# JOHN B. CLINTON *v.* MICHAEL E. ASPINWALL ET AL.
## (SC 21072)

McDonald, D'Auria, Ecker, Alexander and Dannehy, Js.

*Syllabus*

The defendants, three members and managers of C Co., a Delaware limited liability company, appealed from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, a former member and manager of C Co., on his breach of contract claim. The plaintiff had alleged that the defendants breached their contractual duties under a duty of care provision in C Co.'s operating agreement by, inter alia, removing the plaintiff as a member of C Co. and by maintaining an allegedly unnecessary $3 million capital reserve fund. The first sentence of the duty of care provision required managers to exercise their best judgment in carrying out C Co.'s operations and in performing their other duties under the agreement, whereas the second sentence provided that a manager would not incur any liability in performing his duties, unless any act or omission on the part of the manager was the result of gross negligence or wilful misconduct, or unless the man-

ager did not act in good faith. On appeal, the defendants claimed, inter alia, that the trial court had incorrectly interpreted the second sentence of the duty of care provision as imposing affirmative duties on the defendants, instead of as an exculpatory provision, and had improperly instructed the jury in accordance with that flawed interpretation. *Held*:

The trial court incorrectly construed the second sentence of the duty of care provision as imposing affirmative contractual duties on the defendants, and, because this court could not say that the court's instructions fairly presented the plaintiff's breach of contract claim to the jury in such a way that injustice was not done to the defendants, this court reversed the trial court's judgment, remanded the case for a new trial, and vacated the court's posttrial awards of attorney's fees, costs, and interest.

The second sentence of the duty of care provision was a quintessential exculpatory provision under Delaware law that did not create obligations or duties but, rather, served as a limitation on liability, as it was clearly aimed at eliminating the availability of damages as a remedy for a manager's breach of duty, unless the breach was the result of the manager's gross negligence, wilful misconduct, or failure to act in good faith.

The trial court improperly instructed the jury on the defendants' duties under the operating agreement when it stated that the exculpatory provision prohibited the managers of C Co. from taking actions that are in bad faith or that constitute gross negligence or wilful misconduct, and that the plaintiff's allegations were based on the defendants having had either a bad faith purpose or no good faith basis for their actions, as the references to the defendants' allegedly bad faith purposes and the prohibition on actions constituting gross negligence or wilful misconduct came directly from language in the exculpatory provision, which did not give rise to any contractual duties on the part of the defendants.

Moreover, the trial court compounded its error by repeatedly instructing the jury that the defendants asserted as special defenses that they had complied with the terms of the operating agreement in general, and with the exculpatory provision in particular, and that they had acted in good faith and without gross negligence or wilful misconduct, as those instructions improperly suggested that such actions were elements of the plaintiff's breach of contract claim and required the defendants to disprove those so-called elements.

The trial court's instructional error was further exacerbated by its additional instruction on the jury's role in interpreting the provisions of the operating agreement, because, instead of conducting its own pretrial analysis of the relevant provisions to determine whether they were ambiguous and whether extrinsic evidence should be considered in their interpretation, the court improperly delegated those functions to the jury.

The trial court's instructional errors were harmful insofar as they allowed the jury to find the defendants liable for acting in bad faith or with gross negligence or wilful misconduct, even though the defendants did not owe those duties to the plaintiff, imposed on the defendants the burden of disproving what the court had misdescribed as elements of the plaintiff's breach of contract claim, and allowed the jury to decide whether the relevant provisions of the operating agreement were ambiguous and whether to consider extrinsic evidence, which likely influenced the jury in reaching a verdict for the plaintiff.

The trial court did not abuse its discretion in admitting the testimony of the plaintiff's expert witness, a certified public accountant, about the propriety of the $3 million capital reserve fund.

The expert's areas of special skill or knowledge were directly related to the matters at issue, the testimony regarding the capital reserve fund was a subject that was not within the common knowledge of the average person, the expert appropriately relied on the operating agreement to ascertain the purpose of the capital reserve fund, and, notwithstanding the defendants' claim to the contrary, this court was unaware of any authority that required the expert to base his opinion on a particular formula or standard of care in order for his testimony to be admissible under the provision of the Connecticut Code of Evidence (§ 7-2) governing the admissibility of expert testimony.

(*One justice concurring separately*)

Argued February 5—officially released July 29, 2025

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, granted the plaintiff's motion for summary judgment with respect to the defendants' counterclaim; thereafter, the case was tried to the jury before *Shapiro*, *J.*; verdict for the plaintiff on his breach of contract claim; subsequently, the defendants appealed to the Appellate Court; thereafter, the court, *Shapiro*, *J.*, denied the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict and rendered judgment in accordance with the verdict, and the defendants filed an amended appeal; subsequently, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the plaintiff's motion for attorney's fees and

costs, and the defendants filed a second amended appeal and a separate appeal with the Appellate Court, which consolidated the appeals; thereafter, the Appellate Court, *Lavine*, *Alvord* and *Harper*, *Js.*, reversed in part the trial court's judgment and remanded the case with direction to render judgment in part for the defendants and for further proceedings; subsequently, the defendants and the plaintiff, on the granting of certification, filed separate appeals with this court, which substituted Lynn P. Young, executrix of the estate of David W. Young, for David W. Young as a defendant; thereafter, this court vacated the Appellate Court's judgment and remanded the case to that court with direction to dismiss the defendants' appeals; subsequently, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the plaintiff's motion for additional attorney's fees and for postjudgment interest; thereafter, the plaintiff withdrew the count of the complaint alleging breach of fiduciary duty, and the defendants appealed. *Reversed*; *vacated*; *new trial.*

*Garrett S. Flynn*, with whom was *Barbara M. Schellenberg*, for the appellants (defendants).

*Howard Fetner*, with whom was *Glenn W. Dowd*, for the appellee (plaintiff).

*Opinion*

DANNEHY, J. This corporate governance dispute involving CCP Equity Partners, LLC (CCP), a Delaware limited liability company, requires us to determine whether the trial court properly interpreted certain provisions of the company's operating agreement in accordance with Delaware law. The defendants, Michael E. Aspinwall, Steven F. Piaker, and David W. Young,[1]

[1] On June 26, 2021, during the pendency of this case, the defendant David W. Young died. The plaintiff filed a motion to substitute Lynn P. Young, as executrix of the estate of David W. Young, for the defendant David W. Young, which this court granted. For convenience, however, we refer to David W. Young throughout this opinion by his last name and as one of the defendants.

appeal from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, John B. Clinton, on the plaintiff's breach of contract claim. The defendants' principal claim on appeal is that the trial court committed reversible error by improperly interpreting an exculpatory clause in CCP's operating agreement as imposing affirmative duties on the defendants and instructing the jury in accordance with that flawed interpretation. They also claim that the trial court abused its discretion by permitting the plaintiff's expert, Kenneth Pia, to testify about CCP's capital reserve. We agree with the defendants on their first claim but disagree with them on their second claim. Because the error on their first claim was not harmless, we reverse the judgment of the trial court and remand the case for a new trial.[2]

## I

Beginning in 1992, the plaintiff led a private equity group at Conning Capital Partners (Conning). Piaker joined Conning in 1995, followed by Young and Aspinwall sometime in 2001 or 2002. Soon after Young and Aspinwall joined Conning, Conning's owner decided that it no longer wished to be in the private equity business. The plaintiff, with the help of others, negoti-

[2] Although our conclusion on the defendants' first claim is dispositive of the defendants' appeal, we nevertheless address their claim regarding the testimony of the plaintiff's expert witness because it is likely to arise again on remand. See, e.g., *State* v. *Williams*, 350 Conn. 363, 384 n.14, 324 A.3d 760 (2024). The defendants also claim that the trial court improperly (1) admitted certain parol evidence that varied the meaning of § 8.1 of CCP's operating agreement, and (2) denied two posttrial motions that they filed. It is not evident to us, however, that these other claims will arise on remand given our disposition. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 633 n.16, 998 A.2d 1 (2010). Further, as to the defendants' § 8.1 claim, the defendants concede that the plaintiff's theory of a breach of contract, premised on a violation of § 8.1, collapsed at trial and that the plaintiff never asked the trial court to instruct the jury as to that claim. For that additional reason, we are not persuaded that claim is likely to arise on remand, and, therefore, we decline to review it in this appeal.

ated a deal with Conning's owner to take over two investment funds that had been previously raised. To effectuate the spinoff of the two funds, the parties, in addition to two other individuals, Gerard Vecchio and Preston Kavanagh, created CCP.

On December 29, 2003, the plaintiff, the defendants, Vecchio, and Kavanagh entered into an Amended and Restated Limited Liability Company Agreement for the operation of CCP (agreement). These individuals were the initial "members" of CCP (i.e., the owners of the company) under the agreement. Each member was also a "Manager," as that term is defined in the agreement, and served on the board of managers. The agreement, which the parties agreed would be governed by Delaware law,[3] entrusted the board of managers, but not the members, with the management of CCP. The principal purpose of CCP was to provide management services to its investment funds.

In August, 2005, the board of managers established a $3 million capital reserve for the future expenses of CCP.[4] The purpose of the capital reserve was to keep money within CCP in the event of an unforeseen circumstance or contingency that required the payout of CCP capital, such as a "Repurchase Event" (i.e., a member withdrew or was removed from the company) under § 10.3 of the agreement, pursuant to which CCP was required to repurchase the member's interest in the company for a sum equal to his capital account, minus his pro rata share of the capital reserve.

[3] Section 15.5 of the agreement provides: "This Agreement shall be construed in accordance with the laws of the State of Delaware, without giving effect to the principles of conflicts of law thereof that would cause the application of the laws of any jurisdiction other than the State of Delaware."

[4] Pursuant to § 3.2 (a) (xiii) of the agreement, the managers have the power to "establish from time to time a capital reserve for future expenses of the Company." The managers of CCP at the time the capital reserve was established were the plaintiff, the defendants, and Kavanagh. Vecchio left CCP on June 30, 2004.

In 2006, the members, who at that time included the parties and Kavanagh, amended § 8.1 of the agreement (2006 amendment). Before the 2006 amendment, § 8.1, titled "General Distributions," provided: "Subject to applicable law and except as otherwise provided in Section 8.5, the Company shall make distributions to the Members at such times and in such aggregate amounts as may be determined by the Board of Managers, in its sole discretion. Each such distribution shall be made pro rata among the Members in proportion to their relative Capital Accounts as of the date of the applicable distribution." The 2006 amendment changed the last sentence of § 8.1 to provide: "Each such distribution shall be made pro rata among the Members in proportion to their relative Capital Accounts as of the date of the applicable distribution, *unless otherwise determined and agreed by all of the Members and subject to the remainder of this Section VIII*."[5] (Emphasis in original.)

In 2008, the defendants, who at that time collectively held a 61 percent interest in CCP, made additional amendments to the agreement (2008 amendments) pursuant to § 2.5, which permitted amendments to the agreement when members holding 60 percent or more of the interest in CCP consented to them.[6] The 2008 amendments changed, among other things, each member's percentage interest and the method of allocating income to each member's capital account. They also made it so that a member's death or disability would not require CCP to repurchase his interest.

Five years later, the defendants voted to remove the plaintiff as a member of CCP pursuant to § 2.5 of the

[5] The phrase "and subject to the remainder of this Section VIII" has no bearing on this dispute. (Emphasis omitted.)

[6] Section 2.5 of the agreement provides in relevant part: "In addition to the other matters specified hereunder, subject to the prior approval by the Board of Managers, the consent of Members holding 60% or more of the Percentage Interests shall be required for . . . (ii) the removal of a Member other than on account of death or voluntary resignation . . . and (vii) any amendment to this Agreement."

agreement.[7] See footnote 6 of this opinion. The plaintiff had served as managing partner of CCP from December, 2003, until March, 2008, and was a manager of CCP from its formation in 2003 until he was removed in 2013.

The plaintiff then brought the present action. The operative complaint alleged that the defendants breached their contractual duties under the agreement by making the 2008 amendments (amendment claim),[8] voting to remove the plaintiff as a member of CCP (removal claim), and maintaining a capital reserve fund of $3 million when it was no longer needed (capital reserve claim).[9] The plaintiff alleged that each of these actions was taken in violation of the duty of care provision set forth in § 3.4 of the agreement[10] and that the 2008 amendments also violated § 8.1 of the agreement, as amended.[11]

[7] Kavanagh had previously been removed from CCP in October, 2008.

[8] The plaintiff alleged that the defendants represented to him that the 2006 amendment to § 8.1 of the agreement "lock[ed] in the members' economics" and that the 2008 amendments made by the defendants violated that provision by, inter alia, altering each member's percentage interests in CCP. The plaintiff further alleged that the 2008 amendments had the effect of reducing his percentage interest in CCP and the balance of his capital account while increasing the defendants' percentage interests and the balances of their capital accounts.

[9] By maintaining the capital reserve at $3 million, the plaintiff alleged that the defendants effectively reduced the amount he received when CCP repurchased his interest upon his removal as a member, as a member's payout is reduced by his pro rata share of the capital reserve.

[10] Section 3.4 of the agreement provides in relevant part: "The Managers shall exercise their best judgment in conducting the Company's operations and in performing their other duties hereunder. The Managers shall not incur any liability to the Company, any Member or any other Person for any loss suffered by the Company or such other Member or Person which arises out of any action or omission of the Managers . . . in performing the Managers' duties hereunder, provided, however that (i) the Managers . . . acted in good faith and in a manner such Person reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe such Person's conduct was unlawful, and (ii) such course of conduct did not constitute gross negligence or willful misconduct of the Managers . . . ." (Emphasis in original.)

[11] The plaintiff also brought a fiduciary duty claim against the defendants, which he voluntarily withdrew, that is not at issue in the present appeal.

The defendants filed a motion to strike in December, 2014, and a motion for summary judgment in December, 2016, both of which were denied by the trial court. Prior to trial, the defendants also filed a motion in limine to preclude the plaintiff from introducing parol evidence to vary the meaning of the unambiguous contract language that they argued was contained in both §§ 3.4 and 8.1 of the agreement. Specifically, the defendants argued that the court was "obligated to perform an independent pretrial analysis" of those provisions to determine whether the provisions were clear and unambiguous. If they were unambiguous, the plaintiff would be precluded from introducing parol evidence or argument at trial to vary their terms. As to § 3.4 of the agreement, the defendants argued that the second sentence of that section is an exculpatory provision under Delaware law and did not create any duty or contractual obligation. The defendants requested that the court rule, as a matter of law, that the second sentence of § 3.4 cannot form a basis of a breach of contract claim. With respect to § 8.1 of the agreement, as amended, the defendants similarly argued that the provision was clear and unambiguous on its face and that, contrary to the plaintiff's assertions, it did not preclude the defendants' ability to amend the agreement in 2008, to remove the plaintiff in 2013, or to apply CCP's $3 million capital reserve in calculating the amount CCP used to repurchase the plaintiff's interest. The defendants, therefore, moved to preclude the plaintiff from introducing any evidence or argument to suggest otherwise.

