [that] she needed to testify against [him] to be helpful to the certifying agency in its investigation or prosecution against him"), review denied, Kansas Supreme Court, Docket No. 117,831 (June 24, 2019); *State* v. *Del Real-Galvez*, 270 Or. App. 224, 231, 346 P.3d 1289 (2015) ("[b]ecause [the victim's] mother had applied for an opportunity to stay in the United States on the ground that her daughter had been sexually abused and coerced, a jury could reasonably infer that [the victim], out of a desire to help her mother obtain a U visa, had a personal interest in testifying against [the] defendant"); *State* v. *Dickerson*, 973 N.W.2d 249, 259 n.4, 261 n.6 (S.D. 2022) (rejecting state's assertion that victim's U visa application was not relevant impeachment evidence because victim may not have known about U visa program prior to reporting assault).

Although this court has not previously considered the admissibility of evidence of a witness' U visa application, we have considered the admissibility of evidence of a witness' immigration status generally and

to obtain U visas] . . . ." The state's reliance on the cited principle is misplaced because it is not a rule of admissibility but one of sufficiency. See *State* v. *Hart*, supra, 605–606 ("[o]ur rule barring the inference of the opposite of testimony has been applied uniformly in both criminal and civil contexts . . . [and] is an evidentiary [rule] concerning the proper method of measuring the sufficiency of the evidence" (citations omitted)); see also *Walker* v. *New York*, 638 Fed. Appx. 29, 31 (2d Cir. 2016) ("it is hornbook law that a [party] does not carry [its] burden of proving a fact merely by having witnesses deny that fact and asking the jury to decline to believe the denials"). Evidence of C's and D's U visa applications was offered to demonstrate that C and D had a substantial stake in the outcome of the case, which bore directly on their credibility. Whether their U visa applications caused them to falsely implicate the defendant or otherwise influenced them to cooperate in the prosecution was a question for the jury.

concluded that it is a relevant subject of inquiry, so long as there is a demonstrated link between it and the witness' bias, interest, or motive for testifying in a certain manner. See *State* v. *Jordan*, supra, 305 Conn. 30–31 ("[T]he fact of noncitizenship, standing alone, does not reasonably suggest that a witness will lie. Rather, there must be some demonstrated link between a witness' immigration status and his or her propensity to testify falsely."). With very few exceptions, courts that have considered the admissibility of evidence of U visas have held that a witness' efforts to obtain one is necessarily relevant to the jury's assessment of the witness' bias, interest, or motive for testifying.[12] See, e.g., *People* v. *Anguiano*, Docket No. B304946, 2021 WL 3732619, *10 (Cal. App. August 24, 2021) ("[t]o the extent that [the witness] was made aware that her cooperation in the investigation or prosecution of certain enumerated offenses could provide an avenue [toward] permanent residence and citizenship, such knowledge would have provided a strong ulterior motive to fabricate or exaggerate any criminal charges leveled against [the defendant]"); *People* v. *Villa*, 55 Cal. App. 5th 1042, 1051, 270 Cal. Rptr. 3d 46 (2020) ("evidence of [the witness'] application for a U visa was relevant impeachment evidence"), review denied, California Supreme Court, Docket No. S265552 (January 13, 2021); *State* v. *Dickerson*, supra, 973 N.W.2d 259 ("We have not before examined whether or how a [witness'] . . . efforts to

[12] The state cites two cases that it argues support the trial court's determination that the U visa evidence was irrelevant because the defendant failed to proffer evidence that C and D knew about the U visa program before J's and B's disclosures. See *State* v. *Buccheri-Bianca*, 233 Ariz. 324, 328, 312 P.3d 123 (App. 2013); *Quiroz* v. *State*, Docket No. 05-16-01511-CR, 2018 WL 3387362, *2 (Tex. App. July 12, 2018). We find the cited cases unpersuasive because, in each case, the court applied the same narrow standard of relevance that the trial court applied in the present case. The cited cases are also procedurally distinguishable because neither involved a confrontation clause challenge to the trial court's evidentiary ruling. See *State* v. *Buccheri-Bianca*, supra, 328; *Quiroz* v. *State*, supra, *2.

obtain a [U visa] may be admissible to show motive to testify in a certain manner. However, multiple other appellate courts have examined the issue and have concluded that a [witness'] immigration status is relevant and admissible when such evidence has the tendency to demonstrate the [witness'] bias or motive to fabricate. While the facts of these cases are not all identical to those at issue here, the legal reasoning underlying the courts' rulings is persuasive." (Footnote omitted.)). We agree with the reasoning of these cases, which further supports the conclusion that C's and D's U visa applications were a proper subject of impeachment.

Having determined that the trial court deprived the defendant of his right to confrontation by precluding him from cross-examining C and D about their U visa applications, we normally would consider whether the exclusion of that testimony was harmless beyond a reasonable doubt. See, e.g., *State* v. *Edwards*, 334 Conn. 688, 706, 224 A.3d 504 (2020) ("[w]hen an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt" (internal quotation marks omitted)). Because we already have determined that the defendant is entitled to a new trial on the basis of the trial court's failure to disclose relevant portions of J's and B's psychiatric records, it is unnecessary for us to engage in a harmless error analysis in connection with the U visa evidence.

