PAUL LAIUPPA *v.* MARY MORITZ
(SC 20798)

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

Syllabus

The plaintiff, who had sought to recover damages from the defendant for her alleged negligence in connection with a motor vehicle accident, appealed from the judgment of the Appellate Court, which upheld the trial court's granting of the defendant's motion for summary judgment and affirmed the trial court's judgment. The plaintiff claimed that the Appellate Court incorrectly concluded that the present action was not saved by the accidental failure of suit statute (§ 52-592) because his original action, which previously had been dismissed for insufficient service of process, was not commenced within the time limited by law, as required by § 52-592 (a). *Held*:

An action is "commenced" for purposes of § 52-592 (a) when a defendant has actual or effective notice that the action is pending through the defendant's receipt of the summons and complaint within the time permitted by law, even if such process was improperly served.

The plaintiff failed to establish that the defendant had actual or effective notice of the original action sufficient to commence the action for purposes of § 52-592 (a), as there was no evidence establishing that the defendant or her designated agent had received the summons and complaint within the time limited by law.

(*Two justices dissenting in one opinion*)

Argued December 13, 2023—officially released August 16, 2024*

* August 16, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, granted the defendant's motion for summary judgment and, exercising the powers of the Superior Court, rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Elgo* and *Flynn*, *Js.*, with *Cradle*, *J.*, concurring in the result, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

John L. Bonee III, with whom was *Jesse A. Mangiardi*, for the appellant (plaintiff).

Bridget M. Ciarlo, for the appellee (defendant).

Opinion

MULLINS, J. This certified appeal requires us to construe General Statutes § 52-592, the accidental failure of suit statute, in order to determine whether the plaintiff, Paul Laiuppa, commenced his underlying civil action within the time limited by law. The plaintiff appeals from the judgment of the Appellate Court, which affirmed the trial court's decision to grant the motion for summary judgment filed by the defendant, Mary Moritz, on the ground that the original action was not "commenced within the time limited by law," as required by § 52-592 (a). On appeal, the plaintiff claims that the Appellate Court incorrectly concluded that the action was not "commenced" for purposes of § 52-592 (a) on the ground that the defendant did not receive a copy of the summons and complaint within the time period prescribed by the statute of limitations. We affirm the judgment of the Appellate Court.

This case arises from a motor vehicle accident between the plaintiff and the defendant. The accident took place

on June 21, 2016. On the date of the accident, the defendant resided at the address listed on her driver's license that she presented to the police after the accident occurred—168 Turkey Hills Road in East Granby (property). Although she had continued to reside at the property for approximately eighteen months following the accident, on December 19, 2017, she became hospitalized. The defendant previously had granted Patricia A. M. Vinci the power to act on her behalf under a general power of attorney, which Vinci began exercising on December 20, 2017. Immediately following her hospitalization, the defendant moved to a nursing home facility in Windsor. Then, in January, 2018, the defendant relocated to another facility in Rhode Island; she never again resided at the property. On June 4, 2018, acting through Vinci, the defendant signed the necessary documents for the sale of the property. The sale closed on June 8, 2018, and the deed was recorded in the East Granby land records on June 11, 2018.

Several days after the deed was recorded, on June 14 or 15, 2018, the plaintiff attempted to commence a civil action (original action) against the defendant in connection with the motor vehicle accident by delivering the writ, summons and complaint to a Connecticut state marshal with direction to serve the defendant. The marshal was directed to serve the defendant at the property. Under the applicable statutes, the marshal had until no later than July 15, 2018, to effect service of process on the defendant.[1] Unbeknownst to the plaintiff

[1] General Statutes (Rev. to 2015) § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ." Therefore, under that statute, the plaintiff's cause of action accrued on June 21, 2016, the date of the accident. As a result, the original action had to be brought by June 21, 2018, which would be within two years of the injury.

However, the marshal, during his deposition, indicated that the plaintiff's attorney had delivered the process to him prior to that date, on either June

and his attorney, however, the defendant no longer resided at the property.

Nevertheless, on June 18, 2018, the marshal left a copy of the summons and complaint at the property. The property appeared to be inhabited, and there were no obvious signs that it had been abandoned or recently sold. At that time, the website of the assessor's office for the town of East Granby still listed the defendant as the owner of the property, and the property was the defendant's last known address on file with the Department of Motor Vehicles. Thereafter, the plaintiff's attorney filed the summons and complaint with the Superior Court.

At some point prior to July 3, 2018, the plaintiff's attorney notified the defendant's automobile insurance company about the pending action and forwarded the insurance company a copy of the summons and complaint.[2] On July 3, 2018, an attorney appointed by the defendant's automobile insurance company filed an

14 or 15, 2018. Even if we assume that process was delivered to the marshal on the later date, under General Statutes § 52-593a (a), the marshal had until July 15, 2018, to effect service of process on the defendant. See General Statutes § 52-593a (a) ("a cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery"). Correspondingly, so long as the defendant received actual notice of the original action by July 15, 2018, the plaintiff would have commenced the action within the time permitted by law. See, e.g., *Dorry* v. *Garden*, 313 Conn. 516, 534, 98 A.3d 55 (2014) ("if a defendant has actual notice within the thirty days in § 52-593a for a marshal to make service, the savings statute would operate to save the claim").

[2] The plaintiff submitted an affidavit of David Nielsen, who was employed by the law firm that represented the plaintiff to work on the plaintiff's personal injury file. Nielsen averred that he communicated with a representative from the defendant's automobile insurance company and that, sometime after he prepared the summons and complaint and sent those documents to the marshal for service, he sent a courtesy copy of the summons and complaint to the insurance company representative. Nielsen did not indicate the date on which he sent a copy of the summons and complaint to the

appearance on the defendant's behalf. Thereafter, the defendant's attorney filed interrogatories, requests for production of documents, and a motion for permission to file supplemental discovery.

Vinci first learned of the matter on July 13, 2018, by way of a letter dated July 5, 2018, sent by the defendant's automobile insurance carrier. Vinci averred that the letter "pertained to the [automobile] insurance carrier's reservation of rights with respect to one of the claims made against . . . the defendant. . . . A copy of the summons and complaint was not enclosed with the letter dated July 5, 2018." The reservation of rights letter was not submitted in connection with the summary judgment motion or the opposition and is not, therefore, in the record before us. Vinci did not receive a copy of the summons and complaint until July 17, 2018, which was at least two days beyond the time permitted by law. See footnote 1 of this opinion.

The defendant filed a motion to dismiss the complaint on the ground that the service of process was not sufficient and, therefore, that the trial court lacked personal jurisdiction over her. More specifically, the defendant claimed that the attempted abode service by the marshal on June 18, 2018, was defective because the defendant did not reside at the property on that date and she never received a copy of the summons and complaint. The trial court granted the defendant's motion to dismiss, concluding that the plaintiff's attempted abode service was legally defective because the defendant was no longer residing at the property at the time service was attempted.[3]

insurance company. But, because an attorney appointed by the defendant's automobile insurance company signed an appearance form on behalf of the defendant on July 2, 2018, the insurance company must have been notified of the complaint in the original action on or before that date.

[3] The plaintiff did not appeal from the judgment dismissing the original action. Therefore, the propriety of the trial court's decision on the motion to dismiss is not before this court.

The plaintiff then filed the present action pursuant to § 52-592. The defendant filed an answer and a special defense in response, and, in her special defense, she asserted that the plaintiff's action was barred by the statute of limitations in General Statutes (Rev. to 2015) § 52-584. Thereafter, the defendant filed a motion for summary judgment. In that motion, the defendant asserted that there was no genuine issue of material fact regarding the fact that the plaintiff's original action was not "commenced within the time limited by law" for purposes of § 52-592 (a). Ultimately, the trial court concluded that the "undisputed facts [show] . . . that the defendant [and Vinci] did not receive effective, timely notice of the plaintiff's underlying [action]."

The trial court further found that "the defendant did not have actual notice within thirty days of delivery of the writ, summons and complaint to the marshal. In the reply to the plaintiff's objection to the motion for summary judgment, the defendant included the deposition of the marshal who attempted service in the original action. The marshal stated [that] he received the writ, summons and complaint on June 14 or 15, 2018. . . . General Statutes § 52-593a grants a marshal thirty days to make service if process is delivered to the marshal within the statute of limitations. . . . The uncontested facts show that [Vinci] received a copy of the summons and complaint on July 17, 2018, which is outside the thirty days granted by § 52-593a. Without deciding whether notice to [an agent] is effective [on] the principal, [the trial court concluded that] the notice in the [original] action was not sufficient to commence [that] action within the meaning of § 52-592." (Citation omitted; footnote omitted.) Accordingly, the trial court granted the defendant's motion for summary judgment and rendered judgment for the defendant.[4]

[4] The trial court initially denied the defendant's motion for summary judgment on the basis that there was a genuine issue of material fact as to whether the defendant had received actual and timely notice and was "on

The plaintiff appealed from the judgment of the trial court to the Appellate Court. On appeal, the plaintiff claimed that the trial court incorrectly had concluded that no "genuine issue of material fact exist[ed] as to whether the first action was 'commenced within the time limited by law,' as required by § 52-592 [a]."[5] *Laiuppa* v. *Moritz*, 216 Conn. App. 344, 355, 285 A.3d 391 (2022). Relying on a recent decision, *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 852, 277 A.3d 200 (2022), a majority of the Appellate Court explained that "[t]he critical question, then, is whether the plaintiff in the present case provided the court with any evidence to demonstrate the existence of a genuine issue of material fact as to whether the defendant had actual or effective notice of the original action by way of receipt of the summons and complaint within the applicable limitation period." (Internal quotation marks omitted.) *Laiuppa* v. *Moritz*, supra, 365.

The Appellate Court majority then reasoned that, because the plaintiff failed to provide any evidence that the defendant herself or Vinci had received a copy of the summons and complaint within the time limited by law, there was no genuine issue of material fact as to whether the defendant had actual or effective notice for purposes of § 52-592.[6] See id., 365–73. Accordingly,

notice of the plaintiff's [original] action" because Vinci "learned of [that action] no later than July 13, 2018." The defendant filed a motion to reargue. After hearing argument from both parties, the trial court granted the motion to reargue, vacated its prior ruling, and granted the defendant's motion for summary judgment. Relying on case law, the trial court concluded that the defendant did not receive timely notice of the complaint because Vinci did not receive a copy of the summons and complaint until at least two days after the time limited by law.

[5] On appeal to the Appellate Court, "[t]he plaintiff also claim[ed] that the [trial] court [had] abused its discretion in granting the defendant's motion to reargue." *Laiuppa* v. *Moritz*, 216 Conn. App. 344, 373, 285 A.3d 391 (2022). The Appellate Court concluded that the trial court had not abused its discretion in granting the motion to reargue. Id., 373, 375–76. That issue is not before us.

[6] For purposes of its analysis, the Appellate Court assumed, without deciding, that "notice provided to a defendant's attorney-in-fact may be imputed

the Appellate Court affirmed the judgment of the trial court. See id., 347, 376. Judge Cradle concurred, concluding that she disagreed with such a narrow interpretation of the statute and that receipt of the summons and complaint should not be the exclusive means by which an action may be commenced for purposes of § 52-592. See id., 378 (*Cradle, J.*, concurring in the result).

The plaintiff filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that the plaintiff's failed action did not come within . . . § 52-592 because it was never 'commenced' within the meaning of that statute?" *Laiuppa* v. *Moritz*, 346 Conn. 906, 288 A.3d 628 (2023). Our resolution of this question requires us to ascertain what the legislature intended by using the term "commenced" in § 52-592 (a).

The following legal principles and background are useful in the resolution of this appeal. "When we are called [on] to construe a statute that is implicated by a summary judgment motion, our review is plenary. . . . In determining the meaning of a statute, we look first to the text of the statute and its relationship to other statutes. General Statutes § 1-2z. If the text of the statute is not plain and unambiguous, we may consider extratextual sources of information such as the statute's legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . . Our fundamental objective is to ascertain the legislature's intent." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 181–82, 177 A.3d 1128 (2018).

to the defendant so as to constitute the commencement of an action pursuant to § 52-592." *Laiuppa* v. *Moritz*, supra, 216 Conn. App. 366 n.15.

Section 52-592, known as the savings statute, "is designed to [e]nsure to the diligent suitor the right to a hearing in court [until] he [or she] reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his [or her] adversary of a present purpose to maintain [the litigant's] rights before the courts." (Internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 733, 557 A.2d 116 (1989). "It is well established that the purpose of § 52-592 (a) is to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his [or her] day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case [in which] it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy [when] that can be brought about with due regard to necessary rules of procedure." (Internal quotation marks omitted.) *Larmel* v. *Metro North Commuter Railroad Co.*, 341 Conn. 332, 345, 267 A.3d 162 (2021), quoting *Rocco* v. *Garrison*, 268 Conn. 541, 558, 848 A.2d 352 (2004). "[T]he savings statute is remedial in nature . . . [and therefore] must be afforded a liberal construction in favor of those whom the legislature intended to benefit . . . ." (Citation omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 530, 98 A.3d 55 (2014).

Section 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction . . . the plaintiff

. . . may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

In construing the phrase "commenced within the time limited by law" in § 52-592 (a), we do not write on a clean slate. This court's prior decisions in *Rocco* v. *Garrison*, supra, 268 Conn. 541, and *Dorry* v. *Garden*, supra, 313 Conn. 516, are instructive with respect to the present analysis.

First, in *Rocco*, this court considered whether an action was commenced in a timely manner for purposes of the savings statute. See *Rocco* v. *Garrison*, supra, 268 Conn. 547. *Rocco* involved a motor vehicle accident in which the defendant was a resident of Pennsylvania. Id., 544. The plaintiffs' counsel attempted service under what is now rule 4 (d) (1) of the Federal Rules of Civil Procedure, which is intended to encourage parties to waive formal service of process to save costs. Id., 545–46. The plaintiffs' counsel followed the procedure and sent each of the items required under that federal rule, including the summons and complaint, via certified mail to the defendant's home address and received a return receipt from the United States Postal Service indicating that the items were delivered to the defendant's home address four days before the expiration of the applicable statute of limitations. Id., 546. The defendant did not sign and return the waiver of service form, and the statute of limitations expired before the plaintiffs' counsel could effect formal service of process. Id. The defendant then filed a motion for summary judgment in the plaintiffs' original federal action, which was granted because formal service of process was not made on the defendant during the two year period prescribed by the statute of limitations. Id.

The plaintiffs then commenced a second action in the Superior Court pursuant to § 52-592. Id. The defendant

filed a motion for summary judgment, claiming that "the plaintiffs' federal action had not been commenced within the meaning of the savings statute due to a lack of proper service" and, therefore, that "the plaintiffs' second action was barred by the statute of limitations." Id., 547. The trial court granted the defendant's motion. Id.

On appeal, the plaintiffs asserted that their original federal action was commenced in a timely manner for purposes of § 52-592 because the defendant received clear and unmistakable notice of that action when the summons, complaint and related materials were delivered via certified mail to her home address. Id. The defendant, on the other hand, asserted that an action is not commenced if a defendant is not served properly. See id., 547–48.

This court rejected the defendant's argument, concluding that "[t]he defendant's interpretation of § 52-592 would render a key portion of that statute meaningless. If the savings statute requires effective commencement of the original action, and commencement requires valid service of process, as the defendant argue[d], then any failure of service of process would require us to conclude that no action had been commenced and that the statute does not apply. This would render superfluous one of the principal purposes of the savings statute, namely, to save those actions that have failed due to insufficient service of process. Moreover, the language of § 52-592 distinguishes between the commencement of an action and insufficient service of process by providing that the action may fail following its commencement because of insufficient service. To accept the view that improper or insufficient service defeats such an action would undermine the statute's clear and unambiguous meaning and preclude the filing of a second action. We therefore conclude that the term 'commenced,' as used in § 52-592 [a] to describe an initial

action that 'has failed . . . to be tried on its merits because of insufficient service' . . . cannot be construed to mean good, complete and sufficient service of process, as the defendant contend[ed]." (Citation omitted; emphasis omitted.) Id., 550–51.

This court further reasoned that "[a] review of the record . . . disclose[d] that, although the plaintiffs' counsel did not serve a formal summons [on] the defendant within the time period prescribed by the applicable statute of limitations, all of the requirements of [the applicable federal rule of civil procedure] were satisfied and all of the necessary papers to obtain a waiver of formal service were delivered to the defendant. That the defendant failed to sign and return the waiver [did] not detract from the fact that the plaintiffs' original [federal] action was 'commenced,' for purposes of the savings statute, when the defendant received actual notice of the action within the time period prescribed by the statute of limitations. Thus, in our view, although the original [federal] action was not commenced in a timely manner under the applicable statute of limitations due to insufficient service of process, it nevertheless was commenced for purposes of the savings statute." Id., 552–53.

This court's analysis in *Rocco* demonstrates that the phrase "commenced within the time limited by law" in § 52-592 (a) cannot mean effectuating proper service, or else the statute would be rendered useless. Instead, this court explained that "effective notice" to a defendant is sufficient. Id., 551.

In *Dorry*, this court had another opportunity to construe § 52-592. That case involved a wrongful death action; *Dorry* v. *Garden*, supra, 313 Conn. 518; and, in that case, "the plaintiff sent a writ, summons and complaint to a marshal by overnight delivery and requested that the defendants be served in hand." Id., 520. Although

the marshal indicated on the return of service that each defendant was served " 'in hand,' " the marshal actually left copies of the writ, summons and complaint in the offices of the defendants. Id. The trial court dismissed the first action, and, thereafter, the plaintiff commenced a second action pursuant to § 52-592. Id. The defendants then filed motions to dismiss, which the trial court granted on the basis that the first action was not " 'commenced within the time limited by law,' " as required by § 52-592 (a). Id., 524; see id., 520–21.

Relying on *Rocco*, this court explained that " 'effective notice' " of the original action is sufficient to commence the action for purposes of § 52-592; id., 528; and concluded that two of the defendants had received effective notice within the time period prescribed by the statute of limitations. See id., 530. Specifically, this court explained that those defendants "became aware of the first action and received a copy of the writ, summons and complaint . . . within the statute of limitations." Id., 529.

On appeal to this court, the plaintiff in the present case asserts that the Appellate Court incorrectly interpreted *Dorry* and *Rocco* to require receipt of the writ, summons and complaint within the statute of limitations in order for the action to be "commenced within the time limited by law" for purposes of § 52-592 (a). Instead, the plaintiff asserts that § 52-592 operates to save an action in which a good faith attempt at service of process has been made within the limitation period.

We cannot agree that the savings statute operates to save any action in which a good faith attempt at service of process has been made. Such a reading of § 52-592 and our case law would effectively eliminate any requirement that the action be "commenced," which, for purposes of § 52-592 (a), we have stated, means that the defendant must have actual or effective notice of the action against him or her. See *Dorry* v. *Garden*, supra,

313 Conn. 528–30; *Rocco* v. *Garrison*, supra, 268 Conn. 551–52. Not only did both *Dorry* and *Rocco* rely on the fact that the defendant or the defendants had actual or effective notice, the importance of this requirement for the fair administration of our justice system cannot be questioned. As this court has explained, the "chief purpose [of service of process] is to ensure actual notice to the defendant that the action is pending." *Smith* v. *Smith*, 150 Conn. 15, 20, 183 A.2d 848 (1962). Although we acknowledge that the savings statute is remedial and should be broadly construed to effectuate its purpose; see, e.g., *Dorry* v. *Garden*, supra, 530; we cannot read it in such a way as to ignore the importance of providing notice to a defendant regarding an action brought against him or her.