The trial court denied the defendants' motion in limine. It concluded that "[t]he defendants' arguments regarding §§ 3.4 and 8.1, as amended, of the . . . agreement at issue were previously the subject of other decisions in this case by other judges" and that "[t]he motion in limine, in essence, [sought] reargument as to certain

aspects of those decisions."[12] The court stated that "§ 8.1 is relevant to the plaintiff's claims and § 3.4 [is] to be read together with other provisions of the agreement to ascertain meaning," that it "decline[d] to categorically exclude the general subject matter alluded to in the defendants' motion," and that "[w]hat evidence is admitted at trial remains to be determined."

The parties tried the case to a jury.[13] The jury awarded the plaintiff $146,901 for breach of contract on the amendment claim, $672,208 for breach of contract on the removal claim, and $303,426 for breach of contract on the capital reserve claim.[14] The trial court denied the defendants' motions for judgment notwithstanding the verdict and to set aside the verdict and, after an evidentiary hearing, granted the plaintiff's motion for attorney's fees and costs pursuant to the agreement, awarding the plaintiff $716,200 in attorney's fees and $6118.75 in costs.

The defendants appealed to the Appellate Court, which affirmed in part and reversed in part the judgment of the trial court and remanded the case for a new hearing on the issue of attorney's fees and costs. *Clinton* v. *Aspinwall*, 200 Conn. App. 205, 229, 238 A.3d 763 (2020), vacated, 344 Conn. 696, 281 A.3d 1174 (2022). The plaintiff and the defendants each filed with this court a petition for certification to appeal from the Appellate Court's judgment, both of which were granted.

[12] The trial court's reference to "other decisions in this case by other judges" appears to be in reference to the decisions denying the defendants' motion to strike and motion for summary judgment.

[13] We note that the plaintiff never ultimately asked the trial court to instruct the jury to determine whether § 8.1 of the agreement or some alleged parol agreement surrounding the amendment to § 8.1 was breached by the defendants. The plaintiff's case, therefore, was predicated solely on alleged violations of § 3.4 of the agreement.

[14] The total amount of the jury's damages award equals the sum of damages that the plaintiff's expert, Kenneth Pia, had calculated and testified to on the basis of an assumption that the plaintiff had remained at CCP through the end of 2016, instead of being removed in 2013.

*Clinton* v. *Aspinwall*, 335 Conn. 980, 241 A.3d 703 (2020); *Clinton* v. *Aspinwall*, 335 Conn. 979, 241 A.3d 704 (2020). This court ultimately vacated the Appellate Court's judgment on the basis that the court lacked subject matter jurisdiction over the defendants' consolidated appeals because the defendants did not appeal from a final judgment. *Clinton* v. *Aspinwall*, 344 Conn. 696, 699, 281 A.3d 1174 (2022). On remand to the trial court, the plaintiff withdrew the claim that had been unadjudicated. See footnote 11 of this opinion. The plaintiff also filed a motion for interest and additional attorney's fees, which the trial court granted in part.[15] The defendants subsequently appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

## II

The defendants claim that the trial court committed reversible error by construing the second sentence of § 3.4 of the agreement as imposing affirmative contractual duties on the defendants. They contend that the provision is an exculpatory clause under Delaware law that does not create obligations or duties but, rather, serves as a limitation on liability. They argue that the court's interpretation of the agreement, as evidenced by the court's jury instructions, was harmful and requires a new trial. We agree with the defendants.

When reviewing a challenged jury instruction, we look at the charge to the jury in its entirety to determine its total effect rather than at its individual component parts. See, e.g., *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 289, 838 A.2d 135 (2004). We must determine whether the jury charge "fairly presents the case to the jury in such a way that

[15] The trial court awarded the plaintiff $493,069.99 in additional attorney's fees and $555,608.51 in postjudgment interest.

injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, 334 Conn. 100, 116, 220 A.3d 777 (2019). "As long as [the instructions] are correct in law, adapted to the issues [in the case], and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 189, 93 A.3d 1058 (2014).

The defendants' claim also involves a question of contract interpretation, an issue over which our standard of review is well known.[16] The interpretation of a contract, being a "determination of the parties' intent," is ordinarily a question of fact that "is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 8, 35 A.3d 177 (2011). When there is definitive contract language, however, the determination of what the parties intended by their commitments is a question of law over which our review is plenary. See, e.g., *Poole* v. *Waterbury*, 266 Conn. 68, 88–89, 97, 831 A.2d 211 (2003).

A

Under Delaware law, the law under which the agreement must be construed, courts "start with the text" to determine what the contractual parties intended. *Sunline Commercial Carriers, Inc.* v. *CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). "In upholding the intentions of the parties, [Delaware] court[s] . . . construe the agreement as a whole, giving effect to all provisions therein." (Internal quotation marks omitted.) *GMG Capital Investments, LLC* v. *Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). To aid

[16] Although the agreement contains a choice of law provision that requires the agreement to be construed in accordance with Delaware law, procedural issues such as the standard of review are governed by Connecticut law. See, e.g., *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017).

in the interpretation of the text's meaning, "Delaware adheres to the objective theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party." (Internal quotation marks omitted.) *Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). "When the contract is clear and unambiguous, [Delaware courts] will give effect to the [plain meaning] of the contract's terms and provisions, without resort to extrinsic evidence." (Internal quotation marks omitted.) *Sunline Commercial Carriers, Inc.* v. *CITGO Petroleum Corp.*, supra, 846. Delaware courts "do not consider extrinsic evidence unless [they] find that the text is ambiguous. Ambiguity is present only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Critically, a contractual provision is not rendered ambiguous simply because the parties in litigation differ as to the proper interpretation." (Footnotes omitted; internal quotation marks omitted.) *Cox Communications, Inc.* v. *T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022).

Section 3.4 of the agreement provides in relevant part that "[t]he Managers shall exercise their best judgment in conducting the Company's operations and in performing their other duties hereunder. The Managers shall not incur any liability to the Company, any Member or any other Person for any loss suffered by the Company or such other Member or Person which arises out of any action or omission of the Managers . . . in performing the Managers' duties hereunder, provided, however that (i) the Managers . . . acted in good faith and in a manner such Person reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe such Person's conduct was unlawful, and (ii) such course of

conduct did not constitute gross negligence or willful misconduct of the Managers . . . . The Managers . . . shall be fully protected and justified with respect to any action or omission taken or suffered by any of them in good faith if such action or omission is taken or suffered in reliance upon and in accordance with the opinion or advice as to matters of law of legal counsel, or as to matters of accounting of accountants, selected by any of them with reasonable care. In addition, the Managers . . . shall be entitled to indemnification by the Company to the extent provided in Article XIV hereof."

The defendants claim that the second sentence of § 3.4 of the agreement is an exculpatory clause under Delaware law that limits liability and not one that creates contractual duties. They point to numerous cases, including *Fisk Ventures, LLC* v. *Segal*, Docket Civil Action No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008), aff'd, 984 A.2d 124 (Del. 2009), a Delaware Court of Chancery decision that was summarily affirmed by the Delaware Supreme Court. The court in *Fisk Ventures, LLC*, was tasked with determining whether the operating agreement in that case, which provided in relevant part that "[n]o [m]ember, [r]epresentative, or [o]fficer of the [c]ompany shall be liable to the [c]ompany or to any [m]ember . . . unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct," established a duty to act without gross negligence, fraud or intentional misconduct. (Internal quotation marks omitted.) Id., *9. The court concluded that the clause did not create a duty or code of conduct but, rather, operated as a limitation on liability. Id. The court rejected the request to convert an expressly exculpatory provision into "an all encompassing and seemingly boundless standard of conduct." Id.

The plaintiff contends that *Fisk Ventures, LLC*, is inapposite to the facts of the present case because the agreement at issue in that case did not involve any "best judgment" provision like the "best judgment" provision found in the first sentence of § 3.4 of the agreement. He argues that, because the first sentence of § 3.4 imposes a duty on the managers to "exercise their best judgment," the second sentence must be read in context with that duty. In his view, an objective, reasonable third party would understand the second sentence of § 3.4 as creating a duty for managers to refrain from acting in bad faith or engaging in gross negligence or wilful misconduct.

In reviewing the language of § 3.4 of the agreement, we agree with the defendants that the second sentence of that provision is an exculpatory provision under Delaware law that does not create additional duties under the agreement. See, e.g., *Inter-Marketing Group USA, Inc. ex rel. Plains All American Pipeline, L.P.* v. *Armstrong*, Docket C.A. No. 2017-0030-TMR, 2020 WL 756965, *6 (Del. Ch. January 31, 2020); *Feeley* v. *NHAOCG, LLC*, 62 A.3d 649, 664–65 (Del. Ch. 2012); *Dawson* v. *Pittco Capital Partners, L.P.*, Docket C.A. No. 3148-VCN, 2012 WL 1564805, *28 (Del. Ch. April 30, 2012); *Fisk Ventures, LLC* v. *Segal*, supra, 2008 WL 1961156, *9; cf., e.g., *Metro Storage International, LLC* v. *Harron*, 275 A.3d 810, 847 (Del. Ch. 2022). Although the plaintiff is correct that the first sentence of § 3.4 imposes a duty on managers to "exercise their best judgment" in conducting CCP's operations and in performing their other duties under the agreement, the plain and unambiguous language of the second sentence of § 3.4 limits liability; it does not create it. The provision, read in context, is clearly aimed at eliminating the availability of money damages as a remedy for a breach of duty, subject to the enumerated exceptions. The second sentence of § 3.4 provides in relevant part that "[t]he Man-

agers *shall not incur any liability to* . . . any Member . . . for any loss suffered by . . . such other Member . . . which arises out of any action or omission of the Managers," subject to the exceptions. (Emphasis added.) That is a quintessential exculpatory provision under Delaware law, which Delaware courts have made clear does not give rise to any separate contractual duty. See, e.g., *Fisk Ventures, LLC* v. *Segal*, supra, *9. The second sentence of § 3.4, therefore, comes into play in this case only after the fact finder determines that there was a breach of the agreement.[17] See, e.g., *Gatz Properties, LLC* v. *Auriga Capital Corp.*, 59 A.3d 1206, 1216 (Del. 2012) (addressing exculpation after breach is established). The provision limits managers' liability to members unless the breach was the result of gross negligence or wilful misconduct, or the manager did not act in good faith.

B

Notwithstanding the exculpatory nature of that provision, the defendants argue that the trial court improperly interpreted the second sentence of § 3.4 of the agreement as creating a duty that prohibited them from taking actions under the agreement in bad faith, with gross negligence, or with wilful misconduct, and instructed the jury in accordance with that flawed interpretation.[18]

[17] See footnote 10 of this opinion.

[18] The plaintiff makes a few suggestions throughout his brief that the defendants failed to preserve their claim regarding the court's jury instructions on § 3.4 of the agreement. We do not agree. The record shows that the defendants repeatedly and consistently argued that the second sentence of § 3.4 did not create any contractual duties on the defendants. For example, the defendants filed a motion in limine, expressly arguing this point, and, at the hearing on the motion, the defendants' counsel expressly argued: "[I]f the jury gets an instruction or hears argument that [the defendants] had a duty under the second sentence, it will be extremely prejudicial and incorrect." The defendants also filed a written request to charge that would have expressly prohibited the jury from considering the exculpatory clause in § 3.4 as a source of duties and required the jury to disregard all evidence and argument to that effect. See, e.g., *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 469–70 n.3, 958 A.2d 1195 (2008) ("[i]t is well established that a

We therefore turn our attention to the jury instructions to determine whether they were correct in law and presented to the jury in such a way that injustice was not done.

The trial court instructed the jury in relevant part: "The second element of the plaintiff's breach of contract claim is that the defendants breached the agreement. In this case, the plaintiff claims that the defendants breached § 3.4, the duty of care provision of the . . . agreement on three occasions. Section 3.4 requires the managers of CCP to exercise their best judgment in conducting the company's operations and in performing their other duties under the . . . agreement and prohibits actions that are taken in bad faith or with gross negligence or wilful misconduct.

"Bad faith is synonymous with the absence of good faith, which in turn means honesty and fact and the observance of reasonable standards of fair dealings. A determination will be considered to be in good faith unless it went so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. Wilful misconduct means intentional wrongdoing, not mere negligence, gross negligence or recklessness. And wrongdoing means malicious conduct or conduct designed to defraud or seek an unconscionable advantage. Gross negligence means conduct that constitutes reckless indifference or actions that are without the bounds of reason.

party may preserve for appeal a claim that an instruction was defective either by: [1] submitting a written request to charge the covering matter; or [2] taking an exception to the charge as given" (internal quotation marks omitted)). The defendants' counsel also made similar arguments in his oral motion for a directed verdict, specifically taking issue with the plaintiff's proposed jury instructions interpreting § 3.4, and also during argument on the defendants' posttrial motion for judgment notwithstanding the verdict in which it was evident that the court was well aware of the defendants' position on § 3.4 taken throughout the litigation.

"First, the plaintiff claims that the defendants breached the duty of care provision by amending the . . . agreement in 2008. The plaintiff claims that the defendants enacted the 2008 amendment[s] for the bad faith purpose of decreasing the amount of compensation that [the plaintiff] and . . . Kavanagh would receive and increasing the amount of compensation that the defendants would receive. The defendants do not dispute that they amended the . . . agreement in 2008. But the defendants deny that they did so in bad faith or in breach of the . . . agreement.

"The defendants assert as special defenses that they complied with the terms of the . . . agreement generally and with § 3.4 in particular, and that they acted in good faith without gross negligence or wilful misconduct. Therefore, the defendants have assumed the burden of disproving those elements of the plaintiff's breach of contract claim by a preponderance of the evidence.

"Second, the plaintiff claims that the defendants also breached the duty of care provision by removing him as a member of CCP in 2013. [The plaintiff] claims that the defendants had no good faith basis for removing him and that they did so for the bad faith purpose of enriching themselves at his expense. The defendants do not dispute that they removed [the plaintiff] as a member of CCP, but they deny that they did so in bad faith or in breach of the . . . agreement. As with the 2008 amendment[s], the defendants assert as special defenses that they complied with the terms of the . . . agreement generally and with § 3.4 in particular, and that they acted in good faith without gross negligence or wilful misconduct. Therefore, the defendants have assumed the burden of disproving those elements of [the plaintiff's] breach of contract claim by a preponderance of the evidence.

"Third, the plaintiff claims that the defendants also breached the duty of care provision by maintaining a $3 million capital reserve for CCP, which reduced by $750,000 the amount that [the plaintiff] was paid upon his removal. [The plaintiff] claims there was no good faith basis for a $3 million capital reserve at the time of his removal and that the defendants maintained the $3 million capital reserve at that time for the bad faith purpose of depriving [the plaintiff] of money.

"The defendants do not dispute that they maintained the $3 million capital reserve, but they deny they did so in bad faith or in breach of the . . . agreement. As with the other two aspects of [the plaintiff's] breach of contract claim, the defendants assert [as] special defenses that they complied with the terms of the . . . agreement generally and with § 3.4 in particular, and that they acted in good faith without gross negligence or wilful misconduct. Therefore, the defendants have assumed the burdens—the burden of disproving those elements of [the plaintiff's] breach of contract claim by a preponderance of the evidence.