III

Because they are also likely to arise again at a new trial, we next consider the defendant's unpreserved claims of instructional error.

A

We begin with the defendant's claim that the trial court improperly instructed the jury that, "[w]ith respect

to individual pieces of evidence . . . [w]hen the evidence is subject to two possible interpretations, you are not required to accept the interpretation consistent with innocence. . . . [Y]ou are also not required to accept the interpretation consistent with guilt." The defendant claims that this instruction, which was part of the trial court's instructions on "[e]vidence of intent,"[13] was not a correct statement of the law, diluted the state's burden of proof, and misled the jurors as to the meaning of reasonable doubt. The defendant further contends that the challenged instruction is nothing more than a reformulation of the "two-inference" instruction[14] that is barred by *State* v. *Griffin*, 253 Conn. 195,

[13] The trial court instructed the jury in relevant part: "Evidence of intent. What a person's intention was is usually a matter to be determined by inference. No person is able to testify that he or she looked into another's mind and saw therein a certain knowledge or a certain purpose or intention to do harm to another. Because direct evidence of the defendant's state of mind is rarely available, intent is generally proved by circumstantial evidence. The only way a jury can ordinarily determine what a person's intention was at any given time is by determining what the person's conduct was and what the circumstances were surrounding that . . . conduct . . . and from that infer what his or her intention was.

"To draw such an inference is the proper function of a jury, provided, of course, that the inference drawn complies with the standards for inferences as explained in connection with [the court's] instruction on circumstantial evidence. The inference is not a necessary one. You are not required to infer a particular intent from the defendant's conduct or statements, but it is an inference that you may draw if you find it is reasonable and logical. While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt.

"With respect to individual pieces of evidence . . . [w]hen the evidence is subject to two possible interpretations, you are not required to accept the interpretation consistent with innocence. But you are also not required to accept the interpretation consistent with guilt. You are allowed to choose the interpretation that seems reasonable and logical. I again remind you that the burden of proving intent beyond a reasonable doubt is on the state."

[14] "A two-inference instruction provides that, if two conclusions reasonably can be drawn from the evidence, one of guilt and one of innocence, the jury must adopt the conclusion of innocence." (Internal quotation marks omitted.) *State* v. *Lemoine*, 256 Conn. 193, 205 n.13, 770 A.2d 491 (2001).

208–10, 749 A.2d 1192 (2000). The state responds, inter alia, that the two-inference instruction proscribed by *Griffin* was part of the trial court's instructions on reasonable doubt, which applied to inferences that could be drawn from the evidence as a whole, whereas the challenged instruction in the present case applies to inferences that can be drawn from individual pieces of evidence, and, as such, it was a proper statement of the law because the state is not required to prove such facts beyond a reasonable doubt. We conclude that the challenged instruction could potentially mislead or confuse jurors with respect to the state's burden of proof. Accordingly, our trial courts should henceforth refrain from including it in their jury charges.

In *Griffin*, the defendant challenged the trial court's instruction on reasonable doubt that, "[i]f two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you must adopt the one of innocence." (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 253 Conn. 205. The defendant claimed that the instruction violated his right to due process by diluting the state's burden of proof. Id., 203, 205. This court disagreed, concluding that "the two-inference charge, when viewed in the context of an otherwise proper instruction on reasonable doubt, [did] not impermissibly dilute the state's burden of proof." Id., 209. We nonetheless "recognized that the United States Court of Appeals for the Second Circuit . . . had prohibited the use of such an instruction because the instruction by implication suggests that a preponderance of the evidence standard is relevant, when it is not. Moreover, the instruction does not go far enough. It instructs the jury on how to decide when the evidence of guilt or innocence is evenly balanced, but says nothing on how to decide when the inference of guilt is stronger than the inference of innocence but not strong enough to be beyond a reasonable doubt." (Internal quotation marks

omitted.) Id., 208; see *United States* v. *Khan*, 821 F.2d 90, 93 (2d Cir. 1987). Thus, we concluded that, although the instruction was not misleading when considered in the context of the charge as a whole, "standing alone, such language may mislead a jury into thinking that the [state's] burden is somehow less than proof beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 209. We therefore exercised our "supervisory authority over the administration of justice to direct that, in the future, our trial courts refrain from using the two-inference language so as to avoid any such possible misunderstanding." (Footnotes omitted; internal quotation marks omitted.) Id., 209–10.

The state argues that the present case is distinguishable from *Griffin* because the challenged instruction was given with respect to facts that the state is not required to prove beyond a reasonable doubt. See *State* v. *Ortiz*, 343 Conn. 566, 603, 275 A.3d 578 (2022) ("[Although] the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Emphasis omitted; internal quotation marks omitted.) We are not persuaded that the distinction drawn by the state is a meaningful one.

Indeed, we expressed the same concerns regarding the trial court's instruction on circumstantial evidence in *State* v. *McDonough*, 205 Conn. 352, 533 A.2d 857 (1987), cert. denied, 485 U.S. 906, 108 S. Ct. 1079, 99 L.