A review of our case law demonstrates that we have construed the term "commenced" in § 52-592 (a) to mean actual or effective notice to a defendant that an action is pending through receipt of the summons and complaint. See *Dorry* v. *Garden*, supra, 313 Conn. 528–30; *Rocco* v. *Garrison*, supra, 268 Conn. 551–52. We take this opportunity to clarify what may not have been clear in *Dorry* and *Rocco*, namely, that receipt of the summons and complaint by the defendant *is required* in order for the action to have been "commenced" under § 52-592 (a). It does not matter that the summons and complaint were improperly served for purposes of the savings statute; it matters only that the defendant received those documents within the time permitted by law, even if they were received through improper means.

In the present case, the plaintiff has failed to establish an evidentiary basis to demonstrate that there was a genuine issue of material fact as to whether he was entitled to invoke § 52-592 (a). Specifically, the plaintiff has not established that he had commenced the original action by giving the defendant a copy of the summons

and complaint within the time limited by law, specifically, by July 15, 2018. See footnote 1 of this opinion. First, it is undisputed that the marshal's attempt at abode service was not sufficient because, at that time, the defendant no longer owned or resided at the property, and there was no evidence that she nevertheless received the documents. Second, the plaintiff failed to establish that Vinci had received a copy of the summons and complaint during the time permitted by law. Instead, Vinci submitted two affidavits in which she averred that she did not receive a copy of the summons and complaint until July 17, 2018, which was at least two days after the statute of limitations had expired.

Although Vinci initially learned of the original action on July 13, 2018, which was within the limitation period, through a reservation of rights letter sent by the defendant's insurance carrier, the letter was never submitted as an exhibit and is not part of the court file. Thus, we know only what Vinci averred about the letter. In her affidavit, Vinci averred that the reservation of rights letter "pertained to the [automobile] insurance carrier's reservation of rights with respect to one of the claims made against . . . the defendant" and that "[a] copy of the summons and complaint was not enclosed with the letter . . . ." Thus, on this record, Vinci's receipt of the reservation of rights letter on July 13, 2018, without a copy of the summons and complaint, did not serve to commence the original action.

We conclude that receipt of a summons and complaint by a defendant within the time period required by law, regardless of the manner of receipt, is necessary to commence an action for purposes of § 52-592. In other words, through receipt of the summons and complaint, the defendant not only knows of the existence of the action, but also knows the identity of the parties, the nature of the claims brought against him or her, and the court in which the claims are being brought,

so that the defendant can protect his or her rights and defend the action. Without evidence establishing that the defendant herself had received the summons and complaint within the time limited by law, we cannot conclude that the plaintiff established that the defendant had notice of the original action sufficient to commence the action for purposes of § 52-592.[7]

The judgment of the Appellate Court is affirmed.

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

ECKER, J., with whom D'AURIA, J., joins, dissenting. I would join the majority opinion but for one stubborn fact, which is that lawyers for the defendant, Mary Moritz, entered an appearance on her behalf in the original action on July 3, 2018, eleven days before the expiration of the statute of limitations. In my view, the appearance of the defendant through counsel unequivocally establishes that the defendant received actual or effective notice of the claim, in all its particulars, to bring the case within the scope of our savings statute, General Statutes § 52-592, in accordance with *Rocco* v. *Garrison*, 268 Conn. 541, 550–53, 558, 848 A.2d 352 (2004), and *Dorry* v. *Garden*, 313 Conn. 516, 526–530,

[7] The dissent concludes that the original action was commenced because the attorney hired by the defendant's automobile insurance company had entered an appearance on behalf of the defendant within the time limited by law, and the attorney is an agent of the defendant, so the attorney's knowledge should be attributed to the defendant. We disagree. As we explained herein, we conclude that § 52-592 requires that the defendant himself or herself receive a copy of the summons and complaint within the time limited by law. The plaintiff has failed to present any evidence that the defendant had received a copy of the summons and complaint from her attorney or otherwise during the time limited by law. Even if we were to agree with the dissent that the knowledge of the defendant's attorney about the original action can be imputed to the defendant, that is not enough because there is no evidence that the defendant received a copy of the summons and complaint, which we conclude is necessary to commence an action. Therefore, the original action was not "commenced" for purposes of § 52-592 (a).

534–35, 98 A.3d 55 (2014). See *Laiuppa* v. *Moritz*, 216 Conn. App. 344, 377–79, 285 A.3d 391 (2022) (*Cradle*, *J.*, concurring in the result) (construing *Rocco* and *Dorry* to support conclusion that defendant in this case received actual or effective notice in original action).

This conclusion rests on three things that we know with absolute certainty. First, we know as a matter of fact that the defendant appeared in the original action eleven days before the statute of limitations lapsed when her lawyers filed an appearance on her behalf.[1] It is important to understand that the lawyers appeared on behalf of *the defendant*, not on behalf of her insurance company. Her lawyers owed the *defendant* an undivided and exclusive duty of loyalty; the fact that they may have been appointed or paid by the insurer has no bearing on the nature or extent of their agency relationship with the defendant or their ethical or professional duties to her. See, e.g., *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 61, 730 A.2d 51 (1999) ("we have long held that *even* when an insurer retains an attorney in order to defend a suit against an insured, the attorney's only allegiance is to the client, the insured" (emphasis in original)); *Higgins* v. *Karp*, 239 Conn. 802, 810, 687 A.2d 539 (1997) ("even when an attorney is compensated or expects to be compensated by a liability insurer, his or her duty of loyalty and representation nonetheless remains exclusively with the insured").[2]

[1] The appearance was a firm appearance, filed by the law firm of Nuzzo & Roberts, LLC. A firm appearance allows any lawyer in the law firm to represent the client in connection with any particular event or proceeding relating to the case. The firm appearance in this matter was signed by Attorney Bridget McCormack Ciarlo, who signed most, if not all, of the motions and other written court filings on behalf of the defendant in the original action. The record discloses that at least one other lawyer from the firm also played a significant role in representing the defendant in the original action.

[2] It is irrelevant for present purposes that the insurance company had notified the defendant that it was providing a defense while reserving its rights, to an unknown extent, to contest its contractual obligation to indem-

The second thing we know with certainty is a point of law: when the subject matter of the information learned by an agent is within the scope of the agency, notice to the agent (here, the defendant's lawyers) is notice to the principal (here, the defendant, who is the client). The lawyers who appeared on behalf of the defendant indisputably had notice and knowledge of the entire contents of the complaint, in all of its particulars. That notice and knowledge is chargeable to the defendant as a matter of law. "[G]enerally, notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal." (Internal quotation marks omitted.) *E. Udolf, Inc.* v. *Aetna Casualty & Surety Co.*, 214 Conn. 741, 745–46, 573 A.2d 1211 (1990). "As stated in the Restatement (Second) of Agency . . . 'a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or [on] which it is his duty to give the principal information.' " Id., 746, quoting 1 Restatement (Second), Agency § 272, p. 591 (1958); see *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 634, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) ("[in] our system of representative litigation . . . each party . . . is considered to have notice of all facts, notice of which can be charged [on] the [party's] attorney" (internal quotation marks omitted)).

This fundamental principle of agency law applies with full force to attorneys and their clients; indeed, it operates with greater force in the attorney-client context to the extent that an attorney is charged by the profes-

nify her for any loss. The issue on appeal is whether the defendant was given actual or effective notice of the original action, not whether the insurance company might ultimately contest its duty to indemnify her. The insurer's reservation of rights did not limit the scope or nature of the agency relationship between the lawyers and the defendant in the original action or the duties that the defendant's lawyers owed to her in connection with the original action.

sional rules of ethics with a mandatory, affirmative obligation to keep the client reasonably informed about the matter. See, e.g., Rules of Professional Conduct 1.4 (requiring lawyer to inform and consult with client regarding matters within the scope of representation); see also 1 Restatement (Third), The Law Governing Lawyers § 28 and comment (b), pp. 207–209 (2000) (explicating general rule that knowledge of attorney is attributed to client).[3]

The third thing we know, finally, is an important principle of statutory construction that the majority acknowledges is applicable to this case but then proceeds to disregard. I will quote the principle precisely as described by the majority: "Section 52-592, known as the savings statute, is designed to [e]nsure to the diligent suitor the right to a hearing in court [until] he [or she] reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his [or her] adversary of a present purpose to maintain [the litigant's] rights before the courts. . . . *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 733, 557 A.2d 116 (1989). It is well established that the purpose of § 52-592 (a) is to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his [or her] day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case [in which] it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Our practice does not favor the termination of proceed-

[3] It would violate our ethics rules for an attorney to appear in a case on behalf of a putative client without authorization, and no allegation has ever been made that the lawyers appeared on the defendant's behalf without authority to do so. Indeed, the defendant is still represented on appeal by the same lawyers who originally appeared on her behalf in the original action on July 3, 2018.

ings without a determination of the merits of the controversy [when] that can be brought about with due regard to necessary rules of procedure. . . . *Larmel* v. *Metro North Commuter Railroad Co.*, 341 Conn. 332, 345, 267 A.3d 162 (2021), quoting *Rocco* v. *Garrison*, [supra, 268 Conn. 558]. [T]he savings statute is remedial in nature . . . [and therefore] must be afforded a liberal construction in favor of those whom the legislature intended to benefit . . . . *Dorry* v. *Garden*, [supra, 313 Conn. 530]." (Internal quotation marks omitted.)

In combination, these three points explain why the lawsuit filed by the plaintiff, Paul Laiuppa, comes within the scope of § 52-592. The defendant in the present case is charged as a matter of law with having notice and knowledge of the plaintiff's claims against her no later than July 3, 2018, when she appeared through counsel in the original action nearly two weeks before the statute of limitations lapsed. This state of affairs satisfied the requirement of actual or effective notice that brings the case within the scope of § 52-592 under the standard articulated by this court in *Rocco* v. *Garrison*, supra, 268 Conn. 550–53, and *Dorry* v. *Garden*, supra, 313 Conn. 526–30. See *Isaac* v. *Mount Sinai Hospital*, supra, 210 Conn. 733 ("[t]he important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts" (internal quotation marks omitted)). This is true because the only purpose of such notice is to safeguard and enforce the requirement in § 52-592 (a) that the original action be "commenced within the time limited by law . . . ." The lawyers' appearance on behalf of the defendant in the original action demonstrates definitively that the purpose of the statute of limitations had been met in this case: the defendant had a law firm acting on her behalf, on a timely basis, to vigorously represent her interests in the lawsuit by gathering all available evidence and pre-

senting all legal defenses to defeat the claims alleged in the complaint. "A plaintiff's timely filed action provides notice to the defendant and ensures that the defendant does not find itself in a situation [in which], because of the lapse of time, [the defendant] is unable to gather facts, evidence, and witnesses necessary to afford . . . a fair defense. . . . Statutes of limitations also allow persons, after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability . . . ." (Citations omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 768–69, 104 A.3d 713 (2014).

The majority has no persuasive response to these points. Instead, it relies on pronouncements, unaccompanied by explanation or justification, requiring the defendant's personal, physical receipt of the actual writ, summons, and complaint as necessary to satisfy the actual or effective notice requirement of *Rocco* and *Dorry* when there has been insufficient service of process. The question we must ask is where the majority finds its requirement that a case has not been "commenced" under § 52-592 (a) and, therefore, does not come within its scope, unless and until the legal process is physically delivered into the defendant's actual (not constructive) possession. The statute itself says nothing of the kind. To the contrary, it expressly provides that it applies when there has been "insufficient service" of process, a defect that often, though not always, will result in no physical delivery of the process to the defendant. General Statutes § 52-592 (a). Our case law on the subject, although providing no definitive answer to the question presented in this case, clearly teaches that actual or effective notice—not compliance with the statutes governing service of process—is the critical consideration that determines whether a lawsuit falls

within the scope of § 52-592. Again, these cases hold that a lawsuit is "commenced" for purposes of § 52-592 (a) if the defendant received actual or effective notice of all material information contained in the writ, summons, and complaint. See *Dorry* v. *Garden*, supra, 313 Conn. 526–30, 534–35; *Rocco* v. *Garrison*, supra, 268 Conn. 550–53, 558. As Judge Cradle aptly observed in her concurring opinion in the Appellate Court, "[i]n neither [*Rocco* nor *Dorry*] . . . did [this] court hold that the receipt of a copy of the summons and complaint was *required* to commence an action pursuant to the savings statute. In other words, although [this court's] decisions in *Rocco* and *Dorry* hold that actual notice by way of receipt of a copy of the summons and complaint is *sufficient* to commence an action within the meaning of § 52-592, neither case establishes that [the] receipt of the summons and complaint is the *exclusive* manner by which an action may commence under the statute." (Emphasis in original.) *Laiuppa* v. *Moritz*, supra, 216 Conn. App. 377–78 (*Cradle*, *J.*, concurring in the result).

The majority misconstrues *Rocco* and *Dorry* as holding that actual or effective notice requires actual notice in the form of the defendant's personal receipt of the writ, summons, and complaint. Neither case imposes such a requirement. The issue in both *Rocco* and *Dorry* was not whether notice by way of actual, physical receipt was *required* to trigger application of the savings statute but whether such notice was *sufficient* to do so. Those cases unsurprisingly hold that actual receipt provides actual or effective notice and, therefore, is sufficient to trigger application of § 52-592. A sufficient condition, however, is not the same as a necessary condition, and neither *Rocco* nor *Dorry* goes beyond concluding that actual receipt of legal process was sufficient to bring the case within the scope of the savings statute. If the majority in the present case

chooses to impose an actual receipt requirement, then it has the corresponding obligation to justify that holding. Our precedent does not carry that load.

The sole explanation the majority provides to justify its holding is its observation that, "through receipt of the summons and complaint, the defendant not only knows of the existence of the action, but also knows the identity of the parties, the nature of the claims against him or her, and the court in which the claims are being brought, so that the defendant can protect his or her rights and defend the action." This assertion demonstrates with remarkable precision why the majority reaches the wrong conclusion in the present case. As the majority acknowledges, the fundamental purpose of the notice requirement under § 52-592 is to provide the defendant with the necessary information, within the limitation period, "so that the defendant can protect his or her rights and defend the action." See, e.g., *Isaac* v. *Mount Sinai Hospital*, supra, 210 Conn. 733. The facts of the present case demonstrate conclusively that physical receipt of the writ, summons, and complaint is not the only means by which a defendant can obtain all of the information necessary to investigate the claims and to mount an effective defense on a timely basis. Even without the defendant's physical receipt of process, her lawyers filed appearances and began actively representing her interests in the original lawsuit weeks before the expiration of the statute of limitations. Notice also may be effective, for example, if the defendant is informed of the pendency of an action and provided with sufficient information to permit the investigation of the claims and the preparation of a defense. See, e.g., *Weinstein & Wisser, P.C.* v. *Cornelius*, Docket No. HHD-CV-15-6058159, 2015 WL 6558462, *6 (Conn. Super. October 7, 2015) (concluding that defendant had effective notice of action under § 52-592 "because he had notice of the judgment liens, went to the Superior Court

to make inquiry, had access to the court files, and knew enough to secure a copy of the return of service to initiate what was ultimately the successful process of dismissing the case against him").

Investigating claims and preparing a defense are exactly what defense lawyers do for their clients, which is why I would conclude on this record that the official appearance of counsel for the defendant in the original action nearly two weeks before the expiration of the statute of limitations demonstrated that the defendant was provided with effective notice of that lawsuit and, therefore, that the original action was timely "commenced" within the meaning of § 52-592 (a). The goal of the savings statute is not to enforce the technical requirements of Connecticut law governing service of process, but to make certain that a plaintiff whose original action would have been timely but for certain procedural or jurisdictional defects (including insufficient service of process) will nonetheless have a chance to reinstitute the lawsuit so that it can be decided on the merits. See, e.g., *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 49, 12 A.3d 885 (2011) ("[T]he accidental failure of suit statute, now codified [at] § 52-592, originally was enacted in 1862; Public Acts 1862, c. 14; see *Baker* v. *Baningoso*, 134 Conn. 382, 386, 58 A.2d 5 (1948); to avoid the hardships arising from an unbending enforcement of limitation statutes. . . . Although there is no relevant printed legislative history about § 52-592 due to its age . . . it is well established in our long line of case law interpreting the statute in other contexts that § 52-592 (a) is remedial and is to be liberally interpreted." (Citations omitted; internal quotation marks omitted.)).

Lest there be any misunderstanding, none of the foregoing means that a lawyer is a client's agent for purposes of service of process, and nothing I say herein is inconsistent with the well established principle that,

unless authorized by statute or consent, or waived by words or conduct, service of process on a party's attorney is defective. See, e.g., *Sodhi* v. *Nationwide Mutual Ins.*, Docket No. CV-96-0564554, 1998 WL 161166, *1 (Conn. Super. March 10, 1998) ("[i]n general . . . an attorney is not authorized by general principles of agency to accept service of original process [on] behalf of a client" (internal quotation marks omitted)), quoting *George* v. *Delpo*, Superior Court, judicial district of Waterbury, Docket No. CV-94-0124137 (January 2, 1997) (18 Conn. L. Rptr. 519, 519). Likewise, nothing in this opinion challenges the well established principle that the appearance of counsel does not waive a party's right to challenge the court's personal jurisdiction. See, e.g., *Pitchell* v. *Hartford*, 247 Conn. 422, 432, 722 A.2d 797 (1999) ("the filing of an appearance on behalf of a party, in and of itself, does not waive that party's personal jurisdiction claims" (footnote omitted)). The defendant moved to dismiss the original action for insufficient service of process, and the motion was granted, as it should have been. My point here is simply that dismissal of a lawsuit on procedural or even jurisdictional grounds in no way renders the case ineligible for resurrection under the savings statute.

Simply put, the issue before us does not ask us to inquire about the sufficiency of service of process necessary to commence an action under general principles of Connecticut law, or whether a lawyer may appear on a client's behalf to seek dismissal of the complaint for insufficient service of process depriving the court of personal jurisdiction over a defendant, or whether a plaintiff may effectively serve the defendant's lawyer with legal process. Instead, the issue that must be decided in the present case is whether, *on this record*, the defendant had actual or effective notice of the plaintiff's original action such that the action was "commenced" under § 52-592 (a). This involves a very

different inquiry. See *Dorry* v. *Garden*, supra, 313 Conn. 529 ("in *Rocco*, this court recognized that the phrase 'commenced within the time limited by law' [in § 52-592 (a)] cannot mean effectuating proper service, and that effective notice to a defendant is sufficient"); *Rocco* v. *Garrison*, supra, 268 Conn. 550 ("If the savings statute requires effective commencement of the original action, and commencement requires valid service of process . . . then any failure of service of process would require us to conclude that no action had been commenced and that the statute does not apply. This would render superfluous one of the principal purposes of the savings statute, namely, to save those actions that have failed due to insufficient service of process.").[4]

A case should be decided in light of its particular facts. As a general proposition, a plaintiff may have difficulty proving that a defendant had effective notice sufficient to satisfy the requirements of § 52-592 without evidence of physical receipt of the writ, summons, and complaint. But it is extremely difficult for me to understand how it is possible to say that the defendant in the present case did not have effective notice of the original action when her lawyers appeared on her behalf and participated in the litigation that resulted in its dismissal. The defendant suffered no actual or even possible prejudice as a result of the defective service. To the contrary, the only difference that improper service made is that the

[4] Moreover, the present case involves more than mere notice to the defendant's counsel of the existence or contents of a writ, summons, and complaint. Counsel for the defendant actually appeared on behalf of the defendant in the original lawsuit and actively began litigating the case by filing, and obtaining a ruling on, a motion for permission to file supplemental discovery. The facts of the case therefore do not require us to decide whether the client receives effective notice of the lawsuit for purposes of § 52-592 when the lawyer receives, formally or informally, a copy of the writ, summons, and complaint but does not appear in the lawsuit on the client's behalf. Nor does this case involve any claim that the plaintiff failed to make a good faith effort in the original action to serve the defendant in accordance with law.

case was dismissed on that ground instead of proceeding to an adjudication on the merits. That point, in my view, perfectly describes why the case comes squarely within the scope of § 52-592.