"The defendants deny that they acted in bad faith, committed gross negligence or wilful misconduct. And they allege that they believe their action to be in CCP's best interest or not opposed to [it]. They also contend that their actions were authorized by the sections of the agreement [that] permitted amendment of the . . . agreement, removal of members, and retention of the capital reserve."

On the basis of our review of the jury instructions, we agree with the defendants that the trial court's charge improperly instructed the jury on the defendants' duties under the agreement. The court stated that "§ 3.4 requires the managers of CCP to exercise their best judgment in conducting the company's operations and in performing their other duties under the . . . agree-

ment *and prohibits actions that are taken in bad faith or with gross negligence or wilful misconduct.*" (Emphasis added.) The court then proceeded to instruct the jury on each of the three bases for the plaintiff's breach of contract claim, stating that the plaintiff claimed that the defendants either had a "bad faith purpose" or "no good faith basis" for their actions. The good faith/bad faith references that permeated the court's charge, as well as the reference to the prohibition on actions taken with "gross negligence" or "wilful misconduct," come directly from the language of the exculpatory clause in § 3.4 of the agreement, which we have explained does not give rise to any contractual duties on the part of the defendants. This was error.

To compound the error, the trial court repeatedly instructed the jury that the defendants asserted as special defenses that they complied with the terms of the agreement generally, and with § 3.4 in particular, and that they acted in good faith without gross negligence or wilful misconduct. The court stated that the "defendants have *assumed the burden of disproving those elements* of the plaintiff's breach of contract claim by a preponderance of the evidence." (Emphasis added.) Not only does the court's instruction improperly suggest that acting in good faith, without gross negligence, or wilful misconduct are elements of the plaintiff's contract claim, it also put the burden on the defendants to disprove those so-called elements.[19]

[19] We note that, consistent with the defendants' argument that the exculpatory provision of § 3.4 of the agreement does not create a duty but, rather, addresses liability if the jury concludes they breached the agreement, the defendants in their special defenses stated: (1) "the defendants bear no liability to the plaintiff because their actions were fully 'protected and justified' within the meaning of the second to last sentence of [§] 3.4 of the [agreement], including, without limitation, on the grounds that the defendants took action or refrained from taking action in good faith and in reliance [on] and in accordance with the opinion or advice as to matters of law of legal counsel selected by them with reasonable care," and (2) "[n]one of the defendants [is] liable to the plaintiff because each of the defendants acted in good faith in a manner each of them reasonably believed to be in,

The issues of good faith and whether the defendants' conduct was grossly negligent or constituted wilful misconduct are not elements of the breach of contract claim and would arise only after the trier of fact had determined that there was a breach in the first place. As we previously explained, when an entity's operating agreement contains an exculpatory provision like the one in this case, the trier of fact must first determine whether there was a breach of an independent legal duty before the exculpatory provision becomes operative. See, e.g., *Gatz Properties, LLC* v. *Auriga Capital Corp.*, supra, 59 A.3d 1216–18; *Metro Storage International, LLC* v. *Harron*, supra, 275 A.3d 847; *Wenske* v. *Blue Bell Creameries, Inc.*, Docket C.A. No. 2017-0699-JRS, 2018 WL 3337531, *20–21 (Del. Ch. July 6, 2018). After finding a breach, the trier of fact then considers whether the defendant is nevertheless not liable for damages under the exculpatory clause. See *Gatz Properties, LLC* v. *Auriga Capital Corp.*, supra, 1216–18; *Metro Storage International, LLC* v. *Harron*, supra, 847; *Wenske* v. *Blue Bell Creameries, Inc.*, supra, *20–21.

In the present case, if the jury had found a breach of the agreement (under some provision other than the second sentence of § 3.4), the jury would then have had to determine whether the defendants were liable for damages under the exculpatory clause of § 3.4. If the jury had found that, notwithstanding the breach, the defendants had acted in good faith and in a manner the defendants reasonably believed to be in, or not opposed to, the best interests of CCP, and that their course of conduct did not constitute gross negligence or wilful

or not opposed to, the best interests of CCP, and their actions did not constitute gross negligence or wilful misconduct." The defendants made clear that they were asserting their special defenses "[w]ithout waiving the requirement that the plaintiff bear the burden of proof and persuasion on all elements of his claim . . . ."

misconduct, the plaintiff would not be entitled to any recovery for the breach. If, however, the jury had found that the defendants' actions that constituted the breach of contract were in bad faith and that the defendants could not have reasonably believed that their actions were in, or not opposed to, the best interests of CCP, or that their conduct constituted gross negligence or wilful misconduct, the defendants would be liable for damages for the breach. The trier of fact would then go on to consider the amount of damages to be awarded.

Although it is clear that the trial court erred in instructing the jury on the meaning of § 3.4 of the agreement and the duties of the defendants thereunder, the court's error with respect to the meaning of § 3.4 was further exacerbated by its related instruction to the jury about the jury's role in interpreting the provisions of the parties' agreement. The defendants had argued before the trial court that it should have undertaken a pretrial analysis of the pertinent provisions in the agreement to determine whether they were clear and unambiguous and, if so, that it should have precluded the plaintiff from introducing any parol evidence to vary the terms of the agreement, and also should have concluded, as a matter of law, that § 3.4 did not create any separate legal duties. The court declined to undertake that analysis. A review of the jury instructions reveals that the court, instead, improperly put the onus on the jury to determine whether the contract provisions at issue were ambiguous and, therefore, whether to consider extrinsic evidence to discern the meaning of those provisions.

The court's instruction provided that, "[t]o be enforceable, an agreement must be definite and certain as to its essential terms and requirements. In interpreting a contract, the objective is to determine the intent of the parties from the language of the contract. This inquiry should focus on the parties shared expectation at the

time they contracted. The contract's construction should be that . . . which would be understood by an objective, reasonable third party. *If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties to vary the terms of the contract or to create an ambiguity.* The first place to look to find the party's intent is the wording that was used in the contract. Words in a contract are to be given their ordinary meaning. *If you cannot determine what was intended from the language, you may consider the circumstances surrounding the entering into the contract. To determine the intent of the parties, you may interpret the contract language in light of the situation of the parties and the circumstances surrounding the making of the contract.* You also may consider the motives of the parties and the ends that they sought to accomplish by their contract." (Emphasis added.)

Instead of instructing the jury to decide whether the pertinent provisions were ambiguous and to consider extrinsic evidence only if they were, the trial court should have undertaken its own independent pretrial analysis of the operative provisions as a threshold matter because the question of whether a contract provision is ambiguous is a question of law and, therefore, a question that must be decided by the trial court, not the jury. See, e.g., *Sunline Commercial Carriers, Inc.* v. *CITGO Petroleum Corp.*, supra, 206 A.3d 847 n.68 ("whether a contract is unambiguous is a question of law"); see also *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101–102, 84 A.3d 828 (2014) (under Connecticut law, "the determination as to whether contractual language is plain and unambiguous is itself a question of law"). If a provision is unambiguous, extrinsic evidence that varies or contradicts the terms of that provision would be inadmissible. If the court determined that it was ambiguous, only then could extrinsic evidence be

admitted to help the jury determine the intent of the parties with respect to that provision. As we explained, no such analysis was undertaken by the trial court in the present case.[20] Rather, by delegating that function to the jury, the trial court directed the jurors not only to decide whether the relevant provisions of the agreement were ambiguous but also only then to consider evidence that the court had admitted as full exhibits during the trial.

With respect to the provisions of the agreement that were clear and unambiguous, it was the trial court's duty to instruct the jury as to the correct interpretation of those provisions. See, e.g., *Worth Steel Co.* v. *Lewis*, 32 Del. 286, 288, 122 A. 446 (1923) ("[u]nquestionably it was the duty of the court to construe the contract, and instruct the jury as to its meaning"); cf. *Libero* v. *Lumbermens Mutual Casualty Co.*, 143 Conn. 269, 274, 121 A.2d 622 (1956) ("[i]t is the court's duty, at least when the interpretation of a contract does not depend on facts extrinsic to the contract, to construe the provisions of any contract [that] is in suit and instruct the jury as to the correct interpretation"). With respect to any provision that it concluded was ambiguous, the court was obligated to instruct the jury that the provision *was* ambiguous, as opposed to letting the jury decide *whether* it was ambiguous, and to explain the jury's task in resolving that ambiguity. See, e.g., *GMG Capital Investments, LLC* v. *Athenian Venture Partners I, L.P.*, supra, 36 A.3d 783 ("where reasonable minds could differ as to the contract's meaning, a fac-

[20] The defendants argued in a motion in limine that the trial court was required to undertake this analysis. The trial court denied the motion, concluding that the defendants' arguments were "previously the subject of other decisions in this case by other judges" and that "[t]he motion in limine, in essence, [sought] reargument as to certain aspects of those decisions." Our review of the trial court's earlier decisions, however, reveal that no such analysis had previously been undertaken by other judges, and, therefore, the court should have undertaken that analysis.

tual dispute results and the [fact finder] must consider admissible extrinsic evidence").

Although not all instructional errors are harmful, we conclude that the errors in the present case were. See, e.g., *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 845, 225 A.3d 261 (2020) (setting forth considerations for determining whether instructional errors are harmful and explaining that before "party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful" (internal quotation marks omitted)). The court's jury instructions improperly allowed the jury to find the defendants liable to the plaintiff for breaches of duties (i.e., acting in bad faith or with gross negligence or wilful misconduct) that the defendants did not owe to the plaintiff under § 3.4 of the agreement. The court's instructions also improperly imposed on the defendants the burden of disproving those three specifications of duties, which the court misdescribed as elements of the plaintiff's breach of contract claim. Last, the trial court allowed the jury to decide whether the relevant provisions of the agreement were ambiguous and whether to consider extrinsic evidence that the court admitted, which likely was influential in producing a verdict for the plaintiff.

The plaintiff contends that, even if the trial court improperly instructed the jury that the defendants had a duty to act in good faith under § 3.4 of the agreement, any error was harmless. According to the plaintiff, the defendants' duty to "exercise their best judgment in conducting the Company's operations and in performing their other duties [under the agreement]" in § 3.4 is synonymous with or encompasses a duty to act in good faith. Any error in the jury instructions, he argues, was harmless because one cannot exercise his best judgment while acting in bad faith (i.e., in the absence of good faith). The defendants do not dispute that the first sentence of § 3.4 imposes on them a duty to exercise

"their best judgment" but disagree that the phrase is synonymous with or encompasses a duty to act in good faith. They argue that a requirement to exercise "their best judgment" in a Delaware business context has a plain language meaning, requiring corporate fiduciaries to exercise their independent judgment and prohibiting agreements or delegations that would avoid or obviate each fiduciary's individual responsibility to exercise his own judgment. They contend that this understanding was "clearly articulated nearly seventy years ago" in *Abercrombie* v. *Davies*, 35 Del. Ch. 599, 610–11, 123 A.2d 893 (1956), rev'd on other grounds, 36 Del. Ch. 371, 130 A.2d 338 (1957), and has remained good law to this day. See, e.g., *Toedtman* v. *TurnPoint Medical Devices, Inc.*, Docket C.A. No. N17C-08-210 RRC, 2019 WL 328559, *9 (Del. Super. January 23, 2019). Notably, neither the plaintiff nor the defendants ever submitted proposed jury instructions to the court that defined or explained how the phrase applies to the parties' conduct, and their responses about the meaning of that phrase during oral arguments before this court were equivocal at best. The trial court also did not define or explain the phrase for the jury.

On the basis of our examination of the phrase "their best judgment" in the context of the first sentence of § 3.4 of the agreement, we cannot conclude that the provision is unambiguous, as it is "fairly susceptible [to] different interpretations or may have two or more different meanings." (Internal quotation marks omitted.) *GMG Capital Investments, LLC* v. *Athenian Venture Partners I, L.P.*, supra, 36 A.3d 780. To be sure, on the basis of the plain meaning of the terms "best" and "judgment," the phrase could mean that managers must exercise a high degree of consideration and deliberation in conducting CCP's operations and in performing their other duties under the agreement. See The American Heritage College Dictionary (4th Ed. 2007) pp. 135, 750 ("best"

means "[t]o the greatest degree or extent," and "judgment" means "[a]n opinion or estimate formed after consideration or deliberation, [especially] a formal or authoritative decision"). On the other hand, as the defendants point out, the phrase "their best judgment" could plausibly mean that the phrase simply requires that managers exercise independent judgment and prohibits delegations that would otherwise curtail their exercise of discretion. This interpretation is particularly plausible given a long line of Delaware case law in which Delaware courts have considered challenges to contractual governance arrangements premised on allegedly improper delegations of board authority under § 141 (a) of title 8 of the Delaware Code.[21] See, e.g., *West Palm Beach Firefighters' Pension Fund* v. *Moelis & Co.*, 311 A.3d 809, 818 (Del. Ch. 2024) ("[u]nder Chancellor Seitz's seminal decision in [*Abercrombie*], governance restrictions violate [§] 141 (a) [of title 8 of the Delaware Code] when they have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters or tend . . . to limit in a substantial way the freedom of director decisions on matters of management policy" (internal quotation marks omitted)). Significantly, the plaintiff has not persuaded us that the phrase "their best judgment" in § 3.4 is synonymous with or encompasses a duty to act in good faith, as he contends.[22]

[21] Section 141 (a) of title 8 of the Delaware Code provides: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation." Del. Code Ann. tit. 8, § 141 (a) (2011).

[22] Although the plaintiff points to a few Delaware cases to suggest that the definition of "best judgment" under § 3.4 of the agreement reasonably could encompass a duty to act in good faith, none is persuasive. For example, he directs this court to *University of Delaware* v. *Warrington*, Docket Civ. A. No. 12440, 1993 WL 410417 (Del. Ch. October 6, 1993), a case involving

Because the provision is ambiguous, its meaning becomes a question of fact for the jury. On remand, the trial court should instruct the jury that the provision is ambiguous and as to its proper role in construing ambiguous contractual provisions, including that it may consider extrinsic evidence to discern the meaning of the provision. See, e.g., *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, supra, 36 A.3d 783–84.

Under these circumstances, we cannot say that the trial court's instructions fairly presented the plaintiff's breach of contract claim to the jury in such a way that injustice was not done to the defendants. We therefore conclude that the judgment of the trial court must be reversed and the case must be remanded for a new trial. It follows that the trial court's awards of counsel fees, costs, and interest to the plaintiff, which were based on the underlying erroneous judgment of the trial court, must be vacated.

## III

The defendants also claim that the trial court improperly admitted the testimony of the plaintiff's expert witness, Kenneth Pia, a certified public accountant, about the propriety of the capital reserve pursuant to § 7-2 of the Connecticut Code of Evidence.[23] We disagree.

whether the University of Delaware invoked the cy pres doctrine in bad faith and whether it was required to pay attorney's fees. Id., *3. In declining to award any attorney's fees, the Court of Chancery explained that the "[u]niversity perhaps did not use its *best judgment* when it determined that the doctrines of cy pres and deviation might be available to it in this situation . . . [but] the [u]niversity's poor decision in this matter does not rise to the level of *bad faith* or vexatiousness." (Emphasis added.) Id. The plaintiff's reliance on *University of Delaware* is misplaced, as that case did not involve a contract dispute in which the court was required to determine the intent of the parties from the specific language in the agreement, and the court did not purport to set out definitive meanings of the terms "best judgment" or "bad faith" (i.e., the absence of good faith).