Ed. 2d 238 (1988), which, like the instruction in the present case, also applied to facts that the state was not required to prove beyond a reasonable doubt. In *McDonough*, the trial court had instructed the jury that "[c]ircumstantial evidence involves the offering of evidence of facts from which the jury is asked to infer the existence of and so to find proven another fact or facts. Such facts may be so found proven, but only if the jury finds: one, that the fact or facts from which the jury is asked to draw the inference has been proven by a fair preponderance of the evidence; and two, that the inference asked to be drawn is not only logical and reasonable, but is strong enough so that you can find it is more probable than not that the fact you are asked to infer is true." (Internal quotation marks omitted.) Id., 354. In concluding that the challenged instruction was improper,[15] this court stated: "Although, as an abstract proposition, it is not illogical to draw an inference if the evidence establishes that it is probable, such an instruction in a criminal case may confuse a jury with respect to inferring a particular fact essential to prove an element of the crime. . . . We have disapproved of this type of instruction because of its potential for misleading a jury concerning the state's burden to prove each element of the crime beyond a reasonable doubt." (Citations omitted.) Id., 355–56.

We believe that the instruction in the present case suffers from the same infirmities as the instructions in *McDonough* and *Griffin*. Indeed, the risk of confusion is arguably greater in the present case than it was in *Griffin* because, in *Griffin*, the jury was instructed that, if two conclusions reasonably could be drawn from the evidence, one of innocence and one of guilt, it "*must* adopt the one of innocence"; (emphasis added; internal

[15] Although we found the instruction in *McDonough* to be improper, we concluded that the error was harmless beyond a reasonable doubt. See *State* v. *McDonough*, supra, 205 Conn. 361–62.

quotation marks omitted) *State* v. *Griffin*, supra, 253 Conn. 205; whereas, in the present case, the jury was instructed that it was *not* required to accept the one consistent with innocence. As we explained in *McDonough*, the problem with this type of instruction is that it introduces into the jury's deliberations a standard of proof at odds with the proof beyond a reasonable doubt standard applicable to the charged offenses. See *State* v. *McDonough*, supra, 205 Conn. 355–56. Such an instruction is also inconsistent with the principle that, if jurors "can, in reason, reconcile all of the facts proved with any reasonable theory consistent with the innocence of the accused, then [they] cannot find him guilty . . . ." (Internal quotation marks omitted.) *State* v. *Lemoine*, 256 Conn. 193, 205, 770 A.2d 491 (2001).

Going forward, therefore, trial courts should refrain from instructing jurors, as the court did in the present case, that, "[w]hen the evidence is subject to two possible interpretations, you are not required to accept the interpretation consistent with innocence . . . [and] [y]ou are also not required to accept the interpretation [that is] consistent with guilt." With respect to subsidiary facts that are not subject to the proof beyond a reasonable doubt standard, it is sufficient for the trial court simply to instruct the jury that it may find such facts proven if it is reasonable and logical to do so.

B

We next address the defendant's claim that the trial court erred when it failed to instruct the jury in accordance with instruction 2.6-11 of the Connecticut model criminal jury instructions, which provides in relevant part: "The defendant is entitled to and must be given by you a separate and independent determination of whether [he or she] is guilty or not guilty as to each of the counts. Each of the counts charged is a separate crime. The state is required to prove each element in

each count beyond a reasonable doubt. Each count must be deliberated upon separately. The total number of counts charged does not add to the strength of the state's case.

"You may find that some evidence applies to more than one count in [the] information. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity.

"You must consider each count separately and return a separate verdict for each count. This means that you may reach opposite verdicts on different counts. A decision on one count does not bind your decision on another count." (Footnote omitted.) Connecticut Criminal Jury Instructions 2.6-11, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited January 31, 2023). A footnote to instruction 2.6-11 further cautions that, "[w]hen charges involve different victims, the jury must also be instructed to separately consider the charges relating to each victim, and the evidence pertaining to each victim must be clearly distinguished." Id., n.1.

We have no doubt that the trial court would have instructed the jury in accordance with instruction 2.6-11 if defense counsel had requested the charge. See, e.g., *State* v. *Ortiz*, supra, 343 Conn. 594 ("a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored" (internal quotation marks omitted)). The state does not contend otherwise. This court has recognized the importance of such an instruction in cases in which a defendant faces multiple charges of sexual misconduct relating to multiple alleged victims. See *State* v. *Ellis*, 270 Conn. 337, 379, 852 A.2d 676 (2004). Accordingly, in cases involving multiple charges, multiple victims, or both, we strongly recommend that our trial courts

instruct jurors in accordance with instruction 2.6-11, whether asked to do so or not.[16]

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

In this opinion the other justices concurred.

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[16] We recognize that a trial court is not required to tailor its charge to the precise language of a request to charge or model jury instruction. "If a . . . charge is in substance given, the [trial] court's failure to give [the] charge in exact conformance with the words of the request [or the model instruction] will not constitute a ground for reversal." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 343 Conn. 594–95.