I respectfully dissent.

STATE OF CONNECTICUT *v.* LONNIE MEBANE (SC 20750)

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

Syllabus

Convicted of murder, criminal possession of a pistol or revolver, and carrying a pistol or revolver without a permit, the defendant appealed to this court. The defendant claimed, inter alia, that the trial court had violated his due process right to a fair trial by asking certain witnesses questions that favored the state and prejudiced him, and that the trial court had improperly instructed the jury on the presumption of innocence and his presence at the scene of the crime. *Held*:

The defendant failed to prove the existence of a constitutional violation in connection with the trial court's questioning of certain witnesses in an allegedly partisan manner, as that questioning was not so extensive, substantial, or adverse so as to impair the proper functioning of the jury or to call into question the impartiality of the trial judge.

The evidence was sufficient to support the defendant's murder conviction, as the jury could reasonably have found that the defendant had the conscious objective to cause the victim's death.

The defendant waived his unpreserved claims of instructional error, as defense counsel had a meaningful opportunity to review the jury instructions, the trial court solicited comments from counsel regarding changes or modifications, and defense counsel did not request any such changes or modifications but, rather, affirmatively accepted the challenged instructions on two occasions.

The challenged jury instructions were not so clearly, obviously, or indisputably erroneous as to require reversal of the defendant's conviction under the plain error doctrine.

(*One justice dissenting in part*)

Argued December 20, 2023—officially released August 20, 2024*

* August 20, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

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

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

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, *Colleen P. Zingaro*, supervisory assistant state's attorney, and *Edward Miller*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. Following a jury trial, the defendant, Lonnie Mebane, was convicted of murder, criminal possession of a pistol or revolver, and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, Eric Diaz. In this direct appeal,[1] the defendant raises the following claims: (1) the trial court violated his due process right to a fair trial by asking three witnesses questions that favored the state and prejudiced the defendant, (2) the evidence was insufficient to support a reasonable inference that the defendant had the specific intent to kill the victim, and (3) the trial court improperly instructed the jury on the presumption of innocence and the defendant's presence at the scene of the crime. We affirm the judgment.

[1] See General Statutes § 51-199 (b) (3).

The jury reasonably could have found the following facts. The victim, who was nineteen years old, was selling drugs at the intersection of Newfield Avenue and Beardsley Street in Bridgeport on the night of September 14, 2017. Shortly before 10 p.m., the victim was approached by a medium sized Black man, who had a mole on his cheek and was wearing a bucket hat. The victim followed the man to a black sedan parked nearby. Both the victim and the man entered the car, and, shortly afterward, a fight ensued, during which the victim was shot once in the abdomen. The victim stumbled out of the car and collapsed on the sidewalk while the shooter sped away in the black car down Beardsley Street. The victim later died as a result of the gunshot wound.

After the shooting, the police collected video surveillance footage from the area. Some of the footage captured the events surrounding the murder, but the video quality was poor. It was difficult to determine the make and model of the vehicle and impossible to see inside the vehicle or to discern the physical characteristics of the victim or his assailant. The police nonetheless were able to determine that the black car was a late model Nissan Maxima with a broken rear passenger vent window on the right side. Because the victim was involved in the drug trade, the police employed the assistance of the statewide gang task force to identify the Nissan Maxima. Keith Hanson, a Bridgeport police officer and member of the task force, was able to identify the black Nissan Maxima from undercover drug surveillance he had conducted earlier that day. Hanson had observed a drug transaction that involved a black Nissan Maxima with a broken rear vent window, documented the license plate number of the vehicle, and determined that the registered owner was Frank Bridgeforth.

The police contacted Bridgeforth, who was ninety years old at the time. Bridgeforth confirmed that he was the registered owner of a black Nissan Maxima with a bro-

ken rear vent window but informed the police that it typically was driven by his foster son, the defendant. An alert was issued for the vehicle, which subsequently was located and towed to the police station. A later search of the interior of the vehicle revealed the presence of certain inorganic elements characteristic of gunshot residue.

On September 21, 2017, Bridgeforth voluntarily went to the Bridgeport Police Department and spoke to the lead detective assigned to the investigation, Jorge Cintron. During his conversation with Cintron, Bridgeforth received a call on his cell phone from the defendant. Cintron spoke to the defendant, who asked why the Nissan Maxima had been seized and when it would be returned. Cintron informed the defendant that it was seized pursuant to a search warrant in connection with a homicide investigation into the victim's murder. Cintron asked the defendant to come to the police station for questioning, but the defendant declined to do so. After the phone call, Bridgeforth refused to speak with Cintron any further without an attorney present.

The next day, Bridgeforth went to the Stratford Police Department to drop off a signed and notarized statement reporting three registered firearms as lost, one of which was a KelTec PF9 nine millimeter pistol. Bridgeforth explained in his statement that he accidentally had disposed of the firearms at the Stratford transfer station the day before the victim's murder. The police searched the Stratford transfer station but were unable to find the firearms. Subsequent forensic testing revealed that the bullet that killed the victim could have been fired from only thirty-three types of pistols, one of which is a KelTec PF9.

There were two eyewitnesses to the victim's murder, both of whom testified at the defendant's trial. Javon Gaymon, one of the eyewitnesses, was returning to his

car from a convenience store located on the corner of Newfield Avenue and Beardsley Street at approximately 9:55 p.m. on September 14, 2017, when he heard a noise that "caught [his] attention." Gaymon saw two men fighting in a black car parked approximately thirty feet away and noticed that "the young man was winning the fight, I guess. He was on top . . . ." Gaymon observed the white flash of a gunshot and saw the victim "stumble to the side and fall on the ground." Scared, Gaymon entered his car and fled. The police later identified Gaymon from video surveillance footage and interviewed him. During his police interview and at trial, Gaymon stated that he was "pretty sure" that Bridgeforth's Nissan Maxima was the black car he had seen that night.

The second eyewitness was Brishawn Beason, who was standing outside of the convenience store on the corner of Newfield Avenue and Beardsley Street shortly before 10 p.m. on September 14, 2017. Beason testified that he was a childhood friend of the victim and saw the victim enter a black car with a man whom he later identified as the defendant. Approximately two minutes later, Beason saw the victim exit the car bleeding and the car "pull[ing] off, going down Beardsley Street real fast." Beason fled the scene because he was afraid but, weeks later, came forward after the victim's sister made a plea for information concerning the victim's murder.

After Beason came forward, the police showed him a photographic array, from which he identified, with "1000 [percent]" certainty, a picture of the defendant as the person who had entered the car with the victim. Beason explained that he was able to identify the defendant because he got "a good look" at the defendant's face, he previously had seen the defendant around the neighborhood, and he recognized the defendant from the mole on his face. Beason also was shown photographs of Bridgeforth's Nissan Maxima, which he posi-

tively identified as the black car in which the victim had been shot.

The defendant was arrested and charged with felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes § 53a-54a, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), criminal possession of a pistol or firearm in violation of General Statutes (Rev. to 2017) § 53a-217c (a) (1), and carrying a pistol or revolver without a permit in violation of General Statutes (Rev. to 2017) § 29-35 (a). Following a jury trial, the defendant was found not guilty of felony murder and robbery in the first degree but guilty of the remaining offenses. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of sixty years of imprisonment. This appeal followed.

I

THE TRIAL COURT'S QUESTIONING OF THREE WITNESSES

The defendant first claims that the trial court deprived him of his due process right to a fair trial by questioning three witnesses in a partisan manner that was prejudicial to the defendant. The defendant's claim is unpreserved, and he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[2] We conclude that the defendant's claim fails

[2] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

under the third prong of *Golding* because he has not established the existence of a constitutional violation.[3]

The following additional facts are relevant to our disposition of this claim. During the state's case-in-chief, Detective Martin Heanue of the Bridgeport Police Department testified about the preparation and presentation of the photographic array that led to Beason's identification of the defendant. Heanue testified that photographic arrays typically are prepared and presented to a witness by "a detective [who is] really not overly involved with the investigation" so as not "to tip the [witness'] hand as to the . . . photographs . . . ." He explained that an array usually is composed of eight photographs, one of which is of the suspect and the other seven of which are computer chosen images of individuals with similar physical characteristics. There is no information identifying the individuals in the photographs, and the witness is informed that a suspect may nor may not be present. In this case, the eight photographs were shuffled and presented to Beason, who identified the photograph of the defendant as the person he saw with the victim on the night of September 14, 2017, with "1000 [percent]" confidence.

On cross-examination, Heanue acknowledged that, after Beason identified the defendant's photograph, Beason asked, "[t]hat's him, right?" Heanue responded by informing Beason that, "unfortunately, [he] couldn't tell [Beason] if it was the right guy or not" and that

[3] The defendant has not asked us to exercise our supervisory authority over the administration of justice to determine that the trial court's questioning of the witnesses violated standards of judicial propriety in Connecticut. His only claim is based on the requirements of the due process clause of the fourteenth amendment to the federal constitution. See *Daye* v. *Attorney General of New York*, 712 F.2d 1566, 1570–71 (2d Cir. 1983) (explaining difference between federal due process standard governing claims of judicial impropriety and "the stricter standards" established pursuant to federal courts' supervisory authority), cert. denied, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984).

he could "not give [Beason] any information." Heanue construed Beason's question as an attempt "to confirm his selection" and emphasized that Beason was "confident in his selection."

Following the state's redirect examination, the trial court asked Heanue, "just so I'm clear . . . you administered the photo[graphic] array, or you're selected to administer the photo[graphic] array, because you don't know anything about the investigation, is that correct?" Heanue responded, "[c]orrect." The trial court followed up this inquiry by asking Heanue, "[a]nd what's the purpose of doing that?" Heanue testified that "[t]he purpose of doing that is so that, for the members of the jury, if Detective Cintron went there alone and administered this photo[graphic] array, it [might] seem that he was being biased. The whole purpose of me going and doing it and not knowing much about the case, other than the few things that I knew, was to eliminate some of those biases that . . . would [make you] think that it was [the] police [that] railroaded him into picking somebody that, you know, he normally wouldn't have picked."

The trial court also questioned the defendant's two expert witnesses, Brooke W. Kammrath and Jamie Lincoln Kitman.[4] Kammrath, a professor of forensic science

[4] Our review of the record reveals that the trial court also asked questions of other witnesses, although the defendant does not challenge the propriety of those questions on appeal. For example, the trial court questioned Marshall Robinson, the state's firearm and toolmark examiner, who testified that the nine millimeter bullet recovered from the victim's body could have been fired only from a list of certain firearms, one of which was a KelTec pistol. On cross-examination, defense counsel elicited testimony that the list included more than thirty firearms, which prompted Robinson to explain that it "probably looks like a large list, but it's really not a large list." Following the parties' questioning, the trial court stated that it had "a quick question. You . . . said that does not seem like a long list. What . . . did you mean by that?" Robinson clarified that, "if this list [of all firearms] were printed out, it would be like . . . the old Bridgeport phonebook. It's a . . . large list of firearms based on their rifling characteristics from all over the world, and it's a large list. Compared to the . . . number of firearms that are [on] this list, this is not a lot." The prosecutor followed up by asking:

at the University of New Haven and assistant director of the Henry C. Lee Institute of Forensic Science, testified that the samples recovered from Bridgeforth's Nissan Maxima did not test positive for gunshot residue. Kammrath explained that gunshot residue has two essential characteristics: (1) the presence of three inorganic elements, namely, lead, antimony, and barium, and (2) a spherical morphology. According to Kammrath, the presence of only two of the three inorganic elements or the absence of a spherical morphology could be called "consistent with gunshot residue, but it's not gunshot residue because there are other materials that may also have that same elemental composition," such as brake linings. Kammrath reviewed the laboratory report generated by the state's forensic science examiner, Alison Gingell, and technical reviewer, Amy Duhaime,[5] and determined that the results were

"So, you're saying that . . . the phonebook full of all potential weapons is thousands and thousands of weapons that it could have come from. You narrowed it down to about thirty, thirty-three weapons that this could have come from?" Robinson responded, "[y]es."

Additionally, the trial court asked a question of Gregory Sawicki, a detective in the special licensing and firearms unit of the Connecticut state police, who was called as a witness by the state. Sawicki testified on direct examination that the defendant did not "hold a permit with the Connecticut state police . . . ." The trial court asked, "[j]ust so we're clear, when . . . you say a 'permit,' are you referring to a carry permit?" Sawicki responded, "[y]eah, a Connecticut state pistol permit."

[5] Gingell testified that three samples were taken from the Nissan Maxima and submitted for forensic analysis. Initially, all three samples tested negative for gunshot residue. However, a problem was found with the instrument used to test the samples, and they were retested using a different instrument.

Duhaime testified about the results of the second test for gunshot residue. According to Duhaime, the sample taken from the ceiling area between the front and back seats of the Nissan Maxima revealed the presence of one particle containing antimony and barium. The sample taken from the backseat area of the Nissan Maxima revealed the presence of one particle containing antimony and barium, and one particle containing lead. The sample taken from the center console of the vehicle revealed the presence of one particle containing the elements of lead, antimony, and barium, and one particle containing lead. Duhaime explained that the particle containing all three elements of lead, antimony, and barium "is considered characteristic of primer gunshot residue," whereas the other particles with only two elemental

insufficient to establish the presence of gunshot residue because "there was no mention" of the morphology of the single particle containing all three elements, and "it's standard that you need three particles . . . containing lead, barium, and antimony, with the spheroid morphology, in order to positively identify something as gunshot residue."[6]

On cross-examination, the prosecutor asked Kammrath whether it was possible that the particle with all three elements of lead, antimony, and barium had a spherical morphology but that that fact was omitted from the laboratory report. Kammrath replied, "[i]t's possible, but it should have been in the report."

At the end of questioning, the following colloquy occurred between the trial court and Kammrath:

"The Court: I . . . just have a couple questions. Miss, are you familiar with Alison Gingell . . . ?

"[Kammrath]: Alison who?

"The Court: Alison Gingell.

"[Kammrath]: No, I'm not.

"The Court: What about Amy Duhaime?

components "are considered consistent with gunshot residue." Duhaime did not testify as to the morphology of any of the particles.

[6] The testimony of the state's expert witnesses, Gingell and Duhaime, was not inconsistent with Kammrath's testimony. Gingell explained that gunshot residue is composed of three elements, lead, antimony, and barium, all of which are "found in one particle and . . . form a sphere, a perfect sphere . . . ." However, she did not testify about the results of the second test performed in this case. See footnote 5 of this opinion. That task fell to Duhaime, who did not mention the morphology of the particles at issue. Furthermore, Duhaime never testified that any of the particles recovered from the Nissan Maxima were gunshot residue. Instead, she testified that one particle containing lead, antimony, and barium was "characteristic of" gunshot residue and that some other particles containing two elemental components of lead, antimony, and/or barium were "consistent with" gunshot residue.

"[Kammrath]: Yes.

"The Court: Alright. You're familiar with her. And were you present when either of them testified?

"[Kammrath]: No, I wasn't.

"The Court: Alright. So, you . . . don't know what their representations were about [the samples recovered from the Nissan Maxima]? Correct?

"[Kammrath]: Correct. I don't know."

After the trial court's questioning, defense counsel sought to ask Kammrath a follow-up question about the definition of "gunshot residue" propounded by the American Society for Testing and Materials, but the trial court interrupted and stated, "I think you're going beyond the scope here, Counsel. I asked about two witnesses . . . ." Defense counsel responded: "I understand, but we repeatedly referred to this as gunshot residue, so I believe that's a mischaracterization." The trial court replied that "[i]t'll be the jury's recollection as to what those witnesses said about the findings of the analyses."

Lastly, the court questioned Kitman, an automotive journalist and the president of Octane Film Cars, who testified that, in his expert opinion, the vehicle depicted in the video surveillance footage was not Bridgeforth's Nissan Maxima but, instead, most likely was a Chevrolet Impala. After examining Bridgeforth's Nissan Maxima and watching the surveillance video footage, Kitman determined that Bridgeforth's Nissan Maxima had very little or no tint on the windows, whereas the car in the video had heavily tinted windows. Kitman explained that he had arrived at this conclusion because it was possible to see light emanating from within and outside of other cars in the video, but the black car that the victim entered was "completely blacked out. And that is differ-

ent than what you would have gotten with [Bridgeforth's Nissan Maxima]."

Kitman's expert opinion also was based on other differences he discerned between Bridgeforth's Nissan Maxima and the car depicted in the video. For example, Bridgeforth's Nissan Maxima had "a chrome strip along the trunk" that did not extend to the taillight, whereas the car in the video had a chrome strip that extended all the way to the taillight. Additionally, the car in the video did not have a third brake light, unlike Bridgeforth's car, and there were differences between the designs of the headlights and taillights. Moreover, the logo on the car in the video did "not mirror the Nissan logo, which is . . . round with a cross bar," but, instead, was "more of an oval shape and possibly . . . consistent with . . . a Chevrolet Impala."

On cross-examination, the prosecutor asked Kitman, "other than blacked out tinting, [there are] other things that may obscure somebody [from] seeing the inside of a car, correct?" The prosecutor asked whether it would be possible to see inside the car if the windows were covered with something like a curtain. Kitman acknowledged that, if the windows were covered, it "wouldn't be [possible] to see inside . . . or outside" the car. Additionally, Kitman acknowledged that there is usually a way to disable the interior lights to prevent them from illuminating when the car doors are opened.

Following questioning, the trial court indicated that it had "a couple of questions," and the following exchange occurred:

"[The Court]: Sir, the Maxima that you examined on May—

"[Kitman]: 3rd.

"[The Court]: May 3rd?

"[Kitman]: Yes, sir.

"[The Court]: What year was that?

"[Kitman]: 2011.

"[The Court]: That's the make of the car. What year did you examine the vehicle?

"[Kitman]: I said 2011.

"[The Court]: Okay. So you believe you examined the vehicle in 2011?

"[Kitman]: Oh, no. It was May 3, 2022.

"[The Court]: Okay. Thank you. Alright. So, 2011 is the model year of the Maxima that you examined?

"[Kitman]: I believe, yes.

"[The Court]: Alright. And do you know if that year model had a device in the car that would allow you to dim the dashboard lights?

"[Kitman]: I don't specifically, but I assume that you could dim them.

"[The Court]: That's a pretty—that's been around for a long time, right?

"[Kitman]: Mm-hmm.

"[The Court]: You can make the dashboard brighter?

"[Kitman]: You can—most cars you can. I mean, for the last seventy-five years, I think you could dim the lights.

"[The Court]: And do you know if the 2011 Maxima had a pull up sunshade in the back door window?

"[Kitman]: I don't believe so."

Defense counsel did not object to any of the trial court's questions or request a jury instruction pertaining to the court's questioning of the witnesses. In its general

jury instructions to the jury, the trial court cautioned that its "actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, or in setting forth the law in these instructions, are not to be taken by [the jury] as any indication of [the court's] opinion as to how [the jury] should determine or resolve questions of fact."