[23] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning

The following additional facts and procedural history are relevant to the defendants' claim. Before trial, the defendants filed a motion in limine seeking to preclude the admission of Pia's anticipated testimony regarding CCP's $3 million capital reserve. The defendants argued that Pia's deposition testimony revealed that he did not have an adequate basis to opine on the need for CCP's capital reserve, and, therefore, his testimony was irrelevant, unhelpful to the trier of fact, and, even if his testimony was relevant and had some probative value, that value was substantially outweighed by the likelihood that the testimony would waste time, as well as cause prejudice and confuse and mislead the jury.

In his opposition to the motion in limine, the plaintiff argued that Pia's testimony, particularly with respect to his knowledge of accounting, would assist the trier of fact in several ways. The court heard oral arguments on the defendants' motion prior to trial, reserved its ruling, and later denied the motion on the first day of trial. The court stated that the defendants had not shown that Pia's expert testimony was inadmissible under § 7-2 of the Connecticut Code of Evidence. In the court's opinion, Pia's anticipated testimony appeared to satisfy the three requirements of § 7-2, and the defendants' arguments went more to the weight of the evidence than to its admissibility.

A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. E.g., *Fleming* v. *Dionisio*, 317 Conn. 498, 505, 119 A.3d 531 (2015). Trial courts are afforded "wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on 'untenable grounds' . . . or involves 'a clear misconception of the

scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

law,' we will not disturb its decision." (Citation omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014). Pursuant to Connecticut Code of Evidence § 7-2, expert testimony is generally admissible if "(1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *State* v. *Bruny*, 342 Conn. 169, 187, 269 A.3d 38 (2022). We have explained that expert testimony is not required in every case, but it "may be helpful [to the trier of fact] in many instances . . . ." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 700, 138 A.3d 868 (2016).

Pia was offered as an expert in the areas of general accounting, financial analysis, and forensic damage analysis, which were areas of special skill or knowledge directly related to the issues in the case. Pia testified that he had performed financial analyses of and appraised closely held companies for over thirty years and had rendered hundreds of opinions on issues related to reserves. He estimated that he has testified as an expert 200 times. Pia also testified about the purpose of capital reserves in general, a subject that is not common knowledge to the average person, and indicated that the creation of the capital reserve at issue in the present case was permitted under the § 3.2 (a) (xiii) of the agreement, which provides in relevant part that the managers have the power to "establish from time to time a capital reserve for future expenses of the Company." Although he had never previously analyzed a reserve based on the exact contractual language at issue in the parties' agreement or seen a capital reserve used in a formula to determine a payout to a terminated member, he indicated that he has rendered opinions in adversarial pro-

ceedings regarding issues relating to reserves in hundreds of cases.

Pia opined that CCP did not need a $3 million capital reserve in 2013 at the time of the plaintiff's termination on the basis of his review of the purpose of the reserve under the agreement and a review of financial records reflecting CCP's balance sheet assets, liabilities, and equity. He testified that one must understand the financial position of the enterprise to see if all or some of that money needs to be set aside for the future expenses of the entity. Pia acknowledged that this opinion was not based on any established industry standards, such as accounting standards that govern the preparation for financial statements or business valuations, and that he was not rendering an opinion on the valuation of an asset or offering an opinion on whether the defendants breached the agreement under any standard of care, including gross negligence, recklessness, or bad faith. Rather, his testimony focused primarily on his opinion of whether, based on his experience and a review of voluminous financial records, a $3 million capital reserve for future expenses was needed in 2013 at the time of the plaintiff's termination.

The defendants contend on appeal that Pia's testimony should have been precluded because it was not based on a particular formula or standard of care. Before the trial court, the defendants' counsel objected to Pia's testimony about capital reserves on the basis of Pia's qualifications. According to the defendants' counsel, Pia had no basis to render an opinion under the agreement or under any other standard of care. This claim, whether described as an objection to Pia's qualifications or to his failure to base the opinion on a particular standard of care, is without merit. Although the defendants direct us to a case in the medical malpractice context to suggest that Pia was required to identify a particular standard of care for determining the need

for CCP's capital reserve, their reliance on that case is misplaced. See, e.g., *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 567, 864 A.2d 1 (2005) (explaining that plaintiffs in medical malpractice cases must generally present expert testimony to establish requisite standard of care because requirements for proper medical diagnosis and treatment are not within common knowledge of laypersons). The establishment and purpose for the capital reserve at issue in this case is not based on a professionally recognized standard of care but dictated by the terms of the parties' agreement. Although the defendants attempt to paint Pia's opinion as being wholly untethered from the parties' agreement, that contention is belied by the record. Pia appropriately relied on the agreement to ascertain the purpose of the capital reserve. On the basis of his training, experience, and a review of various financial records, he then opined that, in light of its purpose, a $3 million reserve was not needed in February, 2013. We are not aware of any authority—and the defendants have not directed us to any—that required Pia to have identified a particular formula or standard of care in this contractual context in order for his testimony to be admitted pursuant to § 7-2 of the Code of Evidence. On the facts of this case, we conclude that the trial court did not abuse its discretion in admitting Pia's testimony about the capital reserve under § 7-2.

The judgment is reversed and the case is remanded for a new trial; the trial court's awards of attorney's fees, costs, and interest to the plaintiff are vacated.

In this opinion the other justices concurred.

McDONALD, J., concurring. I agree with and join the majority's well reasoned opinion. Specifically, I agree that the jury was improperly instructed that the second sentence of § 3.4 of the operating agreement of CCP

Equity Partners, LLC, a Delaware limited liability company (LLC), imposes a duty on managers not to act in bad faith or with gross negligence or wilful misconduct because, under settled Delaware law, this sort of exculpatory provision does not impose affirmative duties on the parties.[1] I further agree that a retrial is warranted because the first sentence of § 3.4 *does* impose affirmative duties on the managers (to "exercise their best judgment" in conducting CCP's operations and performing their contractual obligations), and the "best judgment" requirement, although ambiguous, reasonably could be construed—either independently or in context—to prohibit the sort of oppression of minority interests that the plaintiff, John B. Clinton, alleged and that the jury apparently found.[2] I write separately to emphasize two points.

I

First, because the operating agreement is not governed by Connecticut law, the majority's resolution of the contract issues does not establish any precedent under the laws of Connecticut regarding the interpreta-

[1] See, e.g., *Feeley* v. *NHAOCG, LLC*, 62 A.3d 649, 664–65 (Del. Ch. 2012) (similar limiting language in exculpatory clause is addressed to fiduciary duties, which are assumed to exist independently of written contract).

[2] I agree with the plaintiff that a plain language reading of the term "best judgment," as those words typically are defined, is consistent with the conclusion that members of an LLC fail to exercise their best judgment when they establish an unnecessarily and unreasonably large capital reserve, expel a minority shareholder, and then almost immediately begin to dissipate the capital reserve by distributing to themselves that shareholder's accrued earnings, resulting in an anticipated and costly legal battle. I also agree with the plaintiff that, although "best judgment" does not appear to be a settled term of art under Delaware law, some courts have used that term in a manner that implies that, by acting in bad faith, one necessarily fails to exercise his or her best judgment. See, e.g., *University of Delaware* v. *Warrington*, Docket Civ. A. No. 12440, 1993 WL 410417, *3 (Del. Ch. October 6, 1993); *Dunning* v. *Barnes*, Docket No. Civ. A. 98C-02-045, 2002 WL 31814525, *1 n.1 (Del. Super. November 4, 2002); see also, e.g., *Hernandez* v. *Employers Mutual Liability Ins. Co. of Wisconsin*, 346 F.2d 154, 155 (5th Cir. 1965).

tion or application of LLC operating agreements, and nothing in the majority opinion should be interpreted to do so. There is no disagreement, at this point, that the relationship between the parties, both contractual and fiduciary, is governed by the law of Delaware. That state's corporate governance law features "distinctive substantive and structural attributes . . . ." J. Fisch, "Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance," 37 Del. J. Corp. L. 731, 740 (2013). For example, it is the stated policy of the Delaware legislature "to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." Del. Code Ann. tit. 6, § 18-1101 (b) (2005). One corollary of this is that the Delaware courts often dismiss at the pleading stage claims alleging breach of fiduciary duty when those claims overlap completely with claims alleging breach of a corporate governance agreement. That may well be why the trial court in this case did not permit the jury to find, in the alternative, that the defendants, Michael E. Aspinwall, Steven F. Piaker, and David W. Young, breached their duty of loyalty to the plaintiff.[3]

[3] To be clear, I do not understand Delaware law to have required the jury verdict form to be structured as it was under the facts of this case.

Substantively, the trial court presumably was relying on a line of Delaware cases holding that a breach of contract claim cannot be bootstrapped onto a breach of fiduciary duty claim when the two claims are substantially identical and the obligation is expressly addressed by the contract. See, e.g., *Nemec* v. *Shrader*, 991 A.2d 1120, 1129 (Del. 2010) ("It is a [well settled] principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."). The Delaware Supreme Court has made clear, however, that this bootstrapping rule does not preclude a plaintiff from bringing a breach of fiduciary duty claim that overlaps with a contract claim but relies on additional factual allegations, implicates distinct legal principles, or affords different remedies. As that court recently explained in *Bäcker* v. *Palisades Growth Capital II, L.P.*, 246 A.3d 81 (Del. 2021), "[t]his bootstrapping case law only requires dismissal where a fiduciary duty claim wholly overlaps with a concurrent breach of contract claim." Id., 109. It does not apply, the court explained, when the two claims share a common nucleus of operative

Accordingly, our conclusions in this case should not be taken to mean that the result necessarily would have been the same had the matter been litigated under Connecticut law.

## II

Second, I would accept the plaintiff's request in his preliminary statement of the issues that we address his challenge to the trial court's ruling striking his claim alleging that the defendants had breached the implied covenant of good faith and fair dealing (implied covenant). The following procedural history is relevant.

In his first amended complaint, the plaintiff alleged that each of the defendants had violated the implied covenant under Delaware's statutory[4] and common law. Specifically, he alleged that § 10.3 (b) of the operating

facts, but the fiduciary duty claim depends on additional facts and considerations, or provides for different remedies. See id. That is true of the present case, in which the plaintiff's breach of fiduciary duty claim involved, at the very least, distinct factual allegations and legal theories (e.g., that the defendants failed to deal with the plaintiff in good faith with respect to extracontractual representations, and that they sought to advantage themselves at his expense).

Procedurally, in Delaware, cases of this sort are not typically tried to a jury, so the verdict form issue simply does not arise. As a matter of Connecticut procedural law, I see no reason why the jury could not have been permitted to find, in the alternative, that the plaintiff had established every element of a breach of fiduciary duty claim. See *Clinton* v. *Aspinwall*, 344 Conn. 696, 711, 281 A.3d 1174 (2022) ("under Delaware law, breach of fiduciary duty is a legally consistent alternative theory of recovery to breach of contract"). Of course, the plaintiff could not recover the same damages under distinct legal theories.

As it was, though, because no judgment was rendered on the breach of fiduciary duty claim, the plaintiff was required to withdraw that claim in order to permit the present appeal to proceed. See id., 711 n.7. I see no reason why, on remand, he cannot seek the trial court's leave to amend his complaint and to reinstate that claim, on which the jury should be permitted to reach a verdict, regardless of how it resolves the contract claim.

[4] See Del. Code Ann. tit. 6, § 18-1101 (c) (2005) (LLC agreement may not eliminate implied covenant).

agreement,[5] which deals with the repurchase of member interests, includes an implied contractual obligation not to maintain an unreasonably large company capital reserve at the time of a member's repurchase event. The plaintiff further alleged that the $3 million reserve that the defendants maintained when they removed him from the company was unreasonably large.

The defendants moved to strike the implied covenant claim, contending that the claim was not cognizable under Delaware law because, among other things, the purported obligation not to maintain an unreasonably large capital reserve was inconsistent with what they understood to be the "virtually unfettered discretion" afforded to them under the operating agreement.[6] (Internal quotation marks omitted.) The trial court, *Peck*, *J.*, granted the motion to strike the implied covenant claim, concluding that the plaintiff's allegations were legally insufficient under Delaware law. Specifically, the court concluded that the alleged reasonableness requirement was not "clearly implied" by the express terms of the operating agreement because § 10.3 (b) "makes a mere reference to the capital reserve" and does not address its reasonableness.

The plaintiff took the initial steps necessary to challenge this ruling on appeal. When the defendants brought their appeals in 2018, the plaintiff filed his own preliminary statement of issues. Pursuant to Practice Book

[5] Section 10.3 (b) of the operating agreement provides in relevant part: "Upon any repurchase . . . [the] Repurchase Member . . . shall receive . . . an amount equal to the aggregate amount in the Capital Account of such Repurchase Member . . . less such Repurchase Member's pro rata share . . . of the then-current capital reserve for future expenses established by the Board of Managers."

[6] Section 3.2 (a) (xiii) of the operating agreement provides that managers shall have the power to "establish from time to time a capital reserve for future expenses of the Company."

(2019) § 63-4 (a) (1) (B),[7] he requested that, in the event that the defendants were awarded a new trial, the following adverse rulings of the Superior Court (among others) be considered on appeal:

"1. Whether the Superior Court erred in striking [the plaintiff's] claim for breach of the implied covenant . . . .

"2. Whether the Superior Court erred in striking [the plaintiff's Connecticut Unfair Trade Practices Act (CUTPA)] claim."

Following the dismissal of the defendants' original appeals; see *Clinton* v. *Aspinwall*, 344 Conn. 696, 699, 713, 281 A.3d 1174 (2022); and the plaintiff's withdrawal of his fiduciary duty claim, which allowed this appeal to proceed, the plaintiff again presented for this court's review, under Practice Book (2024) § 63-4 (a) (1) (B), the issue of whether the trial court properly struck his implied covenant and CUTPA claims. Although the plaintiff briefed both issues before the trial court, he has not addressed them in his briefs submitted to the Appellate Court or this court.

There is no question that, before we could consider the plaintiff's implied covenant claim, we would need to afford the parties a new opportunity to brief the issue. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–62, 84 A.3d 840 (2014). I would have requested supplemental briefing because I think the plaintiff plau-

[7] Practice Book (2019) § 63-4 (a) (1) provides in relevant part: "If any appellee wishes to . . . (B) present for review adverse rulings or decisions of the [trial] court which should be considered on appeal in the event the appellant is awarded a new trial . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

"Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue."

sibly argues that his implied covenant claim was colorable under Delaware law and should not have been stricken, and because judicial economy favors resolving the issue at this time rather than after a second trial.[8]

Courts and commentators have observed that Delaware's courts have provided uncharacteristically opaque guidance with respect to the implied covenant.[9] The boilerplate language typically emphasizes the cautiousness with which Delaware courts approach such claims, given their disinclination to imply contract terms to which the parties did not formally agree or to "rebalanc[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract." (Internal quotation marks omitted.) *Gerber* v. *Enterprise Products Holdings, LLC*, 67 A.3d 400, 421 (Del. 2013), overruled on other grounds by *Winshall* v. *Viacom International, Inc.*, 76 A.3d 808 (Del. 2013). Despite the cautions, however, plaintiffs regularly prevail on implied covenant claims in Delaware. See, e.g., B. Horton, "Modifying Fiduciary Duties

[8] Although I would have no objection to it, I see no need to solicit supplemental briefing on the plaintiff's CUTPA claim, which, for various reasons, I believe was correctly stricken.

[9] See, e.g., *E.I. DuPont de Nemours & Co.* v. *Pressman*, 679 A.2d 436, 443 (Del. 1996) ("[a]lthough the [implied] [c]ovenant is a generally acknowledged principle, its precise contours are not fixed"); D. Listwa, "Cooperative Covenants: Good Faith for the Alternative Entity," 24 Stan. J.L. Bus. & Fin. 137, 137 (2019) ("[l]acking a clear notion of what the implied covenant demands, the Delaware courts have been hobbled in their attempts to generate a standard commensurate with the much-praised set of precedents the jurisdiction has developed with regard to corporate fiduciary duties"); D. Listwa, supra, 141 ("the Delaware Supreme Court has struggled to develop a workable [implied covenant] doctrine"); M. Manesh, "Express Contract Terms and the Implied Contractual Covenant of Delaware Law," 38 Del. J. Corp. L. 1, 1 (2013) ("Delaware law conceives of the implied . . . covenant . . . in contradictory terms. It is both a [gap-filler] subject to the express terms of a contract and an overriding obligation notwithstanding the express terms of a contract. It is not a judicial license to equitably rewrite bargained for agreements, yet courts may invoke [it] to limit express contractual rights when fairness dictates.").

in Delaware: Observing Ten Years of Decisional Law," 40 Del. J. Corp. L. 921, 921 (2016) ("despite the [Delaware] Court of Chancery's recurring admonition that the implied covenant is not a replacement for fiduciary duties, the implied covenant remains a potent attack where the [LLC] agreement partially modifies fiduciary duties, leaving discretionary gaps").

The trial court concluded that the plaintiff's implied covenant claim must be stricken because the alleged contractual obligation was not "clearly implied" by the express terms of the operating agreement. The primary source that the trial court relied on in imposing that requirement was *Liberty Property Ltd. Partnership* v. *25 Massachusetts Avenue Property LLC*, Docket C.A. No. 3027-VCS, 2009 WL 224904 (Del. Ch. January 22, 2009), aff'd, 970 A.2d 258 (Del. 2009) (*Liberty Property*). But that unpublished case was decided under the law of the District of Columbia, not of Delaware. See id., *4–5.

In the "foundational" case on the matter; D. Listwa, "Cooperative Covenants: Good Faith for the Alternative Entity," 24 Stan. J.L. Bus. & Fin. 137, 141 (2019); the Delaware Supreme Court embraced what it referred to as a "commonsensical" approach to implied covenant claims. (Internal quotation marks omitted.) *Gerber* v. *Enterprise Products Holdings, LLC*, supra, 67 A.3d 418. Under *Gerber*, which was decided subsequent to all of the Delaware cases on which the trial court relied in its decision addressing the defendants' motion to strike, the implied covenant is used to enforce the parties' contractual bargain by implying those terms that the parties would have agreed to during their original negotiations. Id. "Under Delaware law, a court confronting an implied covenant claim asks whether it is clear from what was expressly agreed [on] that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had

they thought to negotiate with respect to that matter. . . . [Fair dealing means] a commitment to deal fairly in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise good faith does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract." (Emphasis omitted; internal quotation marks omitted.) Id., 418–19. Put differently, "[Delaware law suggests that] there are two strains of the implied covenant: (1) gap-filling and (2) protecting against arbitrary and bad faith exercise of discretion. Under the first strain, the implied covenant is implicated when an agreement is *truly silent* on a term and requires a party to identify a gap in the contract to state a claim. Under the second strain, the implied covenant is implicated when a party is given discretion to act as to a certain subject and it is argued that the discretion has been used in a way that is impliedly proscribed by the contract's express terms." (Emphasis added; footnotes omitted; internal quotation marks omitted.) *Osios LLC* v. *Tiptree*, *Inc.*, Docket C.A. No. 2023-0589-NAC, 2024 WL 2947854, *5 (Del. Ch. June 12, 2024). The *Liberty Property* standard, as applied by the trial court, thus captures only a subset of those claims that are cognizable under the current Delaware rule, which recognizes that the implied covenant extends to questions on which the contractual language is silent.[10]

[10] A primary purpose of the implied covenant is to fill gaps in the express terms of the contract that the parties either (1) never thought to address or (2) considered so obvious as to not require discussion. See, e.g., *Cygnus Opportunity Fund*, *LLC* v. *Washington Prime Group*, *LLC*, 302 A.3d 430, 458–59 (Del. Ch. 2023). But, by definition, few, if any, such gaps will be *clearly* implied by the text of an LLC agreement, at least in the way that the trial court appears to have understood and applied that standard. See, e.g., id., 461 ("The defendants [argue] that the LLC [a]greement does not impose any express limitations on [their discretion], but the answer to that is, '[p]recisely.' The absence of any express limitation is what creates a gap in the [provision]. The LLC [a]greement provides the [board of managers] with discretion over which path to take, and the implied covenant requires that the [b]oard exercise that discretion reasonably."). The standard that the trial court adopted would make it almost impossible for a plaintiff to

I believe that the Delaware courts would have allowed the plaintiff's implied covenant claim to proceed under either strain of the implied covenant, insofar as he alleged both that the defendants had violated implied contractual provisions to which rational actors would have agreed and that the defendants had performed their discretionary management functions arbitrarily and in bad faith.[11] It makes sense that the parties would have agreed at the original bargaining stage to afford majority shareholders broad discretion to establish a suitable cash reserve and equally broad discretion to remove a minority shareholder with whom they could no longer constructively operate. That sort of self-interest is assumed and permitted under Delaware law. But no rational agent would agree in advance to an arrangement whereby, if he happened to fall into the minority at any point, the majority could transfer all of his accrued profits into an unnecessarily large capital reserve, remove him from the company, and then redistribute his share of the profits to themselves.[12] Interpreting the operating agreement in that manner would give rise to a sort of prisoner's dilemma scenario, in which each group of members would be incentivized to dispossess a tran-

prevail on an implied covenant claim. Of course, under *Gerber*, for the plaintiff to prevail, it still must be clear that the parties to the operating agreement, had they considered the issue during the contract drafting process, would have agreed to prohibit the challenged conduct.

[11] In his opposition to the motion to strike, the plaintiff repeatedly cited *Gerber* as providing the governing standard and explained, at some length, how his allegations were consistent with both strains of Delaware implied covenant law.

[12] See, e.g., *ArchKey Intermediate Holdings Inc.* v. *Mona*, 302 A.3d 975, 1005 (Del. Ch. 2023) ("[Although] they obviously are not fiduciaries and are free to act in their own interests, [the parties] have committed themselves to an effort to create joint surplus. For purposes of the implied covenant, that means that in the original bargaining position, the parties would have viewed a promise not to harm each other intentionally as so obvious that neither side would have raised it."). The extent to which the defendants engaged in that sort of improper conduct is, of course, a question of fact for the jury.

sient minority, before they themselves were dispossessed. Delaware courts repeatedly have rejected the argument, raised by the defendants in this case, that a contractual grant of managerial discretion should be read so broadly as to allow that degree of self-dealing, which deprives the oppressed minority member of the benefit of the bargain; rather, such conduct is insulated from challenge only if it is plainly *permitted* by the language of the contract.[13]

We can certainly defer action on this issue, but I fail to see the wisdom in that approach. On remand, the plaintiff may seek to have his implied covenant claim reconsidered by a different trial court, and reinstated. In light of the authorities identified herein, perhaps that trial court will allow the claim to proceed. Either way, years from now, we face the potential of yet another appeal, another reversal, another retrial. The plaintiff alone has now spent more than $1.2 million in attorney's fees litigating a $1.1 million judgment. The underlying conduct took place in 2013. The case was tried in 2018. This court, in 2022, directed that the defendants' initial appeals be dismissed; see *Clinton* v. *Aspinwall*, supra, 344 Conn. 699, 713; and now, in 2025, we are sending it back so that the parties and the trial court can start all over again. Accordingly, rather than prolong and make more complicated a dispute that should have been resolved years ago, I would afford the parties an

[13] Cf., e.g., *Dieckman* v. *Regency GP LP*, 155 A.3d 358, 367–69 (Del. 2017); *Dunlap* v. *State Farm Fire & Casualty Co.*, 878 A.2d 434, 440 (Del. 2005); *Cygnus Opportunity Fund, LLC* v. *Washington Prime Group, LLC*, 302 A.3d 430, 458–61 (Del. Ch. 2023); *Bandera Master Fund LP* v. *Boardwalk Pipeline Partners, LP*, Docket C.A. No. 2018-0372-JTL, 2019 WL 4927053, *21–24 (Del. Ch. October 7, 2019); *Bay Center Apartments Owner, LLC* v. *Emery Bay PKI, LLC*, Docket C.A. No. 3658-VCS, 2009 WL 1124451, *7 (Del. Ch. April 20, 2009); *Amirsaleh* v. *Board of Trade of the City of New York, Inc.*, Docket Civil Action No. 2822-CC, 2008 WL 4182998, *1, *7–9 (Del. Ch. September 11, 2008); *Charlotte Broadcasting, LLC* v. *Davis Broadcasting of Atlanta, L.L.C.*, Docket C.A. No. 13C-04-143-WCC CCLD, 2015 WL 3863245, *6–8 (Del. Super. June 10, 2015), aff'd, 134 A.3d 759 (Del. 2016).

opportunity to brief the implied covenant claim and address it now. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 161–62.

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## PHYLLIS AIREY ET AL. *v.* GISELLE FELICIANO ET AL.
## (SC 21117)

McDonald, D'Auria, Ecker, Dannehy and Bright, Js.

*Syllabus*

Pursuant to statute (§ 9-329a (b) (3)), when a candidate who claims to be aggrieved by a ruling of an election official in connection with a primary election files a complaint in the Superior Court, the court must hold a hearing, and, "if [the court] finds any error in the ruling of the election official," it may "order a new primary if [it] finds that but for the error . . . the result of [the] primary might have been different and [it] is unable to determine the result of such primary."

The intervening defendants, a slate of candidates seeking to appear on the ballot for a primary election for the Democratic Town Committee for the seventh voting district of the city of Hartford, appealed from the decision of the trial court, which denied their motion for a new primary election on the ground that the court lacked authority to order a new primary. Previously, certain Hartford election officials had certified the intervening defendants' slate for the primary, as well as a competing slate consisting of the plaintiffs. A prior court determined that the intervening defendants were not qualified for the primary and canceled the primary. Thereafter, this court upheld the prior court's determination that the intervening defendants were not qualified for the primary and also concluded that the plaintiffs were not qualified. On appeal from the denial of the motion for a new primary election in the present case, the intervening defendants claimed, inter alia, that the trial court had incorrectly determined that it lacked authority to order a new primary election under § 9-329a (b) (3). *Held*:

The trial court correctly concluded that it lacked authority under § 9-329a (b) (3) to order a new primary election under the circumstances of this case.

The remedy afforded by § 9-329a (b) (3) for an error in an election official's ruling, namely, a new primary, contemplates a contested primary election that has been held or will be held, but, when the intervening defendants moved for a new primary in this case, the scheduled primary had been canceled, and neither slate was deemed to have qualified for the primary, thereby leaving no remaining qualified candidates.

Insofar as there were no qualified candidates remaining for the requested primary, the statute (§ 9-421) governing when primaries are not to be held for town committee members dictated that no primary would be held under these circumstances, and any vacancies were to be filled in accordance with the local party rules.

Consequently, the intervening defendants were unable to establish that, but for erroneous decision of Hartford election officials to certify both slates of candidates, the result of the canceled primary might have been different.

There was no merit to the intervening defendants' claim that the trial court's failure to order a new primary violated the fundamental rights of the Democratic voters in the seventh voting district of Hartford, as the candidates, having failed to qualify for the primary, bore responsibility for the lack of a primary rather than the court.

This court declined the intervening defendants' invitation to overrule or narrow the imputed knowledge doctrine, which affords standing to candidates aggrieved by rulings of election officials.

The trial court properly applied the law when it concluded that both slates of candidates had standing pursuant to the imputed knowledge doctrine, and neither cogent reasons nor inescapable logic compelled this court to overrule its precedent on the doctrine or to abandon the doctrine altogether.

Argued June 16—officially July 29, 2025

*Procedural History*

Action for a judgment declaring that certain signatures on a petition sheet circulated by a slate of candidates seeking to appear on the ballot for a certain primary election for the Democratic Town Committee for the seventh district for the city of Hartford were invalid and that the slate was not qualified for nomination due to a failure to file the necessary number of signatures, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the motion filed by Kenneth P. Green et al. to intervene as defendants; thereafter, the intervening defendants filed a counterclaim; subsequently, the case was tried to the court, *Noble*, *J.*; judgment for the plaintiffs on their complaint and in part for the intervening defendants on their counterclaim, and an order directing the named defendant et al. to

remove the names of the intervening defendants from the ballot, from which the intervening defendants appealed; thereafter, this court reversed in part the trial court's judgment and remanded the case for further proceedings; subsequently, the court, *Klau*, *J.*, denied the motion of the intervening defendants for a new primary election, and the intervening defendants appealed. *Affirmed*.

*Alexander T. Taubes*, for the appellants (intervening defendants).

*John B. Kennelly*, for the appellees (plaintiffs).

*Opinion*

BRIGHT, J. This is the second appeal arising from a primary election dispute between two competing slates of candidates—the Airey slate, which includes the named plaintiff Phyllis Airey,[1] and the Green slate, which includes defendant Kenneth P. Green[2]—who sought to appear on the ballot for the March 5, 2024 primary election for the Democratic Town Committee for the seventh district of the city of Hartford. After the named defendant, the Democratic registrar of voters, Giselle Feliciano, and defendant city clerk, Noel McGregor, certified that both slates of candidates had qualified for the primary election, the Airey slate filed the underlying action pursuant to General Statutes § 9-329a (a),[3] seeking to disqualify the Green slate. See

[1] The other plaintiff members of the Airey slate are Ayesha Clarke, Amir Rasheed Johnson, Dyshawn Thames, Ewan Shariff, Michelle Whatley, Donna Thompson-Daniel, Andrew Rodney, Yvette Mosely, Raymond Dolphin, Cambar Edwards, Francisca Nugent, Charmaine Anderson, and John Davis.