A trial court indisputably possesses the discretion to question a witness during direct or cross-examination, and the court's exercise of discretion will not be disturbed unless it has "acted unreasonably, or, as it is more often expressed, [has] abused [its] discretion." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 652, 881 A.2d 1005 (2005). Neutral questioning of a witness is appropriate "to clarify confusing testimony, to restrain an obstreperous witness, or to elucidate a [witness'] understanding of a question." *State* v. *Smith*, 200 Conn. 544, 549, 512 A.2d 884 (1986). Additionally, "it is proper for a trial court to question a witness in endeavoring, without harm to the parties, to bring the facts out more clearly and to ascertain the truth," and when "the witness is embarrassed, has a language problem or may not understand a question." (Internal quotation marks omitted.) *State* v. *Fernandez*, 198 Conn. 1, 13, 501 A.2d 1195 (1985).

Any such questioning, however, must be conducted with great care because the trial judge occupies a unique and prominent position in the courtroom as the embodiment of neutrality and fairness. As a consequence, it is critically important that the trial court exercise its discretion to question a witness with judicious prudence, and it "should never assume a position of advocacy, real or apparent, in a case before it, and should avoid any displays of hostility or skepticism toward the defendant's case, or of approbation for the prosecution's [case]." *State* v. *Smith*, supra, 200 Conn. 549. A high degree of caution is especially imperative in a jury

trial. The jury views the judge as authoritative, takes its guidance from the judge with regard to virtually every aspect of the proceedings, and can be expected to place heavy weight on everything the judge says and does. As a result, the trial court's "obligation to comport itself in a circumspect and dispassionate manner" is particularly acute "in the presence of the jury, which may readily be influenced by a judge's words or conduct . . . ." Id. The "jury has a natural tendency to look to the trial judge for guidance, and may find it even where it is not intended. The judge's attitude and the result he supposedly desires may be inferred by the jury from a look, a lifted eyebrow, an inflection of the voice—in many cases without warrant in fact." (Internal quotation marks omitted.) *State* v. *Fernandez*, supra, 198 Conn. 12; see also *Quercia* v. *United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) ("[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling" (internal quotation marks omitted)).

For this reason, we have cautioned trial courts to err on the side of intervening too little rather than too much, particularly in criminal cases. See *State* v. *Fernandez*, supra, 198 Conn. 11 (trial court should "be aware that there may be greater risk of prejudice from overintervention than from underintervention" (internal quotation marks omitted)); id., 16 (trial court's examination of witnesses should be done "with caution and circumspection lest an appearance of partiality, although not intended, emerge"); see also *State* v. *Cianflone*, 98 Conn. 454, 469, 120 A. 347 (1923) ("[t]he difficulty in a protracted examination of separating the judge from the advocate will lead the trial court to refrain from such examination save under exceptional circumstances").

A trial court's abuse of discretion in questioning a witness may implicate a defendant's due process right

to "a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." (Internal quotation marks omitted.) *State* v. *Fernandez*, supra, 198 Conn. 10. "The risk of constitutional judicial misconduct is greatest in cases [in which] the trial court has interceded in the merits of the trial." *State* v. *Woodson*, 227 Conn. 1, 31, 629 A.2d 386 (1993). For example, we have concluded that a criminal defendant's constitutional right to a fair trial was violated when the credibility of a witness was key to the outcome of the jury's verdict and the trial court questioned that witness in a manner that tended to bolster or undermine the witness' credibility in the eyes of the jurors. See *State* v. *Smith*, supra, 200 Conn. 550–51 (trial court's questioning was improper because "[t]he outcome of the trial depended largely on the jury's assessments of the respective credibility of [the state's witness] and the defendant," and because trial court questioned state's witness "in a manner that tended to enhance the [witness'] credibility in the [jurors'] eyes"); *State* v. *Fernandez*, supra, 14, 17 (trial court's questioning of defendant's sole witness, who testified that "*he*, and *not* the defendant, had committed the crimes charged," was improper and deprived defendant of fair trial (emphasis in original)).

The line between permissible and impermissible questioning is not always easy to delineate. We have endorsed the observation of Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit that " '[t]here is simply no handy tool with which to gauge a claim that a judge's conduct improperly has shifted the balance against a defendant.' " *State* v. *Fernandez*, supra, 198 Conn. 13, quoting *United States* v. *Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973). "Such a decision is reached only after the most thorough and careful deliberation, as in such cases the court faces a special quandary stemming from the fact that [the court is] not given the benefit of witnessing the juxtaposition of personali-

ties which may help prevent reading too much into the cold black and white of a printed record." (Internal quotation marks omitted.) *State* v. *Fernandez*, supra, 13; see *State* v. *Gonzalez*, 272 Conn. 515, 536, 864 A.2d 847 (2005) ("[u]nlike an appellate court, the trial court is able to observe the testimony of witnesses firsthand and, therefore, is better able to assess the relative clarity—or lack thereof—of any particular testimony").

Because a trial court's questioning of a witness is fraught with risk, even when its "intentions [are] entirely benevolent"; *State* v. *Smith*, supra, 200 Conn. 553; it is generally preferable, when practicable, "for the trial judge to discuss the matter with counsel outside the presence of the jury and [to] request counsel to pose the questions to the witness."[7] (Internal quotation marks omitted.) *State* v. *Hays*, 256 Kan. 48, 52, 883 P.2d 1093 (1994); see also *People* v. *Nieves*, 11 Cal. 5th 404, 498, 485 P.3d 457, 278 Cal. Rptr. 3d 40 (2021) ("it is ordinarily the better practice for the trial court to let counsel develop the case" (internal quotation marks omitted)); *State* v. *Giordano*, 440 A.2d 742, 745 (R.I. 1982) (trial court should question witness only after "first allow[ing] counsel every opportunity to refine the [witness'] testimony"); *Auger* v. *Auger*, 149 Vt. 559, 562, 546 A.2d 1373 (1988) ("It is the better practice to allow counsel the opportunity to develop the facts in the first instance. Counsel is in a better position to do so."). Alternatively, if the trial court exercises its discretion to question a witness, the court should instruct the jury, consistent with instruction 2.1-2 of our model criminal jury instructions, that the court's questions to witnesses should not be taken by the jury as an indication of its opinion as

[7] We recognize that trial courts, on occasion, may deem it appropriate during a witness' testimony to interject a question for the limited purpose of immediately clarifying an imprecise word or reference. The preferable practice we identify in the body of this opinion is not intended to apply to or restrict the trial court's use of that type of nonsubstantive questioning.

to how the jury should resolve any issues of fact. See Connecticut Criminal Jury Instructions 2.1-2, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited August 19, 2024).[8]

The narrow issue before us is not whether the trial court's questioning of the witnesses comported with best practices but, rather, whether it deprived the defendant of his due process right to a fair trial before an impartial judge and unprejudiced jury. On the basis of our thorough review of the entire record, we cannot conclude that the trial court's intervention was so extensive, substantial, or adverse as to impair the proper functioning of the jury or to call into question the impartiality, real or perceived, of the trial judge. See, e.g., *State* v. *Mack*, 197 Conn. 629, 638, 500 A.2d 1303 (1985) (defendant was unable to prevail on unpreserved claim because, although some of trial court's questions and comments were improper, "none of them [rose] to the level of constitutional error"); *State* v. *Peloso*, 109 Conn. App. 477, 491, 952 A.2d 825 (2008) ("[a] trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree before the risk of either impaired functioning of the [finder of fact] or lack of the appearance of a neutral judge conducting a fair trial exceeded constitutional limits" (internal quotation marks omitted)), quoting *Daye* v. *Attorney General of New York*, 712 F.2d 1566, 1572 (2d Cir. 1983), cert. denied, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984).

The defendant's trial spanned several days and involved the testimony of twenty-four witnesses. Despite the volume

[8] Instruction 2.1-2 of the Connecticut model criminal jury instructions provides in relevant part: "You should not be influenced by my actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, *or in questions to witnesses*, or in setting forth the law in these instructions. You are not to take my actions as any indication of my opinion as to how you should determine the issues of fact. . . ." (Emphasis added.) Connecticut Criminal Jury Instructions 2.1-2, supra.

of testimonial evidence, the defendant's constitutional challenge is limited to the trial court's brief questioning of three witnesses, one of whom testified on behalf of the state. See *State* v. *Bember*, 183 Conn. 394, 402, 439 A.2d 387 (1981) (finding it significant that "the trial court asked questions of both prosecution and defense witnesses"); see also footnote 4 of this opinion. With respect to the testimony of the state's witness, Heanue, the trial court asked two discrete questions intended to elicit additional information regarding the preparation of the photographic array and its presentation to Beason. Given the brevity of the trial court's questions and the fact that the integrity of the array was not challenged at trial, we conclude that the trial court's questioning of Heanue, although unnecessary, was unlikely to influence the jury's verdict or its perception of the judge's neutrality. See, e.g., *State* v. *Iban C.*, supra, 275 Conn. 655 (concluding that trial court's brief questions on discrete issue did not contain "a suggestion of advocacy"); *State* v. *Rosario*, 209 Conn. App. 550, 565, 267 A.3d 946 ("the court's questions did not prejudice the defendant because the relevant elicited facts were not truly in dispute"), cert. denied, 342 Conn. 901, 270 A.3d 98 (2022).

Likewise, the trial court's short series of questions to the defendant's expert witnesses did not rise to the level of a constitutional violation. The few questions posed to Kammrath regarding her familiarity with the in-court testimony of the state's expert witnesses were ill-advised and best left unasked by the court because they could have been perceived to suggest, at least vaguely and by implication, that Kammrath was unaware of the opinions offered by these witnesses or that the judge believed that the testimony of the state's expert witnesses contained information that Kammrath may have overlooked. But the questions did not cross the constitutional line into advocacy or partiality; the fact that Kammrath may not have been present in the courtroom when the state's expert witnesses testified does not provide a meaningful or effectual critique of Kammrath's expert

opinion, and we will not attribute more significance to the impact of the trial court's questions on the jury than is warranted.

As for the trial court's questioning of Kitman, the jury was well aware that there were various reasons why the interior of the car depicted in the video surveillance footage may have appeared dark other than the presence of a heavy tint on the windows. On cross-examination, Kitman agreed with the prosecutor that there are "other things that may obscure somebody [from] seeing the inside of a car" other "than blacked out tinting . . . ." For example, the interior lights could have been disabled or the windows might have been covered or blacked out. The trial court's questions excluded an additional possible reason, the presence of a sunshade, but prompted another, the dimming of the dashboard lights. The trial court's questions did not exhibit the restraint or caution that the circumstances demanded, but neither did they cross the line between judicial neutrality and partisan advocacy. Accordingly, the defendant's claim fails under the third prong of *Golding*.

II

SUFFICIENCY OF THE EVIDENCE OF INTENT

We next address whether the evidence was sufficient to support the defendant's murder conviction. The defendant claims that the evidence was insufficient for the jury reasonably to find that he had the specific intent to kill the victim because "[f]iring only one shot amid a struggle at a nonvital body part simply does not mean there was an intent to kill," especially in the absence of "evidence of any prior relationship between the defendant and [the victim], or of any animosity between the two men."[9] The state responds that "the evidence supported a reasonable inference that the defendant intended to kill the victim when he shot him

[9] The defendant does not claim that the evidence was insufficient to establish his identity as the perpetrator of the homicide but contends that "there simply was not sufficient evidence to find an intent to kill."

in the torso at close range with a nine millimeter pistol." We agree with the state.

To prove the defendant guilty of the crime of murder, the state was required to prove beyond a reasonable doubt that the defendant had the specific intent to kill the victim, meaning that he "had the conscious objective to cause the death of the victim." (Internal quotation marks omitted.) *State* v. *Robertson*, 254 Conn. 739, 783, 760 A.2d 82 (2000). "[T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). For example, an intent to kill may be inferred from such circumstantial evidence as "the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012). In particular, use of "a deadly weapon [on] a vital part of another" supports a reasonable inference that an assailant "intended the probable result of that act" and harbored "an intent to kill." (Internal quotation marks omitted.) *State* v. *Tomasko*, 238 Conn. 253, 259, 681 A.2d 922 (1996). Additionally, we have often observed that "it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 320, 253 A.3d 458 (2020).

Construing the evidence in the light most favorable to sustaining the jury's verdict,[10] we conclude that it was suffi-

[10] In reviewing insufficiency of the evidence claims "we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom, the [jury] reasonably could have

cient, beyond a reasonable doubt, to support the jury's finding that the defendant had the conscious objective to cause the death of the victim by shooting him with a nine millimeter pistol at close range in a vital part of his body. James Gill, the state's chief medical examiner, testified that the victim was shot "in the left lower quadrant of [his] abdomen, so the lower part of his . . . trunk . . . ." According to Gill, "after the gunshot entered, it went through a major bone in the pelvis and then injured a major vein, the iliac vein, which is a large vein that is coming from the leg returning the blood to the heart, and it injured that . . . caus[ing] internal bleeding. And that bleeding is what ultimately led to [the victim's] death." In light of the location of the victim's gunshot wound and the grievous nature of the injury inflicted, we reject the defendant's argument that the victim was not shot in a vital part of his body. See, e.g., *State* v. *Murray*, 254 Conn. 472, 480–81, 757 A.2d 578 (2000) (specific intent to kill reasonably may be inferred from single gunshot wound to victim's upper thigh); *State* v. *Gill*, 178 Conn. App. 43, 49–51, 173 A.3d 998 (specific intent to kill reasonably may be inferred from single gunshot wound to victim's torso), cert. denied, 327 Conn. 987, 175 A.3d 44 (2017); *State* v. *White*, 127 Conn. App. 846, 852–54, 17 A.3d 72 (single gunshot wound to victim's neck supported finding of specific intent to kill), cert. denied, 302 Conn. 911, 27 A.3d 371 (2011).

The events immediately preceding the victim's death also support the jury's factual finding that the defendant intended to kill the victim. The jury heard that, right before the shooting, the defendant and the victim were engaged in a physical fight, which it appeared the victim was winning. At least in combination with other circumstantial evidence, an intent to kill reasonably may be inferred from evidence indicating that the defendant and the victim were arguing prior to the victim's death, especially if that argument escalated into

concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Abraham*, 343 Conn. 470, 476, 274 A.3d 849 (2022).

violence.[11] See, e.g., *State* v. *Gary*, 273 Conn. 393, 409, 869 A.2d 1236 (2005) ("we conclude that the jury reasonably could have found that the evidence that [the victim] and the defendant had been involved in an altercation and that [the victim] had punched the defendant supported an inference that the defendant had a motive to kill [the victim]"); *State* v. *Edwards*, 247 Conn. 318, 322, 721 A.2d 519 (1998) (evidence was sufficient to establish that defendant had specific intent to kill victim because "there was eyewitness testimony that the defendant and the victim were arguing prior to the shooting, and that the defendant shot the victim in the head at close range"); *State* v. *Chace*, 199 Conn. 102, 105–106, 505 A.2d 712 (1986) (evidence that defendant stabbed victim multiple times during "a 'heated' argument" was sufficient to establish defendant's specific intent to kill victim); *State* v. *Gill*, supra, 178 Conn. App. 50 (evidence that defendant shot victim once following "a 'scuffle' " was sufficient to support jury's finding that defendant intended to kill victim).

Additionally, the defendant's conduct immediately following the shooting is indicative of his intent. After inflicting a fatal gunshot wound, the defendant fled the scene without aiding the victim or summoning emergency medical assistance. As we explained in *State* v. *Sivri*, 231 Conn. 115, 646 A.2d 169 (1994), "it can be inferred that, if the defendant has caused a grievous wound that could cause the victim's death if not treated promptly, the failure to summon that treatment is consistent with an antecedent intent to cause

[11] The defendant points out that, by finding the defendant not guilty of the crimes of felony murder and robbery in the first degree, the jury necessarily rejected the state's theory that "the defendant's motive was to rob [the victim] of either drugs, money, or his [jewelry]." The fact that the defendant did not intend to rob the victim, however, does not mean that the defendant did not intend to kill the victim. Even if the fight between the two men was prompted by something fleeting, trivial, or inconsequential, "[t]he [jurors were] not required to close [their] eyes to the unfortunate reality that murders frequently are committed in response to seemingly minor provocations." *State* v. *Gary*, 273 Conn. 393, 408, 869 A.2d 1236 (2005).

death." Id., 129; see, e.g., *State* v. *Mejia*, 233 Conn. 215, 225, 658 A.2d 571 (1995) ("the jury was free to infer an intent to kill from the defendant's failure to attempt to aid [the victim] or to show concern for [the victim's] welfare"); see also *State* v. *Tomasko*, supra, 238 Conn. 259. The inference may be stronger or weaker depending on all of the circumstances, but, if reasonable, it is something that the jury may consider in determining intent.

We recognize that "the evidence certainly did not *mandate* an inference of an intent to kill . . . ." (Emphasis in original.) *State* v. *Otto*, supra, 305 Conn. 74. The jury reasonably could have found that the shooting was accidental, intended to incapacitate the victim rather than to kill him, or intended to cause the victim's death. Because intent is subjective, the perpetrator's state of mind often is unknown and unknowable. See, e.g., *Oregon* v. *Kennedy*, 456 U.S. 667, 679, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) (Powell, J., concurring) (observing, in context of prosecutorial misconduct, that " 'subjective' intent often may be unknowable"). But this metaphysical condition of ultimate uncertainty does not, as a matter of law, prevent a fact finder from drawing reasonable inferences to conclude, beyond a reasonable doubt, that a defendant intended to cause a victim's death. We conclude, after a thorough review of the record in the present case, that the evidence was sufficient to support the defendant's murder conviction.

III

JURY INSTRUCTIONS

Lastly, we address the defendant's two challenges to the trial court's jury instructions. First, the defendant claims that the trial court improperly instructed the jury that it must return a verdict of not guilty "[i]f the state fails to prove *each* of the elements of the charged offense beyond a reasonable doubt," rather than *any* of the elements of the charged offense. (Emphasis added.) Second, the defendant claims that the court improperly instructed the jury that the defen-

dant's "mere presence at the scene of [the] crime is insufficient to convict [the defendant] of the charged offenses" because the charge undermined the defendant's defense that he was not present at the scene of the crime, thereby invading the fact-finding province of the jury and relieving the state of its burden of proving the essential element of identity beyond a reasonable doubt. The defendant did not preserve either of his instructional claims and seeks to prevail on appeal under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781, and the plain error doctrine. The state contends that the defendant's claims have been waived pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), and that there was no plain error necessitating the reversal of the defendant's conviction. We agree with the state.

The following additional facts are relevant to our resolution of these claims. Midway through the defendant's trial, on May 13, 2022, the trial court informed the prosecutor and defense counsel that it would "email [a] first draft of the jury charge tonight." The prosecutor requested certain jury instructions, and the trial court asked defense counsel, "any special instructions?" Defense counsel requested a special credibility instruction for "a couple witnesses who [had] pending felony charges" and an expert witness instruction for Kammrath and Kitman.