[2] The other intervening defendant members of the Green slate are Benita Toussaint, Helen Boutte, Elaine Hatcher, Cynthia Jennings, Kreeshawn Rismay, Katibu Hatcher, Keith Bolling, Jr., Elisha Barrows, Camille Thomas, Ashley Thomas, and Sherma Rismay.

[3] General Statutes § 9-329a (a) provides in relevant part: "Any . . . elector or candidate aggrieved by a ruling of an election official in connection with any primary held pursuant to . . . section . . . 9-425 . . . may bring his complaint to any judge of the Superior Court for appropriate action. . . . If such complaint is made prior to such primary such judge shall proceed

*Airey* v. *Feliciano*, 350 Conn. 162, 164–66, 323 A.3d 1037 (2024). The individual members of the Green slate intervened and filed a counterclaim seeking to disqualify the Airey slate. Id., 165–66. After a hearing, the trial court concluded that only the Airey slate had qualified for the primary and ordered Feliciano and McGregor to remove the Green slate from the ballot. Id., 167. As a result, the March 5 primary was canceled. Id., 168 n.3. The Green slate appealed; id., 165;[4] and we reversed in part the judgment of the trial court. Id., 181–82. We concluded that neither the Green slate nor the Airey slate had qualified for the primary and remanded the case with direction to disqualify the Airey slate "and for other proceedings according to law . . . ." Id., 182.

On remand, the trial court denied the Green slate's motion for a new primary election, reasoning that it lacked the authority to order a new election under § 9-329a (b) (3) because neither slate had qualified for the primary. The Green slate appeals, claiming that (1) the trial court improperly failed to order a new primary election under § 9-329a (b) (3), and (2) the court's failure to order a new primary election violated the fundamental rights of the Democratic voters in Hartford's seventh district. As alternative relief, the Green slate asks this court "to overturn or substantially narrow the overly broad 'imputed knowledge doctrine' that enabled this destructive litigation and threatens to undermine Connecticut democracy." We conclude that the court lacked the authority to order a new primary and that its failure to do so did not violate any voter's fundamen-

expeditiously to render judgment on the complaint and shall cause notice of the hearing to be given to the Secretary of the State and the State Elections Enforcement Commission. If such complaint is made subsequent to such primary it shall be brought, not later than fourteen days after such primary . . . ."

[4] This court elected to treat the appeal as if it had been filed in the Appellate Court and transferred the appeal to itself. See *Airey* v. *Feliciano*, supra, 350 Conn. 168 n.4.

tal right to vote. We also decline the Green slate's request that we overrule or narrow our imputed knowledge doctrine precedent. We therefore affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. Following our remand order in *Airey*, the Hartford Democratic Town Committee posted a notice of its intent to fill the vacancies for the city's seventh district by committee appointment during a meeting scheduled for September 16, 2024.[5] Three days before that meeting, the Green slate had moved for a temporary injunction barring the Hartford Democratic Town Committee from filling the vacancies for the seventh district and enjoining Feliciano and McGregor from accepting or recognizing any purported appointments to the seventh district. The Green slate also moved for a new primary pursuant to § 9-329a (b) (3), which authorizes a court to "order a new primary if [it] finds that but for the error in the ruling of the election official . . . or any violation of said sections, the result of such primary might have been different and [the court] is unable to determine the result of such primary." The Green slate argued that the statutory criteria

[5] During oral argument before this court, counsel for the Airey slate represented that, if no candidates qualify for a primary, the vacancies are filled pursuant to the local rules of the Hartford Democratic Town Committee. The party's local rules, including any amendments thereto, are filed with the secretary of the state and the Hartford town clerk pursuant to General Statutes § 9-374. We take judicial notice of the Hartford Democratic Town Committee's local rules, which are a public record. See, e.g., *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 769 n.28, 12 A.3d 817 (2011) (court may take judicial notice of public records). Article II, § 2, of those rules provides the procedure for filling vacancies on the Hartford Democratic Town Committee when there is no primary election. See Amendment to the Bylaws Governing the Democratic Town Committee of the Town of Hartford, Connecticut (December 17, 2013) art. II, § 2 ("[a]ny vacancy on the Town Committee, *arising from any cause including failure to elect*, may be filled by the Town [C]ommittee by a majority vote of those present and voting at a meeting called for that purpose" (emphasis added)).

were met in the present case because (1) the error in the rulings of the election official likely affected the result of the primary, given that those rulings "determined which slates appeared on the ballot," and (2) the court was unable to determine the result of the election.

On September 16, 2024, the parties agreed that Feliciano and McGregor would "hold any and all filings by the Hartford Democratic Town Committee regarding the membership of the seventh . . . district until there [was] a final decision" in the matter, and the court accepted the parties' agreement. The Airey slate and Feliciano and McGregor subsequently filed briefs opposing the Green slate's motion for a new primary election, and the parties agreed that the court, *Klau*, *J.*, would decide the matter without a hearing. On April 14, 2025, the court issued a decision denying the Green slate's motion for a new primary. The court reasoned that it lacked the authority to order a new primary under § 9-329a (b) (3) because "no primary election ever occurred, and [this court had] determined that neither slate of candidates qualified to appear on the primary ballot." The court also observed that General Statutes § 9-417 (a)[6] dictated that "[t]he Airey slate—as the party-endorsed slate of candidates for the seventh district—'shall be deemed to have been lawfully elected to such positions . . . .' "

The Green slate filed a motion to reconsider or reargue the court's decision, arguing that (1) the court mis-

[6] General Statutes § 9-417 (a) provides in relevant part: "Except as provided in subsection (b) of this section, if within the time specified in section 9-405, no candidacy for nomination by a political party to a municipal office has been filed . . . by persons other than party-endorsed candidates numbering at least twenty-five per cent of the number of town committee members to be elected by such party either in the municipality or in the political subdivision . . . in conformity with the provisions of sections 9-405 to 9-412, inclusive, and 9-414, no primary shall be held by such party . . . for town committee members . . . and the party-endorsed candidates for election as members of the town committee shall be deemed to have been lawfully elected to such positions at the times specified in section 9-392."

takenly identified the Airey slate as the party-endorsed slate and, therefore, wrongly concluded that § 9-417 (a) dictated the outcome of the present case, and (2) § 9-329a (b) "expressly empower[s] courts to order new primaries when statutory violations make the election result indeterminable."

After hearing argument on the motion for reconsideration, the court issued a decision in which it granted reconsideration and vacated its April 14 decision. The court acknowledged that it had mistakenly identified the Airey slate as the party-endorsed slate and agreed with the Green slate that § 9-417 (a) therefore does not control in the present case. The court, however, reached the same conclusion regarding its lack of authority to order a new primary election as it had in its prior decision, reasoning that, "[p]ursuant to § 9-329a (b), [it could] 'determine the result' of the primary under the present circumstances: no primary shall be held because neither slate qualified for the primary ballot. . . . [T]he current legal status quo is no different than if both slates had simply failed to collect the required number of signatures to qualify for the primary ballot. No primary election would be held under such circumstances." This appeal followed.[7]

I

The Green slate claims that the trial court improperly failed to order a new primary election under § 9-329a (b) (3). We disagree.

We begin our analysis with the applicable standard of review. "[T]he ultimate determination of whether . . . a new election is called for . . . is a mixed question of fact and law that is subject to plenary review on appeal . . . ." (Internal quotation marks omitted.)

[7] Although the appeal was filed in this court, we treated the appeal as though it had been filed in the Appellate Court and transferred it to this court. See footnote 4 of this opinion.

*Keeley* v. *Ayala*, 328 Conn. 393, 404, 179 A.3d 1249 (2018). Whether the court correctly determined that it lacked the authority to order a new primary under § 9-329a (b) (3) involves an issue of statutory interpretation, which is also subject to our plenary review. See id.

General Statutes § 1-2z requires that we first consider "the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Thus, our analysis begins with the plain meaning of the statute, although we remain "mindful that we do not write on a clean slate, but are bound by our previous judicial interpretations of [the statutory] language and the purpose of [the relevant] statute[s]." (Internal quotation marks omitted.) *Stamford* v. *Commission on Human Rights & Opportunities*, *Office of Public Hearings*, 351 Conn. 298, 306, 330 A.3d 102 (2025).

Pursuant to § 9-329a (a), any candidate who is aggrieved by a ruling of an election official in connection with a primary may file a complaint in the Superior Court either before or after the primary. Section 9-329a (b) requires that the trial court hold a hearing on the complaint and provides that the court "may (1) determine the result of such primary; (2) order a change in the existing primary schedule; or (3) order a new primary if [the court] finds that but for the error in the ruling of the election official . . . the result of [the] primary might have been different and [the court] is unable to determine the result of such primary." Accordingly, the statute authorizes the court to order three distinct remedies if it "finds any error in the ruling of the election official . . . ." General Statutes § 9-329a (b). Each remedy contemplates a contested primary election that either was held; see General Statutes § 9-

329a (b) (1) and (3); or will be held. See General Statutes § 9-329a (b) (2).

In the present case, the Airey slate initiated the underlying action before the primary occurred, and the primary was canceled after the trial court determined that the Green slate had failed to qualify for the primary. See General Statutes §§ 9-417 (b)[8] and 9-429.[9] We subsequently held that the Airey slate also had failed to qualify for the primary, which left no qualified candidates for the primary. General Statutes § 9-421 expressly provides that "no primary shall be held by a party for the election of a member of a town committee unless candidacies for such election numbering at least twenty-five per cent of the number of town committee members to be elected by such party . . . are filed in conformity with the provisions of sections 9-400 to 9-414, inclusive, by persons other than party-endorsed candidates." Accordingly, when the Green slate moved for a new primary on remand, no primary had been held, and, pursuant to § 9-421, no primary would be held. In these circumstances, § 9-329a (b) (3) does not authorize the court to order a new primary. Indeed, no

[8] General Statutes § 9-417 (b) provides in relevant part: "In the case of any municipality having a population of one hundred thousand or more and in which a party by its rules provides . . . that the town committee members of such party be chosen at direct primaries, if . . . the number of persons who have requested petition forms for candidacies for election as members of such town committee . . . is equal to or less than the number of town committee members to be elected by such party, but at least twenty-five per cent of such number . . . then . . . no primary shall be held by such party for town committee members and such persons shall be deemed to have lawfully been elected to such positions . . . ."

[9] General Statutes § 9-429 provides in relevant part: "If, prior to the opening of the polls at a primary for nomination to an office or for election of town committee members, such a number of candidates have . . . become ineligible . . . as to render the total number of candidates for such office or position no greater than the number to be nominated to such office or elected to such positions, the primary shall not be held, and each of the party-endorsed and other candidates shall be deemed to have been lawfully nominated to such office or elected to such positions."

primary could be held because neither slate qualified to appear on the primary ballot, which left vacancies on the Democratic Town Committee to be filled in accordance with the local party rules. See footnote 5 of this opinion. As a result, the Green slate was unable to establish that, but for the erroneous ruling of the election official—that is, the erroneous certification that both slates of candidates had qualified for the primary—the result of the canceled primary "might have been different . . . ." General Statutes § 9-329a (b) (3). In other words, if the election officials had rejected both slates' petitions, as we concluded in *Airey* that they should have, no primary would have been held, which is exactly what happened.[10] The court therefore correctly concluded that it lacked the statutory authority to order a new primary when no candidates had qualified to appear on the ballot.

The Green slate's arguments to the contrary are unavailing. It argues that ordering a new primary under § 9-329a (b) (3) is authorized, even when the scheduled primary never occurred. According to the Green slate, "[w]hen no primary occurs at all, every conceivable result 'might have been different' than the nonresult of no election." In so arguing, the Green slate seemingly ignores the fact that neither slate had qualified to appear on the primary ballot, and, thus, the candidates—not the election officials—bear responsibility for the canceled primary. The Green slate essentially argues that § 9-329a (b) (3) provides candidates who failed to qualify for the scheduled primary with "the electoral equivalent of a mulligan." (Internal quotation marks omitted.) *Lazar* v. *Ganim*, 334 Conn. 73, 94, 220 A.3d 18 (2019). To the contrary, § 9-329a (b) (3) does not authorize a

[10] During oral argument before this court, counsel for the Green slate conceded that, if the election officials had correctly rejected both slates' petitions, no primary would have been held, and neither slate of candidates would be entitled to a new primary.

trial court to order a new primary whenever candidates fail to qualify to appear on the ballot. Instead, § 9-329a (b) (3) authorizes the trial court to order a new primary only when the statutory requirements are met. In the present case, because neither slate of candidates qualified for the original primary, which never occurred, the Green slate was unable to establish that it was entitled to a new primary under the statute.[11]

II

The Green slate next claims that the trial court's failure to order a new primary violated the fundamental rights of the Democratic voters in Hartford's seventh district. It recounts several provisions of the state and federal constitutions regarding the rights of citizens to vote in elections[12] and argues that the court's decision denying its request for a new primary "does not merely burden or restrict voting rights—it eliminates them entirely." This claim lacks merit.

In *Airey*, we concluded that neither the Green slate nor the Airey slate had qualified to appear on the primary ballot. As we concluded in part I of this opinion, the trial court correctly concluded that it lacked the

[11] We note that, "[j]ust as [s]tates may require persons to demonstrate a significant modicum of support before allowing them access to the [general election] ballot, lest it become unmanageable . . . they may similarly demand a minimum degree of support for candidate access to a primary ballot." (Citation omitted; internal quotation marks omitted.) *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 204, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008); see also *Gottlieb* v. *Lamont*, 465 F. Supp. 3d 41, 55 (D.Conn. 2020) ("[t]he state also has an interest in the orderly and efficient administration of elections . . . an interest clearly served by the petitioning deadlines" (citation omitted)). Because neither slate garnered enough support during the petitioning process to appear on the primary ballot, no primary election was required.

[12] Specifically, the Green slate cites the first amendment to the United States constitution and the state constitutional provisions guaranteeing equal rights; see Conn. Const., art. I, § 1; the right to alter the form of government; see Conn. Const., art. I, § 2; equal protection; see Conn. Const., art. I, § 20; and the right to free suffrage. See Conn. Const., art. VI, § 4.

statutory authority to order a new primary when no slate of candidates had qualified for the primary in the first place. It follows, therefore, that the candidates—not the trial court—bear responsibility for the failed primary. Consequently, because the alleged restriction on voting rights arises from the failure of the candidates to qualify for the primary, and not from any state action, we reject the Green slate's claim that the trial court's decision violated the fundamental rights of Democratic voters in Hartford's seventh district.

III

Last, the Green slate claims that the Airey slate lacked standing to initiate the underlying action because the imputed knowledge doctrine, which grants standing to candidates aggrieved by the decisions of election officials, although "established by precedent, violates the plain language of" § 9-329a (a). The Green slate concedes that this claim is unpreserved but contends that it is reviewable because it implicates the trial court's subject matter jurisdiction. We agree that the claim implicates subject matter jurisdiction and is therefore reviewable. See, e.g., *Arciniega* v. *Feliciano*, 329 Conn. 293, 300–301 n.4, 184 A.3d 1202 (2018). We decline the invitation, however, to abandon the imputed knowledge doctrine in election cases.

Both the Airey slate and the Green slate asserted their respective claim and counterclaim pursuant to § 9-329a (a) (1), which authorizes "[a]ny . . . elector or candidate aggrieved by a ruling of an election official" to bring an action in the Superior Court. Neither slate disputed that the other had standing, and the trial court, *Noble*, *J.*, noted in its memorandum of decision that each slate had standing. Quoting from this court's decision in *Arciniega* v. *Feliciano*, supra, 329 Conn. 303, the trial court recognized that § 9-329a (a) (1) affords

standing only when there is " 'a ruling of an election official' " and that " 'an official may render a ruling, even if the official is unaware that a person has committed a violation of the election laws, if the official would be required to take dispositive action if that violation were known to the official.' " See also *Caruso* v. *Bridgeport*, 285 Conn. 618, 647, 941 A.2d 266 (2008) ("[w]hen an election statute mandates certain procedures, and the election official has failed to apply or to follow those procedures, such conduct implicitly constitutes an incorrect interpretation of the requirements of the statute and, therefore, is a ruling").[13] Under this doctrine, the trial court determined that McGregor's certification that both slates of candidates had obtained sufficient signatures to qualify for the primary election was "a ruling of an election official" by which both slates of candidates were aggrieved.

The trial court properly applied the law, and we conclude that neither cogent reasons nor inescapable logic compels us to overrule *Caruso* or *Arciniega* or to abandon the imputed knowledge doctrine. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 170, 920 A.2d 236 (2007) ("[T]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency." (Internal quotation marks omitted.)).

The judgment is affirmed.

In this opinion the other justices concurred.

[13] The Green slate neither objected to that conclusion before the trial court nor challenged it on appeal in *Airey*.

# STATE OF CONNECTICUT *v.* ROBERT PARRIS (SC 20837)

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

*Syllabus*

Convicted of murder and various firearm offenses in connection with the shooting death of the victim, the defendant appealed to this court. During an interview with the police, the defendant confessed to shooting the victim and discussed in detail his prior struggle with homelessness and certain issues that he had with his stepmother and the victim, who was his next-door neighbor. The defendant expressed his belief that his stepmother had been scheming to prevent him from holding a job, finding housing, and maintaining relationships, and that she and the victim had been conspiring against him. At trial, the defendant asserted the defense of extreme emotional disturbance with respect to the murder charge, which the jury rejected. On appeal to this court, the defendant claimed, inter alia, that multiple instances of impropriety during the prosecutors' closing and rebuttal arguments deprived him of his due process right to a fair trial. *Held*:

The prosecutors committed impropriety during closing and rebuttal arguments by repeatedly misstating the law on the defendant's extreme emotional disturbance defense, and, because that impropriety deprived the defendant of his due process right to a fair trial, this court reversed the defendant's murder conviction and remanded the case for a new trial on that charge.

With respect to the prosecutors' comments during closing and rebuttal arguments that the defendant's state of mind "[did not] matter" with respect to whether he actually believed the circumstances regarding his stepmother, the extreme emotional disturbance defense embraces a standard that is subjective as to the defendant's belief and that requires a jury, in determining the reasonableness of the explanation or excuse for the disturbance, to consider the circumstances as the defendant believed them to be.

Consequently, the defendant's subjective state of mind was an important component to his extreme emotional disturbance defense, and any argument by the prosecutors to the contrary was a clear misstatement of the law.

With respect to one of the prosecutor's comments during rebuttal argument that the defendant's extreme emotional disturbance defense was unreasonable and inapplicable because the defendant's stepmother, and not the victim, was the source of the defendant's purported disturbance, and that the jury should consider whether targeting the victim, as opposed to his stepmother, was a reasonable reaction to the disturbance the defendant had allegedly experienced, those comments incorrectly suggested that there must be a logical nexus between the disturbance and the murder victim,

and that the jury must consider whether it was reasonable for the defendant to have killed the specific victim as a result of the disturbance, when, instead, the extreme emotional disturbance defense asks whether there was a reasonable explanation or excuse for the disturbance itself rather than the criminal act or the choice of victim.

The use of hypotheticals by one of the prosecutors during rebuttal argument in claiming that the defendant's situation, as he believed it to be, was not a reasonable excuse or explanation for his actions was improper.

The introduction of the hypotheticals incorrectly framed the reasonableness inquiry of the extreme emotion disturbance defense, the hypotheticals misled the jury as to the analysis it was required to undertake, each hypothetical provided limited factual information, which tended to cause the jury to consider the hypothetical in a vacuum rather than in the appropriate context, and the fact that the misleading use of hypotheticals occurred during rebuttal argument was significant because the defense never had an opportunity to correct the misconceptions the prosecutor created.

There was a reasonable likelihood that the jury's verdict on the murder charge would have been different in the absence of the impropriety.

The defense did not invite the impropriety, the impropriety was central to a critical issue in the case, namely, the defendant's state of mind, and the prosecutors' misstatements of the law regarding the defendant's extreme emotional disturbance defense was inexcusable such that defense counsel's failure to object more strenuously during the trial did not significantly undermine the defendant's due process claim.

Moreover, although the improper comments did not occur throughout the trial but only during closing and rebuttal arguments, most of the improper comments occurred during rebuttal argument, which was particularly troubling insofar as defense counsel had no opportunity to respond, and whatever curative instructions the trial court did provide, even when considered with the court's accurate instruction on the extreme emotional disturbance defense, did not eliminate the prejudicial impact of the impropriety in light of the challenging legal concepts involved in an evaluation of such a defense.

The trial court did not abuse its discretion in admitting into evidence the entirety of the defendant's statement to the police without redacting those portions in which the defendant used homophobic slurs.

The entire interview was relevant to the defendant's extreme emotional disturbance defense insofar as it gave the jury context to determine whether he had satisfied the first element of that defense, namely, whether he had committed the murder under the influence of an extreme emotional disturbance.

Furthermore, although the use of slurs is inherently prejudicial and can incite strong feelings in jurors, the admission of the slurs was not more

prejudicial than probative because the defendant's choice of language and how frequently he used each slur aided the jurors in determining if he was suffering from extreme emotional disturbance or whether the disturbance was contrived, particularly in light of the trial court's instruction that the derogatory language in the defendant's statement was being offered for the limited purpose of demonstrating the defendant's emotional state and that the jurors were not to punish the defendant for using such language.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued April 14—officially released July 29, 2025

*Procedural History*

Substitute information charging the defendant with the crimes of murder, criminal possession of a firearm, 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 New Haven, where the charges of murder, criminal possession of a firearm, and carrying a pistol or revolver without a permit were tried to the jury before *Alander*, *J.*; verdict of guilty; thereafter, the charge of criminal possession of a pistol or revolver was tried to the court, *Alander*, *J.*; finding of guilty; subsequently, the court, *Alander*, *J.*, rendered judgment of guilty in accordance with the verdict and the finding, from which the defendant appealed to this court. *Reversed in part*; *new trial.*

*Erica A. Barber*, assistant public defender, with whom, on the brief, were *Spencer Buckley* and *Lauren Klobutcher*, certified legal interns, for the appellant (defendant).

*Danielle Koch*, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Melissa Holmes*, assistant state's attorney, for the appellee (state).

*Opinion*

BRIGHT, J. A jury found the defendant, Robert Parris, guilty of, among other offenses, murder in violation of

General Statutes § 53a-54a (a), for shooting and killing the victim, Michael Rosario. The defendant appeals from the judgment of the trial court, claiming that he is entitled to a new trial because (1) multiple instances of prosecutorial impropriety during the state's closing and rebuttal arguments[1] deprived him of his right to a fair trial, and (2) the trial court abused its discretion in admitting portions of his statement to the police that included homophobic slurs. We agree with the defendant that there were multiple instances of prosecutorial impropriety that deprived him of a fair trial but disagree with him that the trial court abused its discretion in admitting his entire statement to the police. Because the defendant's due process right to a fair trial was violated, we reverse the judgment of the trial court as to the defendant's murder conviction and remand the case for a new trial on that charge.

The jury reasonably could have found the following facts. The defendant, who had been experiencing homelessness for more than one decade, secured housing through an assistance program. The victim, who was the superintendent of the building where the defendant lived, and his two children lived next door to the defendant. The victim and the defendant had a tumultuous relationship.[2]

[1] Melissa Holmes, assistant state's attorney, presented the state's closing argument, and John P. Doyle, Jr., state's attorney, presented its rebuttal argument. For purposes of simplicity, we refer to them collectively as the prosecutors and individually as the prosecutor, where appropriate.

[2] The defendant is a registered sex offender. Another resident of the building testified that the victim would occasionally say "disrespectful things" about sex offenders and that he saw the victim harass the defendant about the fact that he was a sex offender. The victim's daughter testified that there was hostility between the victim and the defendant.

The defendant also told the police and others that he believed that the victim was conspiring with his stepmother to prevent him from maintaining a job and relationships. Roughly seven months prior to killing the victim, in May, 2019, the defendant contacted the property manager, alleging that the victim and the defendant's stepmother were conspiring against him and that he was "going to kill that piece of shit." The property manager then forwarded the message to the defendant's case manager at the housing

On the morning of December 19, 2019, the victim's daughter, who was home alone in the apartment she shared with her brother and the victim, heard the defendant pacing back and forth in the hallway outside their apartment and talking to himself.[3] As the day progressed, the defendant's voice became louder, he sounded upset, and he said something about "a small member and a small tommy gun . . . ."[4] The defendant's odd behavior continued for three to four hours. As the defendant's behavior became "more chaotic," the victim's daughter called the victim to tell him that she was afraid to leave the apartment until he got home. When the victim's son returned to the apartment a little before 4 p.m., the defendant was still in the hallway, although he had stopped speaking so loudly. The victim's daughter eventually heard the victim's footsteps and his key make contact with their apartment door, but she heard no voices in the hallway. She then heard a loud thud, which she described as "a drop of a body," and, when she opened the door, she discovered the victim lying on the floor. Another resident called 911. The defendant, who was in the hallway, stepped over the victim's body and left the building. The victim's daughter then noticed that the victim had a gunshot wound to the head, which had caused his death.

On December 20, 2019, the morning after the homicide, the defendant turned himself in to the New Haven

assistance program, who then spoke to the defendant. The defendant did not suffer any consequences for making the threat.

[3] On the morning of the shooting, the defendant showed another resident of the building a small handgun he was carrying. The resident testified that the defendant had hit "a breaking point because [the conflict between the defendant and the victim had] been going on for a couple years." The resident had told the defendant to "just let it go, [to] let it be," and attempted to take the gun from the defendant. The defendant, however, refused to hand him the gun.

[4] The victim's daughter told the police after the shooting that the victim would mock the size of the defendant's penis, and she testified that she took the defendant's "small member" and "small tommy gun" statement as referring to his penis.

Police Department. He consented to an interview with two detectives, which lasted approximately three hours. During the interview, the defendant confessed to shooting the victim with a small handgun. He stated that, after the homicide, he walked to a nearby cemetery where he had once worked, discarding the gun along the way.[5] He also discussed his struggles with homelessness, his stepmother,[6] and the victim.

The state charged the defendant with murder, criminal possession of a firearm, carrying a pistol or revolver without a permit, and criminal possession of a pistol or revolver while subject to a restraining order. Prior to trial, the defendant filed a notice of his intent to rely on the affirmative defense of extreme emotional disturbance with respect to the murder charge, which, if accepted by the jury, would result in the defendant's conviction of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (2) instead of murder.[7] Throughout trial and closing argument, defense counsel focused on the defense of extreme emotional disturbance, discussing the defendant's behavior during the hours leading up to the shooting, the conflict

[5] The gun was never recovered.

[6] The defendant discussed at length his relationship with his stepmother, whom he claimed had prevented him from maintaining a job, finding housing, and maintaining relationships. Among other things, he claimed that his stepmother had approached him "with her eyes glowing yellow" while he was once parked at a cemetery. He additionally claimed that his stepmother had recorded him performing oral sex on another man and would show the recording to others. He also insisted that his stepmother had frequently visited his building and had broken into his apartment with the victim.

Police officers, however, could not find any evidence that the defendant's stepmother spent any time at the defendant's apartment or had a relationship with the victim or any of the defendant's employers. The defendant's stepmother testified that she had last seen him in either 1998 or 1999, and that she had not initiated contact with him in any way since then. She additionally testified that she had not done anything to interfere with his housing, employment, or relationships, and that she had never met the victim.

[7] The defendant has never disputed that he intentionally killed the victim, which he confessed to doing during his interview.

between the defendant and the victim, the defendant's concerns about losing his housing, and the defendant's problems with his stepmother. The prosecutors argued, among other things, that the defendant had planned the victim's death and that his claim of extreme emotional disturbance was contrived.

The jury rejected the defendant's extreme emotional disturbance defense and found him guilty of three crimes, including murder.[8] He was sentenced to a total effective sentence of forty-five years of imprisonment. This appeal followed.

I

The defendant first claims that he is entitled to a new trial because the prosecutors committed numerous instances of impropriety during their closing and rebuttal arguments. Specifically, the defendant contends that the prosecutors acted improperly when they misstated the law regarding the extreme emotional disturbance defense, denigrated the defense, and invited the jury to engage in jury nullification. We conclude that the prosecutors committed impropriety by misstating the law regarding the extreme emotional disturbance defense and that doing so deprived the defendant of a fair trial.

"When considering a prosecutorial impropriety claim, the court engages in a two step process. We must determine (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived [the] defendant of his due process right to a fair trial. . . . It is the defendant's burden to satisfy both steps. . . . With respect to the second step, we must examine not only whether any individual impropriety deprived the defendant of his right to a fair trial, but also whether the cumulative effect of multiple improprieties . . .

[8] The defendant elected a court trial on the charge of criminal possession of a pistol or revolver while subject to a restraining order. The trial court found the defendant guilty of that charge.

deprived [him] of his . . . right to a fair trial. . . . To [do so], we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . We review the instances of impropriety in the context of the entire trial and not in a vacuum." (Citations omitted; internal quotation marks omitted.) *State* v. *Dabate*, 351 Conn. 428, 437, 331 A.3d 1159 (2025).

A

The following additional facts and procedural history are relevant to this claim. During the charging conference held prior to closing arguments, defense counsel requested a jury instruction on extreme emotional disturbance. Section 53a-54a (a) provides in relevant part: "[I]t shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

The prosecutor objected to the charge, arguing that there was "essentially no testimony as to what the defendant's state of mind was . . . specifically at the time of this incident . . . that [there was] no evidence from any expert witnesses . . . who ha[d] discussed specifically the defendant's mental state [or] any mental disease or defect that he may suffer from, and also [that there was] no one to speak to the reasonableness" of the defendant's explanation or excuse. In response, defense counsel argued that there was "a lot of evidence that supports all of the elements of the defense, both from

observations of witnesses that day [who] testified . . . as well as the defendant's statement . . . to the police multiple times indicating what his state of mind was. As far as [there being] no expert witness testi[mony], [the defense is] not required to present an expert witness. . . . [W]e're not required to introduce expert testimony on reasonableness, either."