Four days later, on May 17, 2022, the defense rested, and the trial court conducted a jury charge conference on the record. At the charge conference, the trial court mentioned that it had earlier emailed counsel a draft of the proposed jury instructions. The trial court provided the prosecutor and defense counsel with printed copies of those instructions and marked and preserved a copy as an exhibit. The trial court went through the proposed instructions page by page and asked the prosecutor and defense counsel whether they had any exceptions. Relevant to the present appeal, the proposed instruction on the presumption of innocence provided in relevant part that, "[i]f the state fails to prove

each of the elements of the charged offense beyond a reasonable doubt, then you must return a verdict of not guilty." (Emphasis added.) Additionally, the proposed instruction regarding the element of identity provided in relevant part: "The state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the charged offenses. *The defendant's mere presence at the scene of a crime is insufficient to convict him of the charged offenses.* Rather, the state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the crime. *It is not enough for the* [*s*]*tate simply to prove that he was present when the offenses* [*were*] *allegedly committed.*" (Emphasis added.) When the trial court asked defense counsel whether he had any exception to either of these proposed instructions, defense counsel responded, "[n]o, Your Honor." There were a few changes requested by the prosecution, none of which related to the instructions at issue on appeal.

At the end of the charge conference, the trial court stated that it would make the requested changes and that, if counsel wanted to wait around for a few minutes, it would provide them with a printed copy of the revised instructions. Both the prosecutor and defense counsel informed the court that they would prefer to receive their copies via email, to which the court responded, "[c]onsider it done." The trial court then adjourned proceedings for the day.

At 12:20 p.m. the next day, following closing arguments, the trial court instructed the jury on the law, consistent with what had been discussed at the charge conference, including the challenged instructions set forth in the preceding paragraph. After instructing the jury, the trial court inquired whether the prosecutor or defense counsel had "any exception to the charge . . . as given," and defense counsel responded, "[n]o, Your Honor . . . ."

In *Kitchens*, this court held that, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solic-

its comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83. Under *Kitchens*, an unpreserved claim of improper jury instructions is unreviewable under the third prong of *Golding* if the claim has been implicitly waived by defense counsel. See id., 468. "Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." Id., 483.

Our close examination of the record reveals that defense counsel had a meaningful opportunity to review the jury instructions because he was given an advance copy of the instructions approximately four days before the charge conference, the instructions were reviewed page by page at the charge conference, and defense counsel subsequently had the opportunity to review the instructions overnight. See, e.g., *State* v. *Webster*, 308 Conn. 43, 63, 60 A.3d 259 (2013); *State* v. *Mungroo*, 299 Conn. 667, 675–76, 11 A.3d 132 (2011); *State* v. *Akande*, 299 Conn. 551, 561–62, 11 A.3d 140 (2011). The record reflects that the trial court solicited comments from counsel regarding changes or modifications, that defense counsel did not request any changes or modifications, and that defense counsel affirmatively accepted the challenged instructions twice, once at the charge conference and again after the instructions were read to the jury. See, e.g., *State* v. *Bellamy*, 323 Conn. 400, 410, 147 A.3d 655 (2016); *State* v. *Darryl W.*, 303 Conn. 353, 368, 33 A.3d 239 (2012); *State* v. *Joseph*, 174 Conn. App. 260, 281, 165 A.3d 241, cert. denied, 327 Conn. 912, 170 A.3d 680 (2017). Consistent with the principles set forth in *Kitchens* and its progeny, unchallenged by the defen-

dant in the present case,[12] we conclude that the defendant's instructional claims have been waived.

The defendant also seeks review under the plain error doctrine. See *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017) ("a *Kitchens* waiver does not preclude plain error review"). To prevail, the defendant must satisfy the two-pronged plain error test. "First, the defendant must establish that there was an obvious and readily discernable error . . . . Second, the defendant must establish that the obvious and readily discernable error was so harmful or prejudicial that it resulted in manifest injustice." (Citation omitted; internal quotation marks omitted.) *State* v. *Diaz*, 348 Conn. 750, 762–63, 311 A.3d 714 (2024). The plain error doctrine is a rule of reversibility, not reviewability, and the defendant is not entitled to relief unless "the alleged error is *both* so clear *and* so harmful that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Emphasis in original; internal quotation marks omitted.) Id., 763; see also *State* v. *McClain*, supra, 813–14 ("[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. . . . Put another way, plain error is reserved for only the most egregious errors. When an error of such magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.)).

The first prong of the plain error analysis, as applied to instructional claims, requires us to "read [the charge] as a whole," and emphasizes that "individual instructions are not to be judged in artificial isolation from the overall charge. . . . In reviewing the charge as a whole, [the] instructions need not be perfect, as long as they are legally correct, adapted to the issues and sufficient for the jury's guidance. . . . The test to be

[12] See *State* v. *Bellamy*, supra, 323 Conn. 403, 422–23 (declining to overrule *Kitchens* in divided opinion).

applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result." (Internal quotation marks omitted.) *State* v. *Blaine*, 334 Conn. 298, 308, 221 A.3d 798 (2019); see also *State* v. *Kyle A.*, 348 Conn. 437, 447, 307 A.3d 249 (2024) (jury instruction is not improper simply because it is not consistent with "the better practice"). As we recently observed in *Kyle A.*, it is "especially rare for a jury instruction to be so clearly improper that our courts have deemed plain error review necessary to correct it." *State* v. *Kyle A.*, supra, 448. "[T]he reluctance with which we have chosen that course underscores that plain error is reserved for only the most egregious defects." Id.

Having reviewed the jury instructions in their entirety, we conclude that the challenged instructions were not clearly, obviously, or indisputably erroneous. See, e.g., *State* v. *Darryl W.*, supra, 303 Conn. 373 (emphasizing plain error's "relatively high standard" and explaining that "it is not enough for the defendant simply to demonstrate that his position is correct" but, instead, must demonstrate that claimed error was "clear, obvious and indisputable" (internal quotation marks omitted)). The trial court's instruction on the presumption of innocence was imperfect in its use of a single word, but the jury instructions as a whole made it abundantly clear that the state was required to prove each and every element of the crime beyond a reasonable doubt, and no reasonable juror would have been misled to think otherwise. The trial court informed the jury that "[t]he defendant does not have to prove his innocence" and that "the state must prove beyond a reasonable doubt each and every element necessary to constitute the crimes charged." With respect to the crime of murder in particular, the court instructed the jury that "the state must prove the following elements beyond a reasonable doubt": intent to cause death and

proximate cause resulting in death. The court repeatedly emphasized the state's burden to prove each of these essential elements beyond a reasonable doubt and, in summary, informed the jury that "the state must prove beyond a reasonable doubt that (1) the defendant intended to cause the death of another person, and (2) in accordance with that intent, the defendant caused the death of [the victim]." On the basis of these instructions, we conclude that "there was no possibility that the jury was improperly led to believe that it could find the defendant not guilty only if the state failed to prove every element of the offense beyond a reasonable doubt." *State* v. *Singleton*, 292 Conn. 734, 770, 974 A.2d 679 (2009); see id., 769–770 (concluding, after reviewing jury instructions in their entirety, that there was no reasonable possibility that jury was misled by instruction that it could "find the defendant not guilty if the state failed to prove 'each,' instead of 'any,' element of manslaughter in the first degree"); *State* v. *Wade*, 106 Conn. App. 467, 491–92, 942 A.2d 1085 (reviewing "the court's entire instruction to the jury" and finding no "meaningful distinction" between instructing jury that it must find defendant not guilty if state failed to prove each, as opposed to any, of essential elements of charged crimes beyond reasonable doubt), cert. granted, 287 Conn. 908, 950 A.2d 1286 (2008) (appeal withdrawn June 11, 2008).

With respect to the trial court's instruction on mere presence at the scene of the crime, we reject the defendant's claim that this instruction improperly invaded the province of the jury, relieved the state of its burden of proof, or prejudiced the defendant's defense of mistaken identity. The trial court explicitly instructed the jury that "[t]he state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the charged offenses. . . . Identification is a question of fact for you to decide, taking into consider-

ation all the evidence that you have seen and heard in the course of the trial. . . . [T]he state's evidence must satisfy you that it has proven the defendant's identity beyond a reasonable doubt. It is for you to decide how much weight to place [on] such evidence." Additionally, the trial court informed the jury that its instructions on the law "are not to be taken by you as any indication of [its] opinion as to how you should determine or resolve questions of fact." The trial court's instructions as a whole accurately conveyed the law to the jury, and there was no clear, obvious, or indisputable error.[13] Moreover, although the defendant denied being present at the crime scene, the "mere presence" charge protected him against the possibility that the jury might have otherwise drawn the wrong inference from his presence if it had concluded that he was, in fact, there.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD, MULLINS, DANNEHY and GOLD, Js., concurred.

D'AURIA, J., dissenting in part. Because I cannot conclude, as the majority does, that the trial court's unnecessary questioning of the defendant's two expert witnesses, Brooke W. Kammrath and Jamie Lincoln Kitman,

[13] The defendant points out that the model jury instruction on "Identification of Defendant" on the Judicial Branch website does not contain the mere presence language. See Connecticut Criminal Jury Instructions 2.6-4, supra. As we previously have observed, the language of the model jury instructions, although instructive, is not binding. See, e.g., *State* v. *Calhoun*, 346 Conn. 288, 298, 289 A.3d 584 (2023) ("[j]ury instructions are not 'one size fits all formulations,' which is why trial courts must sometimes modify jury instructions to meet the needs of a case"); *State* v. *Ortiz*, 343 Conn. 566, 599, 275 A.3d 578 (2022) ("[T]he language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court. . . . [W]e previously have cautioned that the . . . jury instructions found on the Judicial Branch website are intended as a guide only, and that their publication is no guarantee of their adequacy." (Internal quotation marks omitted.)).

"was [not] so extensive, substantial, or adverse" as to deprive the defendant of a fair trial, I respectfully dissent as to part I of the majority opinion and would order a new trial. I do not reach parts II and III of the majority opinion.

The majority opinion has much to commend it. It is researched thoroughly and written persuasively. It is also candid in describing the challenged questions of the trial court as "unnecessary," "ill-advised and best left unasked," and "not exhibit[ing] the restraint or caution that the circumstances demanded . . . ." I agree with the majority that "[t]he line between permissible and impermissible questioning is not always easy to delineate" and that, as we have stated before, "[t]here is simply no handy tool with which to gauge a claim that a judge's conduct improperly has shifted the balance against a defendant." (Internal quotation marks omitted.) Part I of the majority opinion, quoting *State* v. *Fernandez*, 198 Conn. 1, 13, 501 A.2d 1195 (1985), and *United States* v. *Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973). Ultimately, whether a trial court's active questioning of witnesses deprives a defendant of a fair trial is a matter of degree, and an issue on which reasonable appellate jurists can disagree (even if there might be disagreement over whether I fall within that category of jurists). Because the claim is unpreserved, it is, of course, not possible to ascertain precisely either the effect of the court's questions on the jury, or the court's purpose in asking them. I cannot and do not ascribe to the trial court any partisan intent on this record. Nonetheless, I believe the possibility of harm was grave here, and I am convinced that, viewed objectively, the court's questions discredited the defendant's expert witnesses and could have been viewed by the jury as an expression of the court's approval of the state's position on issues "key to the outcome of the jury's verdict," as the majority describes them. Part I of the majority

opinion; see *State* v. *Smith*, 200 Conn. 544, 549, 512 A.2d 884 (1986) (trial court "should never assume a position of advocacy, real or apparent, in a case before it, and should avoid any displays of hostility or skepticism toward the defendant's case, or of approbation for the prosecution's [case]").

I do not draw much guidance from federal case law that the majority cites or that I have reviewed. See, e.g., *Daye* v. *Attorney General*, 712 F.2d 1566, 1570 (2d Cir. 1983), cert. denied, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984). It is possible that federal courts tolerate significant intrusions by district courts in the form of questioning witnesses before they will conclude that the questioning deprives a defendant of a federal constitutional right. But I believe that the majority will agree that, because the defendant's trial took place in *our* courts, we are equally responsible for determining—in fact, principally responsible and perfectly well-equipped to determine—whether the defendant received a fair trial under the due process clause of the federal constitution. See *Pompey* v. *Broward County*, 95 F.3d 1543, 1550 (11th Cir. 1996) ("state courts are courts of equal dignity with all of the federal 'inferior courts'—to use the [f]ramers' phrase—and state courts have the same duty to interpret and apply the United States [c]onstitution as [federal courts] do").

I agree with the majority that "it is proper for a trial court to question a witness in endeavoring, *without harm to the parties*, to bring the facts out more clearly and to *ascertain the truth* . . . ." (Emphasis added; internal quotation marks omitted.) Part I of the majority opinion, quoting *State* v. *Fernandez*, supra, 198 Conn. 13. A trial judge who considers it his job to examine witnesses as part of the judiciary's truth-seeking function risks unduly influencing the jury, however, particularly when he believes that one of the parties came up short with their questions. This is because "[t]he

influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." (Internal quotation marks omitted.) *Quercia* v. *United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321 (1933). We have held that, when "[t]he outcome of the trial depended largely on the jury's assessments of the respective credibility of [the state's witness] and the defendant," a new trial was warranted when the court questioned the state's witness "in a manner that tended to enhance the [witness'] credibility in the jury's eyes." *State* v. *Smith*, supra, 200 Conn. 550–51.

The majority notes that "[t]he defendant's trial spanned several days and involved the testimony of twenty-four witnesses." In juxtaposition, the majority points out that "the defendant's constitutional challenge is limited to the trial court's brief questioning of three witnesses, one of whom testified on behalf of the state." I focus on only two of the witnesses: the defendant's experts, Kammrath and Kitman.[1] I do not believe that the number of witnesses called during the trial or the number of questions the defendant challenges is an accurate measure of the impact that the trial court's active questioning had on the fairness of the defendant's trial. Brief questioning can be very effective, even devastating, especially coming from the trial judge. Moreover, whether intentional or not, the trial court managed to have the last word as to the main two witnesses the defendant called in his own defense.

[1] I do not believe that the trial court's questions of Detective Martin Heanue, which the majority admits were "unnecessary," impacted significantly enough on the fairness of the defendant's trial to warrant discussion in this opinion. I do not agree, however, with any implication, if intended by the majority, that the fact that Heanue testified on behalf of the state meant that the trial court's questions of Heanue somehow counterbalanced the court's questions to the defendant's experts. The court's questions of Heanue appear to emphasize precautions the police took with the photographic array, even though the state had already covered the rationale for the double-blind identification procedure in its direct examination.

Nor, in my view, were the trial court's questions confined to clarifying for the jury or elucidating the court's own understanding of the witnesses' testimony. See *State* v. *Smith*, supra, 200 Conn. 549–50. Instead, I read the trial court's questions as susceptible to being interpreted by the jury as supporting the state's case and expressing skepticism of the defendant's expert witnesses, whose credibility was key to the jury's acceptance of their conclusions. For these reasons, I cannot conclude that the defendant received a fair trial.[2]

I

After the state rested, defense counsel called Kammrath, an expert in forensic science, to rebut the state's evidence regarding gunshot residue in the defendant's car. The state had presented evidence from eyewitnesses to the victim's shooting that the car's occupant and the victim were engaging in a struggle in the car, during which the occupant shot the victim. Previously, the state had presented testimony from two experts, Alison Gingell and Amy Duhaime, that laboratory testing revealed elements of gunshot residue in the defendant's car, supporting the state's theory that the victim had been shot while in the defendant's car. Gingell's and Duhaime's testimony was far from incontrovertible, however. First, the state's initial tests of three collected samples came back negative for gunshot residue. The state had Duhaime explain that retesting of the samples was undertaken because the machine initially used failed a monthly performance check. Only upon retesting, more than one year later, did the laboratory report

[2] I acknowledge that my review of the evidentiary record leaves me with the impression that the state's case had significant strength, although it was far from airtight. Nonetheless, I do not believe—and do not believe that the majority contends—that the strength of the state's case, even if it were overwhelming, will always defeat a claim of an unfair trial. See, e.g., *State* v. *Williams*, 204 Conn. 523, 540–41, 529 A.2d 653 (1987).

the presence of antimony, barium, and lead, elements associated with gunshot residue.

These findings were still arguably uncertain, however, as became evident when Gingell and Duhaime testified about information not included in the second laboratory reports to explain what the results indicated. To start, two of the three samples tested contained particles possessing only two of the three elements—antimony and barium—present in gunshot residue. Although these elements may be considered "consistent with" gunshot residue, the existence of those elements in a single particle is insufficient to determine that gunshot residue was in fact present. Lead is the third element, and it was not contained in these two samples. The third sample tested contained a particle containing all three elements, but even then, the most the state's experts could conclude is that this particle is "characteristic of" gunshot residue. As Gingell herself testified, it can be said that a sample contains gunshot reside only if antimony, barium, and lead are "found in one particle and . . . *they form a sphere*, *a perfect sphere* . . . ." (Emphasis added.)

When defense counsel called Kammrath, she emphasized that it would be inaccurate to categorize the samples as gunshot residue when (1) antimony, barium, and lead were not all present, and (2) the state had failed to identify the specific morphology of the particles. Kammrath's expert opinion was necessarily limited to her review of the lab reports admitted through Gingell's testimony because, as the jury soon learned, Kammrath had not heard and was not responding to the trial testimony of Gingell or Duhaime because she was not present for that testimony the day before. In particular, Kammrath had not heard Gingell testify that antimony, barium, and lead only constitute gunshot residue if the elements form "a perfect sphere . . . ." During cross-examination of Kammrath, the state sought to establish

that she did not "look at the evidence in this case" and that the lab reports did not include "all of the technical backup as to how they reached these results." Kammrath readily admitted both points. "So," the prosecutor asked, "in terms of the morphology of the spherical nature of the gunshot residue contained in [sample] three, could it have been contained in that pack of materials, and that's why they concluded it was indicative of gunshot residue?" Kammrath responded: "It's possible, but it should have been in the report."

After the state's cross-examination and defense counsel's redirect examination, the following colloquy took place between Kammrath and the trial court:

"The Court: . . . Miss, are you familiar with Alison Gingell . . . ?

"[Kammrath]: Alison who?

"The Court: Alison Gingell.

"[Kammrath]: No, I'm not.

"The Court: What about Amy Duhaime?

"[Kammrath]: Yes.

"The Court: Alright. You're familiar with her. And were you present when either of them testified?

"[Kammrath]: No, I wasn't.

"The Court: Alright. So, you . . . don't know what their representations were about [the samples recovered from the defendant's Maxima]? Correct?

"[Kammrath]: Correct. I don't know."

So as not to leave this colloquy with the court as the last the jury heard from his expert, defense counsel sought to ask a follow-up question about the definition of gunshot residue propounded by the American Society for Testing and Materials. But the trial court, unprompted

by any objection, shut down any further questioning, stating, "I think you're going beyond the scope here, counsel. I asked about two witnesses . . . ." Defense counsel responded: "I understand, but we repeatedly referred to this as gunshot residue, so I believe that's a mischaracterization." The trial court replied that "[i]t'll be the jury's recollection as to what those witnesses said about the findings of the analyses."

The majority does not attempt to defend the court's inquiries of Kammrath and admits that the questions "could have been perceived [by the jury] to suggest, at least vaguely and by implication, that Kammrath was unaware of the opinions offered [in court] by [the state's] witnesses or that the judge believed that the testimony of [those] . . . witnesses contained information that Kammrath may have overlooked." In my view, this implication was unmistakable. The issue of morphology was not addressed in the lab reports. This was among Kammrath's main criticisms of them: without knowing the morphology of the particle, it cannot be categorized as gunshot residue. Gingell had testified that, for a particle containing antimony, barium, and lead to constitute gunshot residue, it must "form . . . a perfect sphere," but she did not go so far as to testify that the single, three element particle found in one of the samples actually formed a perfect sphere. After Kammrath had criticized the state's lab report for not addressing morphology, however, the state sought to rehabilitate its gunshot residue evidence by suggesting that "the morphology of the spherical nature of the gunshot residue" might have been reflected in the "technical backup" material but left out of the report, "and that's why . . . [the state lab] concluded it was indicative of gunshot residue." Kammrath protested: "It's possible, but it should have been in the report." By making clear to the jury that Kammrath was not present when Gingell or Duhaime testified, and that she therefore did

not know what their representations were *in court*—something the state had not even asked about precisely—the trial court risked being seen as reminding the jury that the state's witnesses had discussed morphology, and also as associating itself with the state's line of questioning by suggesting that Kammrath did not know whether the state's experts had already considered morphology in reaching their conclusions. I believe that, viewed objectively, these questions, combined with the court's questions to Kitman, the defendant's final expert witness, deprived the defendant of a fair trial.

II

Identification of the car in the video surveillance footage that captured the events surrounding the victim's murder was another hotly contested issue at trial. With Kitman,[3] the defendant's last expert witness, defense counsel sought to poke holes in the testimony of the state's witnesses who claimed that the video depicted a 2011 Nissan Maxima, the same make and model of the car owned by Frank Bridgeforth, the defendant's foster father, and driven regularly by the defendant.

Kitman testified that, after examining Bridgeforth's Maxima and watching the video footage, it was his expert opinion that the vehicle in the video was not a Maxima but was most likely a Chevrolet Impala. This opinion was consistent with the recollections of Javon Gaymon, an eyewitness to the murder. Although Gaymon testified at trial that the defendant's car looked like the car he saw on the night of the murder, he also admitted that he had told the police several times

[3] Kitman was an automative journalist who had written exclusively about automobiles for more than thirty years in publications including The New York Times, The Washington Post, and the Los Angeles Times. In addition, Kitman is president of a company that supplies cars to movies and television programs, a member of the Society of Automative Historians, and has served as a judge in car shows.

around the time of the murder that the car had a brand emblem with a silver deer, which was consistent with an Impala, not a Maxima, and that he told the police that the car had tinted windows. He also testified that the police suggested to him that he was wrong about the brand of the car.

Most pertinent to the trial court's questioning, Kitman explained that Bridgeforth's Maxima had very little or no tint on the windows, whereas the car in the video had heavily tinted windows. Kitman reached this conclusion because it was possible to see light emanating from within and outside of other cars in the video, but the black car that the victim had entered was "completely blacked-out. And that is different than what you would have gotten with [Bridgeforth's Maxima]."

On cross-examination, the prosecutor asked Kitman, "other than blacked out tinting, there's other things that may obscure somebody [from] seeing inside a car, correct?" Kitman responded that, certainly, if the windows were "covered," "like, if you had a curtain up in the car or something," it "wouldn't be [possible] to see inside . . . or outside" the car. Kitman also conceded that it is possible to disable the interior lights to prevent them from illuminating when car doors are opened. After the prosecutor and defense counsel had exhausted their questions for Kitman, the trial court inquired of him:

"[The Court]: . . . So, 2011 is the model year of the Maxima that you examined?

"[Kitman]: I believe, yes.

"[The Court]: Alright. And do you know if that year model had a device in the car that would allow you to dim the dashboard lights?

"[Kitman]: I don't specifically, but I assume that you could dim them.

"[The Court]: That's a pretty—that's been around for a long time, right?

"[Kitman]: Mm-hmm.

"[The Court]: You can make the dashboard brighter?

"[Kitman]: You can—most cars you can. I mean, for the last seventy-five years, I think you could dim the lights.

"[The Court]: And do you know if the 2011 Maxima had a pull up sunshade in the back door window?

"[Kitman]: I don't believe so."

With that, Kitman's testimony, along with all evidence in the trial, ended.

Viewed objectively, the import of the trial court's questions in this context was, in my view, unmistakable. The state's cross-examination had sought to make clear to the jury that the occupant of the car might have covered the window or disabled the interior lights to prevent illumination from escaping. Once again, the trial court expounded on the state's questions, suggesting to the jury that there might be other explanations for light failing to escape from the Maxima: dimming the dashboard lights or putting up a sunshade.[4]

Generously, the majority describes the court's extra questioning as "not exhibit[ing] the restraint or caution that the circumstances demanded . . . ." The majority does not seek to justify why the "embodiment" of court-

[4] In my view, it does not matter that Kitman's answer to the trial court's question about the sunshade was that he did not believe that the 2011 Maxima "had a pull up sunshade in the back door window . . . ." By asking its additional questions, the trial court risked appearing to jurors to have associated itself approvingly with the state's immediately preceding suggestion that there were other ways, besides tinting, in which it "wouldn't be [possible] to see inside . . . or outside" the car. Reasonable jurors likely know a vehicle owner could purchase and install a sunshade, even if it was not standard equipment.

room neutrality would ask such questions[5] but merely suggests that "the jury was well aware that there were various reasons why the interior of the car depicted in the video surveillance footage may have appeared dark other than the presence of a heavy tint on the windows." The harm to the defendant, however, in my view, came not simply from the jury's hearing other explanations as to why that light might not escape from the car's interior, but from the very real prospect that the jury would view the trial court as associating itself with the state's cross-examination. Our case law cautions against a trial court's exhibiting "skepticism toward the defendant's case, or of approbation for the prosecution's [case]." *State* v. *Smith*, supra, 200 Conn. 549. If Kitman was right in his expert opinion that the car he saw in the video was not a Maxima, then it was highly unlikely that the state's witnesses were right that they saw the defendant at the scene. By continuing the state's line of questioning, the court risked being seen by the jury as essentially expressing approval of the state's cross-examination, and simultaneously exhibiting skepticism toward the opinion of Kitman, whose credibility was "key to the outcome of the jury's verdict . . . ." Part I of the majority opinion. As such, I cannot conclude that the trial court safeguarded the defendant's right to a fair trial.[6]

[5] I do not agree with the state that the court "properly intervened to clarify factual matters that had been raised by the state's direct examination—i.e., whether it was possible to obscure the view of a car's interior either by covering the windows or by dimming a car's dashboard lights." On the contrary, I believe that, by this line of questioning, the trial court, even if well-intentioned, could have been seen as "assum[ing] a position of advocacy" by raising alternative explanations that the state had failed to explore. *State* v. *Smith*, supra, 200 Conn. 549.

[6] I agree with the majority that, "if the trial court exercises its discretion to question a witness, the court should instruct the jury . . . that the court's questions to witnesses should not be taken by the jury as an indication of its opinion as to how the jury should resolve any issues of fact." The Judicial Branch's model criminal jury instructions have contained such a general cautionary instruction for nearly one decade, including a specific admonition to the jury not to be "influenced by" the trial judge's own questions to

Accordingly, I respectfully dissent as to part I of the majority opinion.

NEMS, PLLC *v.* HARVARD PILGRIM HEALTH CARE OF CONNECTICUT, INC.
(SC 20914)

McDonald, D'Auria, Mullins, Ecker, Alexander, Dannehy and Bright, Js.*

Syllabus

The United States District Court for the District of Connecticut certified to this court, pursuant to statute (§ 51-199b (d)), three questions of law in connection with the efforts of the plaintiff, a group of emergency medicine physicians, to recover damages from the defendant health insurance company for its alleged violations of the Connecticut Unfair Trade Practices

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witnesses. Connecticut Criminal Jury Instructions 2.1-2, available at https://www.jud.ct.gov/ji/criminal/Criminal.pdf (last visited August 19, 2024). Connecticut case law has recognized such a cautionary instruction for at least as long. See, e.g., *State* v. *Rosario*, 209 Conn. App. 550, 565–66, 267 A.3d 946, cert. denied, 342 Conn. 901, 270 A.3d 98 (2022); *State* v. *Swilling*, 180 Conn. App. 624, 644–45, 184 A.3d 773, cert. denied, 328 Conn. 937, 184 A.3d 268 (2018); *State* v. *Fernandez*, 169 Conn. App. 855, 874–75, 153 A.3d 53 (2016). For reasons not apparent from the record, however, the trial court's cautionary instruction did not contain a specific warning about the court's own questions, instead instructing only that its "actions during the trial in ruling on motions or objections by counsel, or in comments to counsel or in setting forth the law in these instructions are not to be taken by you as any indication of [its] opinion as to how you should determine or resolve questions of fact." Although a cautionary instruction can sometimes prevent harm or prejudice from a party's or a trial court's actions, neither the majority nor the state can rely on such an instruction in the present case to counteract what, in my view, was the almost certain impact of the court's questions on the jurors. See, e.g., *Filakosky* v. *Valente*, 175 Conn. 192, 196, 397 A.2d 95 (1978) (cautionary instructions "tend to remove any doubts that the court properly discharged its duty of leaving the jury free to determine the facts and draw [its] own conclusions therefrom" (internal quotation marks omitted)).

* This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy. Thereafter, Chief Judge Bright was substituted for Chief Justice Robinson. Chief Judge Bright has read the briefs and appendices and listened to a recording of the oral argument prior to participating in this opinion.

Act (CUTPA) (§ 42-110a et seq.) and Connecticut's surprise billing law (§ 38a-477aa). *Held*:

Connecticut law does not recognize a cause of action under CUTPA for conduct that violates Connecticut's surprise billing law but that is not identified as an unfair insurance practice under the Connecticut Unfair Insurance Practices Act (§ 38a-815 et seq.).

The surprise billing law does not require a health insurance carrier, pursuant to § 38a-477aa (b) (3) (A), to reimburse a health-care provider for the share of the insured's cost of out-of-network emergency services rendered to the insured (such as a deductible or a copayment) and then to later recover such amount from the insured; rather, the surprise billing law allows the insurer to deduct the insured's cost of the out-of-network services from the amount that it pays to the health-care provider and contemplates that the health-care provider will collect the insured's share of the cost of the services directly from the insured.

The defendant's practice of paying the plaintiff only the amount that exceeds the insured's in-network deductible, copayment, or coinsurance, and leaving the plaintiff to recover the remaining amount directly from the insured, regardless of whether such remaining amount is greater than the amount that the insured would have been personally responsible to pay if he or she had obtained services from an in-network provider, was not a violation of the surprise billing law.

Argued February 6—officially released August 21, 2024**

Procedural History

Action seeking damages for, inter alia, the defendant's alleged violation of the Connecticut Unfair Trade Practices Act, and for other relief, removed to the United States District Court for the District of Connecticut, which certified certain questions of law to this court concerning the interpretation of Connecticut's surprise billing law and whether an action can be maintained under the Connecticut Unfair Trade Practices Act for conduct that does not violate the Connecticut Unfair Insurance Practices Act but that purportedly violates the surprise billing law.

Kristen L. Zaehringer, with whom were *Simon I. Allentuch* and *Timothy C. Cowan*, for the appellant (plaintiff).

** August 21, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

John W. Cerreta, with whom were *Elizabeth P. Retersdorf*, *Matthew J. Letten*, and, on the brief, *Jeffrey P. Mueller*, for the appellee (defendant).

Scott T. Garosshen, *Patrick W. Begos* and *Milanna Datlow* filed a brief for the Connecticut Association of Health Plans as amicus curiae.

Opinion

DANNEHY, J. The present case, which reaches us in the form of three certified questions from the United States District Court for the District of Connecticut, arises from an ongoing billing dispute between a group of emergency room physicians and an insurance company (insurer or carrier). The dispute revolves around the requirements imposed by the so-called "surprise billing law," General Statutes § 38a-477aa. The surprise billing law affords various protections to insured individuals (insureds) who have no realistic choice but to obtain medical care outside of their insurance carrier's network of health-care providers, such as when they are taken to the nearest emergency room during a medical emergency, as well as to the medical professionals who treat them. The plaintiff physicians' group, NEMS, PLLC, contends that those protections include the following: (1) there is a private cause of action under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., for conduct that violates the surprise billing law, even if that conduct is not identified as an unfair insurance practice under the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq.; (2) the surprise billing law requires that a carrier pay a provider directly for the full allowable cost of out-of-network emergency care (allowable amount) and then seek reimbursement from its insured for any applicable copayment, deductible, coinsurance, or other out-of-pocket cost sharing expenses, rather than remitting its share and then leaving the provider to collect the insured's share; and (3) an insured's

required cost share for out-of-network emergency care is arrived at by determining what that amount would be as applied to the average or typical cost of in-network emergency care in the area, rather than by applying the maximum allowable amount of cost sharing under the insured's policy to the cost of out-of-network care. The defendant carrier, Harvard Pilgrim Health Care of Connecticut, Inc., now known as Harvard Pilgrim Health Care, Inc., takes issue with each of those contentions. We agree with the defendant.

We begin by summarizing the legal, factual, and procedural background, as characterized by the District Court. See generally *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, 680 F. Supp. 3d 158 (D. Conn. 2023). "Health insurers often negotiate agreements with medical providers that set an . . . amount the provider is allowed to charge patients for a given treatment or service. . . . Providers with such negotiated agreements are called in-network providers. . . .

"When a patient receives a medical service from an in-network provider, the provider bills for the allowed amount under the provider's agreement with the insurer. The insurer typically pays a portion of the provider's fee, and the patient pays what is known as a [cost share], which is typically made up of a deductible, copayment, or coinsurance. . . .

"[When], however, a patient is treated by a provider that does not have an agreement with the patient's insurer, that provider is considered [out of network]. When a provider is [out of network], the provider can generally choose what it charges the patient for a given procedure or treatment. . . . Whether a provider is [out of network] or [in network] for a given patient can significantly increase or decrease the cost the insured is required to bear. . . . [I]n addition to out-of-network providers having no pre-negotiated maximum allowed

amount, in-network and out-of-network services have different benefit structures, with patients typically having to pay higher deductibles or coinsurance rates for out-of-network services. . . .

"The [s]urprise [b]illing [l]aw was enacted by the Connecticut [l]egislature in 2015. . . . [The law] was passed in an effort to shield patients from being saddled with surprisingly high medical bills when they receive emergency medical treatment. In a medical emergency, the logic goes, a patient does not have time to examine which providers or facilities may be [in network] or [out of network]; she simply goes to the place she can reach the quickest. The [s]urprise [b]illing [l]aw is intended to prevent such a patient from being punished for making the expedient choice by having to pay a higher cost for the out-of-network provider's services than she would have had to pay for similar services rendered by an in-network provider." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 161–62.

Two provisions of the surprise billing law are particularly relevant to this action. The first, § 38a-477aa (b) (3) (A), allows a provider to bill a carrier directly for emergency services provided out of network to the carrier's insured. That provision requires the carrier to reimburse the provider the greatest of three amounts: the amount the insured's health-care plan would pay for such services if they had been rendered by an in-network provider; the usual, customary and reasonable rate for such services in the area; or the amount Medicare would reimburse for such services. The second provision at issue, § 38a-477aa (b) (2), prohibits a carrier from imposing out-of-pocket cost sharing expenses for out-of-network emergency care that are greater than would be imposed if the insured had seen an in-network provider.[1]

[1] The full text of the relevant provisions is set forth in either part II or part III of this opinion. This action encompasses services that were provided and bills that were submitted for different insureds over a period of time.

During the relevant time frame, the plaintiff "employed emergency medicine physicians and supplied them to hospital emergency departments," and the defendant "provided health insurance policies to Connecticut residents." *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, supra, 680 F. Supp. 3d 163. Because the parties had not entered into a provider agreement, the plaintiff's physicians were out of network vis-à-vis the defendant's insureds. Id. When one of those insureds received treatment from the plaintiff's physician members, the defendant would determine the allowable amount for the procedure according to its understanding of the surprise billing law, calculate the insured's in-network cost sharing obligations, again, according to its understanding of the law, and remit to the plaintiff the difference between those two figures, leaving the plaintiff to collect the balance—the cost share—directly from the insured. See id.

In 2018, when the plaintiff began using a new revenue management company, it disputed the defendant's interpretation of the surprise billing law and the formula by which the defendant was calculating its share and its insureds' shares of the allowable amount. Id. As we explain further in part III of this opinion, the defendant reads § 38a-477aa (b) (2) to mean only that a carrier may not impose copayments, deductibles, and other cost sharing expenses for emergency care at an out-of-network rate; that is to say, all emergency care must be treated as in-network care for cost sharing purposes. The plaintiff, by contrast, began, in 2018, to construe the law to mean that an insured's cost sharing amount should be calculated based on what the insured would pay for a lower, in-network *cost of services*, as opposed to the amount

Although § 38a-477aa has been amended since the federal action was filed on September 1, 2021, those amendments are not relevant to this appeal. For purposes of convenience and clarity, we refer to the current revision of the statute.

allowed under § 38a-477aa (b) (3), and the cost sharing amount permitted under the insured's policy. Moreover, relying on General Statutes § 20-7f; see part III of this opinion; the plaintiff also took the position that, if the sum of the insured's cost sharing contribution, as understood by the plaintiff, and the amount the carrier pays, does not cover the total allowable amount, the provider would not be permitted to "balance bill" the insured for the unpaid balance.[2]

The parties' divergent understandings of how much an insured is required to contribute to the costs of out-of-network emergency care resulted in a gap between the amount the plaintiff believed it was entitled to be paid under the surprise billing law and the amount that it believed it was actually able to recover. Specifically, the plaintiff only collected from the insured what it took to be the insured's lower required contribution under the surprise billing law, and then tried to collect the remaining balance from the defendant. The defendant refused to pay those balances, leading the plaintiff to file the present action in state court, which subsequently was removed to federal court.

The operative second amended complaint alleges violations of CUTPA and standalone violations of the surprise billing law, and seeks compensatory damages, punitive damages, and a declaratory judgment interpreting the surprise billing law. Among other things, the plaintiff seeks payments that it claims the defendant owes for the treatment of nearly 300 of the defendant's insureds, who obtained emergency services from the plaintiff's physician members between 2018 and 2021.

[2] Balance billing occurs when the total bill for a medical treatment exceeds the sum of the insured's cost sharing contributions and the amount paid by the carrier, and the provider attempts to bill the insured for the outstanding balance. See, e.g., *Gianetti* v. *Rutkin*, 142 Conn. App. 641, 650–51, 70 A.3d 104 (2013). Statutory restrictions on cost sharing would count for little if a provider could simply bill the insured for any remaining balance that the carrier was unwilling to cover.

The District Court granted the defendant's motion to dismiss the plaintiff's stand-alone claims under the surprise billing law, concluding that the law does not create a private right of action. See *NEMS PLLC* v. *Harvard Pilgrim Health Care of Connecticut Inc.*, 615 F. Supp. 3d 125, 135–36 (D. Conn. 2022). The parties then filed competing motions for summary judgment as to the plaintiff's remaining claims. The primary issues raised were, first, whether the plaintiff had stated a cognizable CUTPA claim and, second, which party's interpretation of § 38a-477aa (b) (2) was correct. The District Court held a hearing on these issues, during which the court, sua sponte, raised a third question, namely, whether § 38a-477aa (b) (3) should be construed to mean that a carrier must directly pay the provider the entire allowable amount under the greatest of three and then collect the deductible or other cost share from its insured. Both parties initially eschewed this reading of the statute, observing that it would effect a dramatic change in the way medical bills are paid, although the plaintiff later embraced it. See *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, supra, 680 F. Supp. 3d 165.

The District Court, concluding that the matters in dispute at the summary judgment stage presented issues of first impression under Connecticut law, certified the following three questions[3] to this court pursuant to General Statutes § 51-199b (d):

(1) Under any interpretation of the surprise billing law, can a plaintiff successfully maintain an action under CUTPA for actions that do not violate CUIPA but purport to violate the surprise billing law, because the surprise billing law regulates a specific type of insurance related conduct, under *State* v. *Acordia, Inc.*, 310 Conn. 1, 73 A.3d 711 (2013) (*Acordia*)?

[3] We have reordered the certified questions to facilitate our analysis.

(2) Does Connecticut's surprise billing law, which provides in relevant part that, "[i]f emergency services were rendered to an insured by an out-of-network health care provider, such health care provider may bill the health carrier directly and the health carrier shall reimburse such health care provider the greatest" of three amounts; General Statutes § 38a-477aa (b) (3) (A); require a health insurance carrier to fully reimburse an out-of-network health-care provider at the greatest of the three amounts for emergency services rendered to its insureds, and then later recover any applicable deductible, copayment, or coinsurance directly from the insured?

(3) If the answer to the second question is "no," is the defendant's practice of paying the plaintiff only that amount that exceeds the insured's in-network deductible, copayment, or coinsurance, and leaving the plaintiff to recover the remaining amount directly from the insured, regardless of whether such remaining amount is greater than the amount that the insured would have been personally responsible to pay had they visited an in-network provider, a violation of the surprise billing law?

NEMS, PLLC v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, supra, 680 F. Supp. 3d 169–70.

Because the certified questions raise issues of statutory construction, our review is guided by General Statutes § 1-2z, the plain meaning rule.

I

A

The first certified question invites us to clarify our decision in *Acordia* and, specifically, to determine whether Connecticut law recognizes a cause of action under CUTPA for conduct that violates the surprise billing law but is not identified as an unfair insurance

practice under CUIPA. We answer that question in the negative.

The following principles frame our analysis. In determining whether a practice violates CUTPA, we have adopted the so-called "cigarette rule": "(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]." (Internal quotation marks omitted.) *Kent Literary Club of Wesleyan University* v. *Wesleyan University*, 338 Conn. 189, 232, 257 A.3d 874 (2021).

In *Mead* v. *Burns*, 199 Conn. 651, 661, 509 A.2d 11 (1986), this court considered the scope of liability that CUTPA imposes on the insurance industry. This court concluded that CUIPA, which regulates the insurance industry but affords no private right of action; *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015); and CUTPA have overlapping jurisdiction, such that any conduct that the legislature has expressly identified as an unfair insurance practice under CUIPA may form the basis of a CUTPA claim. See *Mead* v. *Burns*, supra, 661–63. This court also strongly suggested in *Mead* that the inverse is true as well, that conduct that is not prohibited by CUIPA is not actionable under CUTPA. See id., 663–66.

We revisited the issue in *Acordia*, considering "whether the legislature intended CUIPA to serve as the comprehensive and exclusive means of identifying unfair insurance practices," or whether other insurance practices could independently qualify as unfair under the ciga-

rette rule and, therefore, violate CUTPA. *State* v. *Acordia, Inc.*, supra, 310 Conn. 18. We recognized that § 38a-815 "identifies two different ways in which a practice may be determined to be an unfair insurance practice in violation of CUIPA: the practice may fall under one of the defined unfair insurance practices in [General Statutes] § 38a-816, or the Insurance Commissioner (commissioner) may determine, pursuant to General Statutes §§ 38a-817 and 38a-818, that the practice constitutes an unfair method of competition or an unfair or deceptive act or practice in the business of insurance . . . ." (Internal quotation marks omitted.) Id., 19.

Reviewing the statutory scheme and its legislative history, we found several reasons to conclude in *Acordia* that the legislature intended those two paths to be the exclusive means of identifying unfair insurance practices for purposes of CUTPA. First, with respect to § 38a-816, we relied on the canon of construction that, "[u]nless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." (Internal quotation marks omitted.) Id., 21. Second, we noted that the legislature identified the list of unfair insurance practices contained in § 38a-816 as definitional, not merely as examples of unfair insurance practices, which further "constrain[s] the discretion of courts to look to other sources in finding a particular insurance practice to be unfair . . . ." (Internal quotation marks omitted.) Id. Third, assuming that this statutory analysis did not unambiguously resolve the matter, we looked to the origin and history of the statutory scheme for further guidance. See id., 24. There, we found persuasive evidence "not only that the legislature intended to set out specifically the types of actions that constitute unfair insurance practices in a highly detailed manner, but also that the legislature viewed accomplishing that task as essential to the underlying purpose of CUIPA . . . ." Id., 25–26.

We concluded that "[t]he many subsequent amendments incorporating additional practices as violative of CUIPA demonstrate an ongoing legislative effort to keep the list of prohibited practices as current as possible and provide further evidence of the legislature's intent to provide in CUIPA a comprehensive list of unfair insurance practices." Id., 26.

At various points throughout our decision in *Acordia*, we drew conclusions from this analysis that appeared to rule out the possibility that there could be unfair insurance practices other than those expressly enumerated in § 38a-816 or otherwise defined by the commissioner pursuant to §§ 38a-817 and 38a-818. See, e.g., id. ("the legislature intended to occupy the field of defining unfair insurance practices"); id., 27 ("conduct by an insurance broker or insurance company that is related to the business of providing insurance can violate CUTPA only if it violates CUIPA"); id., 35 ("a plaintiff must establish a CUIPA claim in order to establish a CUTPA claim for insurance related business practices"); id. ("this court strongly suggested [in *Mead*] that the legislative determinations as to unfair insurance practices embodied in CUIPA are the exclusive and comprehensive source of public policy in this area"); id., 36 ("we see no reason why an allegation of a specific type of insurance related conduct that the legislature has expressed no opinion about should be found to support a CUTPA claim"). We reiterated these conclusions in *Artie's Auto Body, Inc.* See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, supra, 317 Conn. 624 n.14; see also id., 624 ("as a general rule, a plaintiff cannot bring a CUTPA claim alleging an unfair insurance practice unless the practice violates CUIPA").

Still, in summarizing our holding in *Acordia*, we left open the possibility—seemingly in tension with those conclusions—that a CUTPA claim might lie for insurance practices that, although not prohibited under

CUIPA, violate some other statute. We stated: "Because CUIPA provides the exclusive and comprehensive source of public policy with respect to general insurance practices, we conclude that, unless an insurance related practice violates CUIPA *or*, *arguably*, *some other statute regulating a specific type of insurance related conduct*, it cannot be found to violate any public policy and, therefore, it cannot be found to violate CUTPA." (Emphasis added.) *State* v. *Acordia, Inc.*, supra, 310 Conn. 37; see also id., 37–38 ("we conclude that a common-law breach of fiduciary duty arising in the insurance context that does not violate CUIPA *or some other statute regulating the insurance industry* cannot provide the basis for a valid CUTPA claim" (emphasis added)).

This highlighted, qualifying language was dictum in *Acordia*, as no other statute was at issue. The rationale offered in that decision for inserting this qualifying language is a footnote that cited the treatise of the Connecticut Practice Series on unfair trade practices for the proposition that, "if insurance related conduct violates a statute other than CUIPA, the conduct can be the subject of a CUTPA claim." (Emphasis omitted.) Id., 34 n.9, citing R. Langer et al., 12 Connecticut Practice Series: Unfair Trade Practices (2003) § 3.15, p. 133. The authors of that treatise, in turn, had relied on a 1992 Superior Court decision, a case that we suggested in *Acordia* might have been incorrectly decided. See *State* v. *Acordia, Inc.*, supra, 310 Conn. 34 n.9. Ultimately, we left the issue unresolved because it was unpreserved. Id., 34–35 n.9.

In the present case, the plaintiff relies on the qualifying language in *Acordia*, construing it broadly to mean that, although CUIPA occupies the field as to general insurance practices, other statutes that prohibit specific types of unfair insurance related conduct can provide the basis of a CUTPA claim. The plaintiff contends that

the surprise billing law is just such a statute. We are not persuaded.

Even if we assume for the sake of argument that violations of insurance related statutes other than CUIPA can give rise to a CUTPA claim, the meaning of the highlighted language in *Acordia* cannot be as broad as the plaintiff suggests. Chapter 38a of the General Statutes, which encompasses more than one thousand individual statutes, prohibits numerous, *specific* insurance practices. One dozen or so of those prohibited practices are identified as unfair methods of competition or unfair or deceptive acts or practices in the business of insurance for purposes of CUIPA; see General Statutes § 38a-816;[4] but many others are not. Likewise, there are certain general practices—misrepresentation, false advertising, defamation, and unfair claim settlement practices, to name a few—that are defined as "unfair" under § 38a-816, and many others of critical importance to consumers that are prohibited in chapter 38a but are not included in that list. See, e.g., General Statutes § 38a-472f (rules regarding adequacy of provider networks and prohibiting incentives to provide less than medically necessary services); General Statutes § 38a-476 (rules regarding coverage of preexisting conditions); General Statutes § 38a-476a (rules regarding compliance with Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq.); General Statutes § 38a-477jj (rules regarding prescription drug coverage). If any practice prohibited in chapter 38a could qualify as an unfair insurance practice,

[4] The plaintiff's contention that § 38a-816 identifies only *general* unfair insurance practices is perhaps best rebutted by subdivision (14) of § 38a-816, which defines, as an unfair method of competition or unfair or deceptive act or practice, discrimination in insurance "because of exposure to diethylstilbestrol through the female parent." Diethylstilbestrol is a particular form of synthetic estrogen that has not been prescribed in the United States since 1971. See *Kurczi* v. *Eli Lilly & Co.*, 113 F.3d 1426, 1427 n.2, 1431 n.10 (6th Cir. 1997).

as we explained in *Acordia*, there would be no reason for the legislature to have singled out a small subset of those prohibited practices to receive that designation. Nor has the plaintiff pointed to any specific provision of the surprise billing law that sets surprise billing apart from all of the other prohibited practices that the legislature chose not to include in § 38a-816.

Rather, we understand the highlighted language in *Acordia* to mean one of two things. First, the legislature is always free to specify that practices other than those listed in § 38a-816, or otherwise identified as unfair insurance practices by the commissioner, constitute CUTPA violations. For the reasons discussed in *Acordia*, however, we would expect a clear statement of legislative intent before concluding that the violation of a different insurance related statute is actionable under CUTPA. And, in fact, subsequent to our decision in *Acordia*, the legislature has done just that.

In 2017, the legislature enacted No. 17-241 of the 2017 Public Acts, which prohibits certain practices related to the provision of pharmacy services and benefits in insurance contracts. As codified, that statute provides in relevant part: "Any general business practice that violates the provisions of this section shall constitute an unfair trade practice pursuant to chapter 735a. . . ." General Statutes § 38a-477cc (c). Notably, the legislature made clear in § 38a-477cc itself that its violation also violates CUTPA but did not add § 38a-477cc, or the practices barred therein, to the list of unfair insurance practices defined in § 38a-816. The fact that the surprise billing law, which also was enacted after *Acordia* was decided, contains no reference to CUTPA or unfair trade practices, but is, instead, a separate statute that covers other insurance practices by its express terms, is a powerful indicator that the legislature intended to treat the two statutes differently in this respect. See,

e.g., *Dias* v. *Grady*, 292 Conn. 350, 360, 972 A.2d 715 (2009).[5]

A second possible meaning of *Acordia* is that we did not foreclose the possibility that violations of certain statutes, such as criminal statutes prohibiting the aiding and abetting of insurance fraud; see, e.g., General Statutes § 53a-215 (a) (2); might, under certain circumstances, constitute unfair trade practices in violation of CUTPA. There is reason to think that, although the legislature might deem such violations of the criminal law to be sufficiently egregious as to qualify as unfair trade practices, they are so fundamentally distinct from the types of practices prohibited throughout chapter 38a that the legislature could not reasonably be expected to have included them in § 38a-816. We need not resolve that question for present purposes, however, because the surprise billing law undoubtedly is not that sort of statute. The first certified question is answered in the negative.

B

The defendant contends that our conclusion that a CUTPA claim will not lie for a violation of the surprise billing law means that we need not proceed to resolve the remaining certified questions. We disagree.

In count one of its complaint, which alleges violations of CUTPA, the plaintiff contends both that the defendant's alleged violations of the surprise billing law impli-

[5] Section 20-7f (b) identifies certain instances of balance billing, in the context of health insurance, that violate CUTPA, even though they are not addressed in § 38a-816. The fact that, at the same time that the surprise billing law was enacted, the legislature amended § 20-7f (b) to specify that balance billing by a *health-care provider* in the surprise billing context constitutes a CUTPA violation but did not indicate that corresponding violations by insurers violates CUTPA, strongly supports the conclusion that the legislature intentionally decided not to include § 38a-477aa violations among those unfair insurance practices prohibited by § 38a-816. See Public Acts 2015, No. 15-146, § 11.

cate various of the unfair insurance practices defined in § 38a-816 and that its violation of the surprise billing law independently violates CUTPA. In part I A of this opinion, we rejected the latter contention. With respect to the former contention, the District Court concluded that many of the alleged violations of § 38a-816 were not cognizable, insofar as they lacked a required nexus between the plaintiff and the defendant, because the plaintiff had not alleged that it was injured by the defendant's refusal to abide by the terms of any insurance policies held by its insureds. See *NEMS PLLC* v. *Harvard Pilgrim Health Care of Connecticut Inc.*, supra, 615 F. Supp. 3d 140.

But the District Court also concluded that subparagraphs (D) and (F) of § 38a-816 (6), which are implicated by the defendant's alleged violations of the surprise billing law, do not require that the parties be contractually bound pursuant to an insurance policy. See id. The plaintiff alleges that the defendant violated § 38a-816 (6) (D)[6] "when it refused to pay claims without conducting a reasonable review of the claims and [the surprise billing law]." The plaintiff also claims that the defendant violated § 38a-816 (6) (F) "when it failed to settle or resolve the [disputed] claims . . . despite . . . that its legal obligations [were] clear under the surprise billing law."[7] Whether the defendant's payments to the plaintiff were fair and equitable, and whether liability was reasonably clear, depends in no small part on which party has correctly interpreted the requirements imposed by the surprise billing law.

[6] General Statutes § 38a-816 (6) (D) defines as an unfair claim settlement practice "refusing to pay claims without conducting a reasonable investigation based upon all available information [with such frequency as to indicate a general business practice] . . . ."

[7] General Statutes § 38a-816 (6) (F) further defines as an unfair claim settlement practice "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear [with such frequency as to indicate a general business practice] . . . ."

Because the plaintiff's allegations state a colorable CUTPA claim in at least that limited respect, we must answer the remaining certified questions.

II

The next certified question asks whether the surprise billing law requires a carrier to directly reimburse an out-of-network provider for the full allowable amount of emergency services rendered, and then recoup any applicable cost sharing directly from its insured, or whether the insurer can first deduct the insured's required contribution from the amount that it reimburses the provider. The plaintiff contends that the plain language of the statute requires full, direct reimbursement from the carrier to the provider. The defendant argues that there is "no indication the legislature intended to upend" the process by which insureds contribute their share of the cost of health-care treatment. The defendant further argues that, read in the context of the full statutory scheme, the surprise billing law does not "disregard the traditional process," pursuant to which the health-care provider, rather than the carrier, is responsible for collecting the insured's share of the cost of services. We conclude that, read as a whole, and in light of its legislative history, § 38a-477aa requires the health-care provider to collect the insured's share of the cost of services.

The statutory language at the core of the parties' dispute is contained in subparagraph (A) of § 38a-477aa (b) (3). Section 38a-477aa (b) (3) (A) provides in relevant part: "If emergency services were rendered to an insured by an out-of-network health care provider, such health care provider may bill the health carrier directly and the health carrier shall reimburse such health care provider the greatest of the following amounts: (i) The amount the insured's health care plan would pay for such services if rendered by an in-network health care

provider; (ii) the usual, customary and reasonable rate for such services; or (iii) the amount Medicare would reimburse for such services. As used in this subparagraph, 'usual, customary and reasonable rate' means the eightieth percentile of all charges for the particular health care service performed by a health care provider in the same or similar specialty and provided in the same geographical area, as reported in a benchmarking database maintained by a nonprofit organization specified by the Insurance Commissioner. . . ." It is undisputed that the amount identified by § 38a-477aa (b) (3) (A) (ii), "the usual, customary and reasonable rate for such services," typically will be higher than the in-network or Medicare reimbursement rates and is the reimbursement to which the provider will be entitled in almost all cases.

The plaintiff relies on the fact that §38a-477aa permits the provider to bill the carrier "directly" and requires the carrier to reimburse the provider the usual, customary, and reasonable rate for the services provided. The plaintiff argues that nothing on the face of § 38a-477aa permits the carrier to reimburse the provider any less than that amount, such as by deducting the insured's required cost sharing contributions. As a result, the plaintiff contends, the responsibility for collecting the insured's contributions must fall to the carrier.

At first glance, the plaintiff's interpretation is one reasonable reading of § 38a-477aa (b) (3) (A) (ii). But § 1-2z instructs us also to consider, at this stage in the analysis, the relationship of clause (ii) of § 38a-477aa (b) (3) (A) to the other parts of § 38a-477aa (b) (3) (A) and to other related statutes, as well as whether this interpretation would yield absurd or unworkable results. See General Statutes § 1-2z.

It is a "basic tenet of statutory construction that the intent of the legislature is to be found not in an isolated

phrase or sentence but, rather, from the statutory scheme as a whole." (Internal quotation marks omitted.) *Wiseman* v. *Armstrong*, 269 Conn. 802, 820, 850 A.2d 114 (2004). The plaintiff's reading of the statute, however, makes sense only when reading clause (ii) of § 38a-477aa (b) (3) (A) in isolation. We must read clause (ii) together with clauses (i) and (iii). Regardless of which of the three amounts most commonly serves as the basis for calculating the provider's recovery from the carrier, by stating that the provider is entitled to the "greatest of the following amounts"; General Statutes § 38a-477aa (b) (3) (A); which includes the options in all three clauses, the legislature contemplated that any of the three potentially could yield the greatest amount. Although clauses (i) and (iii) set forth amounts without expressly mentioning the insured's cost sharing burden, those clauses, nonetheless, clearly account for, and necessarily exclude, that burden.[8] Both amounts are limited to what the insurer or Medicare would pay for the services. See General Statutes § 38a-477aa (b) (3) (A) (i) and (iii) ("[t]he amount the insured's health care plan would pay for such services if rendered by an in-network health care provider . . . or . . . the amount Medicare would reimburse for such services"). *Those* provisions require the carrier to directly reimburse the provider for only the amount that it, or Medicare, would actually pay for an in-network visit. In practice, that amount excludes any contributions by the insured.[9]

[8] See General Statutes § 38a-591a (30), which provides: " 'Participating provider' means a health care professional who, under a contract with the health carrier, its contractor or subcontractor, has agreed to provide health care services to covered persons, with an expectation of receiving payment or reimbursement directly or indirectly from the health carrier, other than coinsurance, copayments or deductibles."

[9] Our conclusion that the legislature did not intend to completely transfer the responsibility for the collection of insureds' out-of-pocket expenses for out-of-network emergency treatment to their insurance carriers under any of the greatest of three amounts is confirmed by § 20-7f. That statute was amended at the same time the surprise billing law was enacted to provide in relevant part that it is an unfair trade practice "for any health care provider

By contrast, clause (ii) of § 38a-477aa (b) (3) (A) does not, on its face, limit a provider's entitlement to reimbursement to what the insurer would otherwise pay, that is, exclusive of the insured's cost sharing burden. Instead, it identifies the amount as "the usual, customary and reasonable rate for such services . . . ." General Statutes § 38a-477aa (b) (3) (A) (ii). Interpreting § 38a-477aa (b) (3) (A) (ii) to be the sole amount among the three that includes the insured's cost sharing burden, however, would create an odd, apples to oranges payment scheme by requiring carriers to compensate providers the greatest of three amounts, when only one of those amounts includes the insured's share of the costs, and the other two include only the carrier's share.[10]

The absence of express language in clause (ii) of § 38a-477aa (b) (3) (A) specifying that copayments and other cost sharing contributions of the insured are not

to request payment from an enrollee, other than a coinsurance, copayment, deductible or other out-of-pocket expense, for . . . emergency services covered under a health care plan and rendered by an out-of-network health care provider . . . ." General Statutes § 20-7f (b), as amended by Public Acts 2015, No. 15-146 § 11. The statute does not mention anything about the carrier requesting payment from an enrollee. Accordingly, we find unpersuasive the plaintiff's reliance on the fact that § 20-7f prohibits balance billing for emergency services.

[10] We find unpersuasive the plaintiff's contention that, because other statutes, by contrast, expressly exclude that cost sharing burden, the legislature intended to include that amount in the greatest of three in § 38a-477aa (b) (3) (A). In support of this argument, the plaintiff cites to General Statutes § 38a-591a (30), which defines a "participating provider" as a "health care professional who, under a contract with the health carrier, its contractor or subcontractor, has agreed to provide health care services to covered persons, with an expectation of receiving payment or reimbursement directly or indirectly from the health carrier, *other than coinsurance, copayments or deductibles*." (Emphasis added.) The plaintiff's argument, however, does not account for the language of clauses (i) and (iii) of § 38a-477aa (b) (3) (A), which respectively limit the carrier's contribution to the amount that the carrier would pay for the services if they were provided in network, and the amount that Medicare would pay for the services. Both of those amounts exclude the amount that the insured is obligated to pay.

encompassed within the carrier's payment obligations is insufficient, when read in the context of the entire statute, to support the inference that the legislature intended the carrier to reimburse the provider an amount that includes the insured's share of the cost of services. Although our review of the plain language reveals that the defendant's interpretation of the statutory language is more persuasive, the plaintiff's interpretation of that language is at least plausible.

The defendant contends, however, and we agree, that the plaintiff's reading of the statute would yield absurd, unworkable, or otherwise bizarre results. We have interpreted § 1-2z to instruct Connecticut's courts, when construing statutory language, to eschew those interpretations that, although not literally impossible to effectuate, would be so bizarre, impracticable, or contrary to common sense that one cannot reasonably assume that they reflect the considered intent of the legislature. See, e.g., *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 91 and nn.10–11, 282 A.3d 1253 (2022); *Casey* v. *Lamont*, 338 Conn. 479, 493, 258 A.3d 647 (2021); *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 17–18 n.13, 110 A.3d 419 (2015); *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010); *Wallingford* v. *Werbiski*, 274 Conn. 483, 491, 877 A.2d 749 (2005); see also *Cohen* v. *Rossi*, 346 Conn. 642, 700, 295 A.3d 75 (2023) (*Ecker*, *J.*, concurring in part and concurring in the judgment) ("[t]his court repeatedly has held that the threshold ambiguity analysis under § 1-2z should and must take into account . . . commonsense, practical considerations regarding how the statutory scheme will operate in the real world"); *State* v. *Blasko*, 202 Conn. 541, 558–59, 522 A.2d 753 (1987) (court declined to construe legislative silence to bring about "difficult and possibly bizarre result . . . sub silentio" (internal quotation marks omitted)).

The insurance industry is—and has long been—heavily regulated. *Serrano* v. *Aetna Ins. Co.*, 233 Conn. 437, 449, 664 A.2d 279 (1995). In particular, the legislature has enacted consumer protections meant to regulate the manner by which out-of-network health-care providers collect balances due from insureds. See, e.g., General Statutes § 20-7f; General Statutes § 38a-193 (c) (3). The obligation to collect these out-of-pocket payments represents a significant burden that the current system imposes on health-care providers, and *not* having such an obligation is a corresponding benefit enjoyed by carriers. In light of this history of heavy regulation, it is unlikely that the legislature would have enacted a sea change in this system, requiring carriers to develop novel mechanisms for collecting out-of-pocket payments from their insureds, for only one small subsegment of health-care services, without acknowledging that change, let alone enacting rules to manage such a major transition and to provide insureds with protections comparable to those that they currently enjoy.

Moreover, the surprise billing law indisputably allows out-of-network providers, such as the plaintiff, to collect fees at higher than the prevailing in-network rate, and at higher even than the median usual, customary, and reasonable rate, directly from carriers. This creates a disincentive for emergency medicine physicians to join insurance networks, which would pay them at the lower, in-network rates. If the legislature had further tipped the scales in favor of providers by eliminating any costs and uncertainties associated with having to collect from insureds, emergency physicians would have little reason to join networks, which would have adverse effects on health-care cost containment efforts, contrary to the long-standing policy of this state. See, e.g., *Caraballo* v. *Electric Boat Corp.*, 315 Conn. 704, 714–20, 110 A.3d 321 (2015).

Because there are two plausible interpretations of the statutory language, and because adopting the plaintiff's interpretation would strain common sense, we may look to extrinsic sources of legislative intent, including the legislative history of the surprise billing law, for additional guidance. That legislative history provides further support for the defendant's position.

In the lengthy legislative history, there is no indication that the legislature intended to require that insureds contribute their share of the cost of emergency medical care directly to insurers, rather than to providers. Rather, when Representative Matthew D. Ritter introduced the surprise billing law, he twice indicated that the "greatest of three different amounts" provision was modeled on, or was intended to mirror,[11] "the Affordable Care Act," that is to say, the federal Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 763. See 58 H.R. Proc., Pt. 20, 2015 Sess., pp. 6716–17. We assume that his references were to 29 C.F.R. § 2590.715-2719A, a United States Department of Labor regulation adopted in 2010 pursuant to the Affordable Care Act, which established new protections for insureds undergoing out-of-network emergency treatment. Subparagraph (i) of 29 C.F.R. § 2590.715-2719A (b) (3), which is quite similar in structure and content to § 38a-477aa (b) (3) (A), defines each of the greatest of three amounts to exclude insured cost sharing contributions. See 29 C.F.R. § 2590.715-2719A (b) (3) (i) (2010). If the legislature had intended to depart from the federal scheme in enacting the surprise billing law, as the plaintiff advocates, it could have stated this intention in the language of the

[11] Specifically, Representative Ritter stated that "there's a listing in the statute, which sort of models the Affordable Care Act, which lists different things. It would be the greatest of three different amounts . . . ." 58 H.R. Proc., supra, p. 6716. "[I]f they couldn't agree, then they'd go back to the greatest amount of the three listed, which [sort of] mirrors the Affordable Care Act . . . ." Id., p. 6717.

statute. It did not.[12] If anything, then, the legislative history provides further support for our interpretation of the statutory text.

We thus answer the second certified question in the negative. Regardless of which of the greatest of three amounts applies, the surprise billing law does not require the carrier to reimburse the provider for the insured's out-of-pocket costs and then collect those costs from the insured. Rather, the greatest of three amounts refers only to the carrier's share of the cost of services.

III

The third certified question addresses § 38a-477aa (b) (2) of the surprise billing law. Section 38a-477aa (b) (2) provides in relevant part that "[n]o health carrier shall impose, for emergency services rendered to an insured by an out-of-network health care provider . . . a coinsurance, copayment, deductible or other out-of-pocket expense that is greater than the coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed if such emergency services were rendered by an in-network health care provider . . . ." The plaintiff interprets § 38a-477aa (b) (2) to mean that the total amount that an insured is required to pay out of pocket for emergency services provided by an out-of-network health-care provider must be calculated on the basis of the in-network cost sharing obligation of

[12] The different language in the federal and state statutory schemes provides an explanation for the Connecticut legislature's failure to expressly exclude cost sharing expenses from each of the greatest of three amounts. Specifically, the federal regulations refer to "[t]he amount negotiated with in-network providers for the emergency service furnished" and "[t]he amount that would be paid under Medicare"; 29 C.F.R. § 2590.715-2719A (b) (3) (i) (2010); which, standing alone, reasonably could be read to include the cost sharing component of each amount, whereas the surprise billing law, which refers to "[t]he amount the insured's health care plan would pay" and "the amount Medicare would reimburse," excludes the cost sharing component. General Statutes § 38a-477aa (b) (3) (A) (i) and (iii).

the insured under its policy, as applied to the in-network cost of the services. The plaintiff contends that its reading properly ensures that the total amount that an insured is required to pay for the services is the same amount that would have been required if the services had been provided by an in-network emergency department.[13]

The defendant reads the law differently. It contends that § 38a-477aa (b) (2) requires the carrier to apply in-network deductibles, copayments, and other cost sharing expenses under the insured's policy to the cost of the services, as applied to greatest of three amounts. The purpose of § 38a-477aa (b) (2), the defendant contends, is not to afford insureds the benefit of the lower rates for the cost of services that carriers negotiate with their network of providers, particularly when the carrier itself cannot receive the benefit of those negotiated rates. We agree with the defendant.

This certified question requires us to construe the meaning of the phrase "the coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed if such emergency services were rendered

[13] The defendant construes the plaintiff's argument to rely on and center around the residual phrase "or other out-of-pocket expense" in § 38a-477aa (b) (2). We do not understand that to be the basis of the plaintiff's argument. As the District Court's hypothetical makes clear, the parties would construe the surprise billing law as they have, even if the statute applied only to deductibles and not to other out-of-pocket expenses.

Insofar as the plaintiff may rely on that residual phrase, however, that reliance would be misplaced. Specifically, the ejusdem generis canon of statutory construction suggests that this residual phrase is merely intended to encompass other types of cost sharing expenses akin to copayments and deductibles, and not qualitatively different things, such as the total amount that an insured ultimately is obligated to pay for medical treatment. See, e.g., *Wind Colebrook South, LLC* v. *Colebrook*, 344 Conn. 150, 165 and n.14, 278 A.3d 442 (2022) ("[when] a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to . . . things of the same general kind or character as those specified in the particular enumeration" (internal quotation marks omitted)).

by an in-network health care provider . . . .'' General Statutes § 38a-477aa (b) (2). That is, does this statutory language require the deductible to be calculated in reference to a theoretical, in-network cost that might have been charged, or does it require the deductible to be calculated on the basis of the insured's in-network cost sharing expenses under its policy but with reference to the actual charge for the out-of-network services? To better crystallize the question, the District Court posed the following hypothetical.

An insured has a $1000 deductible for in-network emergency care and a $5000 deductible for out-of-network emergency care. She visits an emergency room during a medical emergency and receives out-of-network care. The in-network fee for the procedure would be $500, and the greatest of three amounts in this instance, would be the usual, customary and reasonable rate for such services, which is $1500. The question is, how much of the $1500 fee is the carrier's responsibility and how much is the insured's responsibility? See *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, supra, 680 F. Supp. 3d 164–65.

Under the plaintiff's reading of the statute, the insured can be required to pay only $500. That is, the insured's liability for the out-of-network services would be capped, not solely by the maximum allowable in-network deductible of $1000 as applied to those services, but also by the maximum allowable deductible, as applied to the in-network cost of the services.

Under the defendant's reading of the statute, the carrier would impose the in-network deductible of $1000, regardless of whether the insured obtains emergency care in network or out of network. The only difference would be that the insured would exhaust that full $1000 deductible by obtaining out-of-network care, whereas she would have exhausted only one-half of the deduct-

ible, $500, had she stayed in network. What would be prohibited, under the defendant's reading of the statute, would be the application of the $5000 deductible to the out-of-network services. The imposition of that cost sharing amount on the insured would violate the statute's prohibition against imposing "a coinsurance, copayment, deductible or other out-of-pocket expense that is greater than the coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed if such emergency services were rendered by an in-network health care provider . . . ." General Statutes § 38a-477aa (b) (2).

One way to think about the parties' dispute, then, is whether the legislature intended to limit the deductible, copayment, etc., to that which would be imposed based on the in-network rate for the emergency care, or to that which would be imposed based on the maximum in-network cost sharing permitted under the insured's policy. For the following reasons, we find the latter reading more persuasive.

First, the meaning of the phrase "the coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed if such emergency services were rendered by an in-network health care provider"; General Statutes § 38a-477aa (b) (2); presents a question of statutory interpretation, guided by established principles for discerning legislative intent. See, e.g., *Fay* v. *Merrill*, 336 Conn. 432, 446, 246 A.3d 970 (2020) (describing plain meaning rule, as set forth in § 1-2z, and principles for discerning legislative intent). The phrase "such emergency services" refers back to the phrase "emergency services rendered to an insured by an out-of-network health care provider . . . ." General Statutes § 38a-477a (b) (2). Section 38a-477aa (b) (3) (A) instructs us that the cost of services rendered by an out-of-network provider is set according to the greatest of three amounts. The logical reading of § 38a-477aa

(b) (2), therefore, is that the phrase "coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed" is applied against the greatest of three amounts, as if an in-network provider had rendered the out-of-network services. That reading, that the applicable cost sharing amount of the insured is applied to the greatest of three amounts, calls into question the plaintiff's reading, which would require the application of the insured's cost sharing obligation to a hypothetical in-network cost of the services.

Second, the District Court's hypothetical assumed that the in-network rate for care would have been $500. See *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, supra, 680 F. Supp. 3d 164–65. The flaw in that assumption is key to our second point. In fact, there is no one, uniform in-network rate for any particular treatment. The parties have stipulated that carriers such as the defendant negotiate different in-network rates with different providers, presumably on the basis of their relative size and bargaining power, among other factors. The plaintiff's theory that § 38a-477aa (b) (2) caps an insured's contribution at the "in-network" rate only makes sense, then, if there is one established in-network rate to serve as a benchmark.

The plaintiff appears to recognize this problem, but we are not persuaded that its proposed solution is correct. The plaintiff posits that "there are at least three available avenues to determine the in-network rate: the median in-network rate of that insurer for that service in that geographical area, the mean in-network rate of that insurer for that service in that geographical area, or the in-network rate under the insured's health-care plan." Each of those methods of calculating the in-network rate may yield a different result. The plain language of the statute does not support a determination that the legislature included, within § 38a-477aa (b) (2), an unstated requirement that the carrier calculate

an undefined, in-network rate, one that the plaintiff itself concedes will vary depending on which of several plausible calculation methods is employed. The plaintiff's interpretation would require us to engage in significant gap filling by reading words into the statute in a manner contrary to standard principles of statutory construction.[14] See, e.g., *Ghent* v. *Planning Commission*, 219 Conn. 511, 515, 594 A.2d 5 (1991) ("we may not read into clearly expressed legislation provisions [that] do not find expression in its words" (internal quotation marks omitted)).

Third, and relatedly, the plaintiff's interpretation of § 38a-477aa (b) (2) is incompatible with the very definition of a deductible and would yield absurd or unworkable results. See General Statutes § 1-2z. Specifically, the term "deductible" is defined as, "[u]nder an insurance policy, the portion of the loss to be borne by the insured *before* the insurer becomes liable for the payment." (Emphasis added.) Black's Law Dictionary (10th Ed. 2014) p. 501; see also General Statutes § 17b-290 (7) (defining "deductible" to mean "the amount of out-of-pocket expenses that would be paid for health services on behalf of a member *before* becoming payable by the insurer" (emphasis added)). Under the plaintiff's analysis of the District Court's hypothetical, § 38a-

[14] We note that other states that have enacted surprise billing laws consistent with the plaintiff's interpretation have specified how the insured's financial burden is to be calculated. For example, § 4303-C (2) (A) of title 24-A of the Maine Statutes provides in relevant part: "A carrier shall require an enrollee to pay only the applicable coinsurance, copayment, deductible or other out-of-pocket expense that would be imposed for health care services if the services were rendered by a network provider. For an enrollee subject to coinsurance, the carrier shall calculate the coinsurance amount based on the median network rate for that health care service . . . ." Me. Rev. Stat. Ann. tit. 24-A, § 4303-C (2) (A) (Cum. Supp. 2024). The fact that the Maine legislature specified a means of calculating the imputed in-network rate solely for the purpose of coinsurance implies that cost sharing for deductibles and copayments is to be applied consistently with the defendant's interpretation of the surprise billing law.

477aa (b) (2) would require that the carrier begin paying for the insured's treatments after the insured has contributed only $500 out-of-pocket, even though one-half of her annual $1000 deductible remain unexhausted. That reading would conflict with the definition of a deductible and would, effectively, rewrite insurance policies so that each insured has, in essence, multiple different deductibles, each tailored to the imputed cost of different treatments. Either way, we see no indication that this was the intent of the legislature.

Finally, even if we were to conclude that the statutory language was ambiguous, any statutory ambiguity is resolved by referring to the legislative history of § 38a-477aa (b) (2). Statements in the legislative history support reading the statute as applying an insured's in-network cost share to the greatest of three amounts for emergency services. The primary purpose of the surprise billing law is to spare consumers the unwelcome surprise they experience when receiving an unexpectedly large medical bill after an unplanned and, often, unintentional visit to an out-of-network provider. As Representative Ritter explained, "[T]he New York Times did an exposé on . . . patients hit with, like, $15,000 bills. Surprise. That's where the name comes from. It's a bad surprise, and we tried to make that better." 58 H.R. Proc., supra, pp. 6715–16; see also id., p. 6717, remarks of Representative Prasad Srinivasan ("[The bill] definitely takes away the surprise element, which is a good thing. . . . [T]he whole purpose of the bill is to take away, for the consumer, that . . . surprise component . . . .").

The surprise that the statute guards against is that of an unexpectedly large medical bill, which is addressed under § 38a-477aa (b) (3) (A) and the greatest of three amounts. There is no suggestion in the legislative history that the statute was intended to transfer to carriers the out-of-pocket expenses that are ordinarily paid by

insureds. There is no surprise attached to an insured learning, after receiving out-of-network emergency treatment, that she is responsible for paying her full in-network copayment or deductible. We see nothing in the legislative history to suggest that the statute was intended to apply an insured's out-of-pocket expenses to some standard (or mean or median) in-network fee for services in her geographical area, and we will not engage in such extensive gap filling, absent some indication that the legislature intended such an approach.[15]

All three certified questions are answered in the negative.

No costs shall be taxed in this court to either party.

In this opinion the other justices concurred.

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[15] The plaintiff contends that the legislative history reinforces its interpretation of the statute. Specifically, the plaintiff relies on testimony that Senator Martin M. Looney presented before the Committee on Insurance and Real Estate with respect to a different version of the legislation. Senator Looney testified that, "[u]nder this [l]egislation, a patient receiving emergency medical services would not be required to pay more than the amount the patient would normally pay for in-network care." Conn. Joint Standing Committee Hearings, Insurance and Real Estate, Pt. 5, 2015 Sess., p. 29.

We do not read Senator Looney's testimony to unequivocally support the plaintiff's position. First, his statements before a hearing committee about a different bill is of questionable relevance. More important, Senator Looney's testimony does not address the precise issue before this court and is compatible with the interpretations of the statute advanced by both parties. Although his testimony could be read to support the plaintiff's view, Senator Looney's reference to "the amount the patient would normally pay for in-network care"; id.; could just as well refer to the patient's standard in-network deductible, copayment, and coinsurance, as applied to the greatest of three amounts for the cost of services.