The trial court agreed to give an instruction on the extreme emotional disturbance defense, stating: "[The defendant], in his interview with the police, certainly talked about his mental state in general, both as it relates to [his] stepmother [and the victim]. There's evidence from [the victim's] daughter that he was talking to himself, pacing outside in the hallway immediately before the shooting, so I think there's sufficient evidence for this defense to go to the jury, [and] I am going to give an instruction on extreme emotional disturbance."

The court provided the parties with its proposed extreme emotional disturbance charge, which, as to the second element of the defense, provided in relevant part that "the reasonableness [of the defendant's explanation or excuse] is determined from the viewpoint of a person in the defendant's situation." The prosecutor requested that the charge be altered slightly so that it read "reasonableness . . . determined from the viewpoint of a *reasonable* person in the defendant's situation." (Emphasis added.) The trial court agreed with the prosecutor and reiterated that the defense involves "a reasonable person standard that has an objective part and a subjective part, and it's a reasonable person in the defendant's situation . . . ." The prosecutor did not otherwise object to the language of the extreme emotional disturbance charge.

During closing argument, after discussing the defendant's police interview, the prosecutor argued: "Now,

remember . . . this is a confession to killing [the victim], and it's your recollection of this video that controls. But it's about [one-half] hour before [the defendant] even mentions [the victim], and that's not even by name. He just calls him the superintendent. . . . So, remember, when you're listening to argument and . . . the law on whether . . . you should consider the defendant's mental state and mitigate this . . . murder in any way, please remember the idea of reasonableness and *what a reasonable person would have done in the defendant's position. What is reasonable about killing* [*the victim*]? Frankly, [the defendant] didn't talk about [the victim] all that much. . . . [M]ostly, it was just him talking about his stepmother. *So, what makes sense . . . in this situation* [*about*] *killing* [*the victim*]?" (Emphasis added.) The prosecutor continued: "You heard from [the defendant's stepmother] herself. . . . Now, there's nothing in [the] evidence to tell you exactly what it was that the defendant believed, if he believed these things about his stepmother or if these were just convenient excuses to come up with after the fact, to really put all the blame on her. *The state's position* [*is that*] *it really doesn't matter whether he believed them* . . . . They clearly are being used as excuses in this interview to explain away and [to] justify what he did. And, again, when you consider that idea of *what a reasonable person would do in these circumstances*, the state would submit [that] there is nothing reasonable about the reaction that he had . . . ." (Emphasis added.)

In response, defense counsel argued that the defendant acted under the influence of extreme emotional disturbance when he killed the victim. He explained that the "extreme emotional disturbance [defense] does not require a provoking or a triggering event. It includes a homicide that is brought about by a significant mental trauma that caused the defendant to brood for a long

period of time and then [to] react violently, seemingly without provocation. The homicidal act need not occur immediately after the cause or the causes of the defendant's extreme emotional disturbance. Rather, the disturbance may have simmered in the defendant's mind for a long period of time. So, it is not necessary that we, the defense, identify some sort of triggering event, something that happened [the] moment before [the victim] was shot.

* * *

"Now, [the defendant] has a long-standing belief that his stepmother had been doing certain things to him, including trying to keep him homeless for all those years, and whether that is true or not, I don't know. But, for the purpose of the extreme emotional disturbance defense, it doesn't matter. The important thing is [that the defendant] believed that she did it." Defense counsel continued: "Now, when the court instructs you later . . . on extreme emotional disturbance, you're going to hear that there has to be a reasonable explanation or excuse [for] the defendant's extreme emotional disturbance. And, to [find] that, you have to measure the view—from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be. In other words, put yourself in his shoes, view it from his situation as [he] believed things to be."

During rebuttal, the prosecutor argued: "[W]hen you determine [the extreme emotional disturbance] defense . . . pay very [close] attention to what the court instructs because, in determining the reasonableness of the defendant's explanation or excuse, you must measure that reasonableness from the viewpoint of a reasonable person in the defendant's situation. I disagree with [defense counsel] on it. It's not . . . reasonableness from the defendant's viewpoint. It's from a

reasonable person in the situation the defendant is in. That is a very big distinction. Listen to what the court says, *because the determination you're going to have to make here is whether the defendant's conduct is reasonable based on what a reasonable person would do in the situation that he perceived himself to be in. And, ask yourself, would a reasonable person kill* [*the victim*]? *Why not the stepmother*? *Why not his employer*? *Why not the property manager*? *Why not the landlord*? *Why not his caretaker*?" (Emphasis added.)

The prosecutor then presented hypotheticals for the jury to consider: "*So, ask yourself this as you consider the defendant's claimed defense, and think about the reasonable person in an everyday world and in an everyday society. Do you get to kill* [*your*] *employer because you got fired or disciplined*? *Do you get to murder your estranged spouse or loved one because there's an ongoing divorce or child custody battle that's been* [*playing*] *in the back of your mind for months or years to come*? *Do you get to kill a rival drug dealer, a gang member, because* [*he*] *cause*[*s*] *you stress by operating on your drug turf or* [*in*] *your drug area*? *Do you get to murder your high school or college basketball coach because* [*he is*] *conspiring with the team captain to sit you out for the next game*? *How about your principal if your teacher fails you in math*? *How about your neighbor because you protect your parking spot*? *It's assigned to you. It's got a number on it. And somebody decides that they want to park there, and it causes you distress. Would a reasonable person have an explanation for going out and putting a bullet in the back of somebody's head over that*? *What about your medical receptionist because you don't like the advice that you just got from the doctor you visited*?" (Emphasis added.)

The prosecutor concluded rebuttal by playing part of the video of the defendant's interview, before stating:

"[The defendant] wonders what it's going to be like to go to court with all this crap, [to] be able to explain everything about [his] stepmother, or [to] explain away [his] putting a bullet in the back of [the victim's] head. There's one thing [on which] the state would agree with the defendant, and you'll have to pardon my language for this, 'the distraught fucking madness. It is distraught fucking madness.' *It is* [*a*] *horrible thing that* [the defendant] *is going to use* [*the extreme emotional disturbance*] *defense to explain taking away the life of* [*the victim*]. On behalf of the state, I'd ask you not to do that." (Emphasis added.)

At the conclusion of arguments and outside the presence of the jury, defense counsel objected to the prosecutors' arguments, stating: "[T]he defense would object to a couple of things in the state's closing. First and foremost, I believe [that], at one point in time, it was stated that the measure of reasonableness is not from the defendant's shoes, it's from [the shoes of] a reasonably objective person. We would object to that. I would ask that something be said in the instructions . . . maybe along the lines of, 'you have heard from both attorneys or both sides about . . . what the standard is, and I'm going to give you the law, and you are to follow the law.' " The trial court agreed to "add something that says, 'both attorneys have addressed the law on extreme emotional disturbance. You are to follow my instructions, and, if what they said differs in any way, you need to follow what I say.' " Defense counsel thanked the court and indicated that there were no other issues on which he wanted to be heard.

In its general instructions to the jury, the trial court stated that, "[i]f what counsel said about the law differs from what I tell you, you will dismiss from your minds what they may have said to you." The court provided a similar instruction at the beginning of its charge on the defense of extreme emotional disturbance: "The

attorneys discussed that law with you during their closing arguments. If anything they said differs from what I say, you're to disregard what they said and follow my instructions to you on all issues of law, and particularly on the issue of extreme emotional disturbance." The court continued: "[The extreme emotional disturbance defense] is an affirmative defense to the crime of murder that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be. The defendant has the burden of proving the defense . . . by a preponderance of the evidence. The state does not have the burden of disproving this defense. Extreme emotional disturbance is a mitigating circumstance [that] will reduce the crime of murder to manslaughter. A person charged with murder may raise this defense to lessen the charge for murder to manslaughter in the first degree. Should the defendant prove his affirmative defense of extreme emotional disturbance, you should [find] him [guilty] of the crime of manslaughter in the first degree with a firearm, rather than [guilty] of the crime of murder. The [defendant] . . . must prove by a preponderance of the evidence each of the following two essential elements to establish his defense of extreme emotional disturbance: (1) the defendant committed the offense under the influence of extreme emotional disturbance, and (2) there was a . . . reasonable explanation or excuse for his extreme emotional disturbance.

"The first essential element is that the defendant committed the offense under the influence of extreme emotional disturbance. . . . To establish this element, you must find (a) that the defendant was exposed to an extremely unusual and overwhelming state that is not

mere annoyance or unhappiness, and (b) that the defendant had an extreme emotional reaction to it as a result of which there was a loss of self-control, and reason was overborne by extreme intense feeling, such as passion, anger, distress, grief, excessive agitation, or other similar emotions. You should consider whether the intensity of these feelings was such that the defendant's usual intellectual controls failed and the normal rational thinking for that individual no longer prevailed at the time of the act. A homicide influenced by an extreme emotional disturbance does not require a provoking or triggering event. . . . The homicidal act need not occur immediately after the cause or causes of the defendant's extreme emotional disturbance; nor is it required that the defendant have lost all ability to reason. . . . The second essential element is that there was a reasonable explanation or excuse for the defendant's extreme emotional disturbance. In determining the reasonableness of [the] defendant's explanation or excuse, you must measure the reasonableness from the viewpoint of a reasonable person in the defendant's situation under the circumstances as the defendant believed them to be."

On appeal, the defendant argues that the prosecutors misstated the law by improperly asserting that (1) the defendant's beliefs did not matter, (2) the reasonableness inquiry under § 53a-54a (a) focuses on whether the defendant's response to the extreme emotional disturbance was reasonable, and (3) the extreme emotional disturbance defense was unreasonable and, therefore, inapplicable if the victim was not the source of the extreme emotional disturbance. In response, the state claims that the prosecutors did not misstate the law at any point during closing and rebuttal arguments but, rather, properly challenged both the subjective and objective components of the affirmative defense. Specifically, the state argues that the challenged statements supported the prosecutors' arguments that the defen-

dant had not acted under extreme emotional disturbance when he killed the victim and that the defendant had failed to satisfy "the objective standard that [his] reaction was that of a reasonable person under the circumstances as [he] believed them to be."

Connecticut appellate courts have consistently held that prosecutors are not permitted to misstate the law and that doing so typically constitutes prosecutorial impropriety. See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 356–58, 260 A.3d 1152 (2021) (prosecutor's misstatement of law governing reasonable doubt standard was improper); *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012) ("prosecutors are not permitted to misstate the law"); *State* v. *Albert D.*, 196 Conn. App. 155, 163–67, 229 A.3d 1176 (comments during rebuttal that explicitly misstated law were improper, even when intertwined with proper remarks relating to jury's role in assessing credibility), cert. denied, 335 Conn. 913, 229 A.3d 118 (2020); *State* v. *Houle*, 105 Conn. App. 813, 824, 940 A.2d 836 (2008) ("[a]lthough some leeway must be afforded to the advocates in offering arguments to the jury . . . we have never held that this principle permits a prosecutor to misstate the law" (citation omitted; internal quotation marks omitted)).

Accordingly, we must determine whether the prosecutors' comments misstated the requirements of the extreme emotional disturbance defense and whether any misstatement constituted prosecutorial impropriety that deprived the defendant of his due process right to a fair trial. "Section 53a-54a (a), in defining the crime of murder, excepts, as an affirmative defense, a homicide committed by a defendant who acts 'under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to

be . . . .' Under such circumstances, if a defendant intentionally causes the death of an individual, but does so under extreme emotional disturbance, the trier of fact may [find] the defendant [guilty] of manslaughter in the first degree in violation of . . . § 53a-55 (a) (2)." *State* v. *Person*, 236 Conn. 342, 345, 673 A.2d 463 (1996).

"Section 53a-54a describes the two elements of [the affirmative defense of extreme emotional disturbance]: (1) the defendant committed the offense under the influence of extreme emotional disturbance; and (2) there was a reasonable explanation or excuse for the defendant's extreme emotional disturbance. . . . In an effort to [interpret] the meaning of the phrase extreme emotional disturbance . . . [this court has] enumerated understandable guidelines for instructing a jury in determining the presence or absence of that mental condition . . . but they are neither conclusive nor exclusive. [A]n extreme emotional disturbance is one [whereby] self-control and reason are overborne by intense feelings such as passion, anger, distress, grief, excessive agitation or other similar emotions. . . . [A] homicide influenced by an extreme emotional disturbance [however] is not one [that] is necessarily committed in the hot blood state but rather can be one brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then [to] react violently, seemingly without provocation." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 351–52. "Thus, the statute sets forth a standard that is objective in its overview, but subjective as to the defendant's belief." *State* v. *Elliott*, 177 Conn. 1, 7, 411 A.2d 3 (1979). As to the objective element under the statute, we have explained that "the reasonable man yardstick is . . . used [only] to determine the reasonableness of the explanation or excuse of the action of the defendant from the viewpoint of a person in the defendant's situation under the circumstances as

the defendant believed them to be." (Internal quotation marks omitted.) *State* v. *Raguseo*, 225 Conn. 114, 127, 622 A.2d 519 (1993). In sum, the defendant must first prove by a preponderance of the evidence that he did in fact suffer from extreme emotional disturbance. The defendant then must prove by a preponderance of the evidence that his excuse or explanation for the disturbance was reasonable "from the viewpoint of a person in [his] situation under the circumstances as [he] believed them to be," regardless of whether the beliefs themselves were reasonable. General Statutes § 53a-54a (a).

After a review of the record, we conclude that the prosecutors' repeated misstatements of the law constitute impropriety.[9]

[9] The defendant additionally claims that the prosecutors' comments referring to the defendant's story as "contrived" and an "excuse" denigrated the defense and invited the jury to engage in nullification by conveying the idea to the jury that it should "not sanction a legal defense that condones the murder of another." The defendant also claims that the prosecutor further denigrated the defense by commenting that it would be a "horrible thing . . . [for the defendant] to use this type of defense to explain taking away the [victim's] life . . . ." We are not persuaded because the record does not compel the conclusion advanced by the defendant. Rather, the prosecutors' arguments can be understood as suggesting that the jury should not believe that the defendant suffered from extreme emotional disturbance and that, instead, he was fabricating the impact that various life events, real or perceived, had on his emotional state to justify killing the victim. Indeed, "when a prosecutor's potentially improper remarks are ambiguous, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). As such, there was nothing improper about such an argument. See, e.g., *State* v. *Grant*, 154 Conn. App. 293, 321, 112 A.3d 175 (2014) ("The occasional use of rhetorical devices is simply fair argument. . . . [S]ome use of sarcastic and informal language, when intended to forcefully criticize a defense theory on the permissible bases of the evidence and the common sense of the jury, is not necessarily improper." (Citation omitted; internal quotation marks omitted.)), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

First, the prosecutors misstated the law when they argued to the jury without qualification that the defendant's state of mind "[did not] matter." During closing and rebuttal arguments, the prosecutors stated that the "pressures . . . of one's life are no excuse for taking the life of another individual" and that, to the state, "it really doesn't matter whether [the defendant] believed [certain things about his stepmother]." These arguments misstate the law because, as we discussed previously, the extreme emotional disturbance defense considers the reasonableness of the explanation or excuse for the disturbance "*from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . . .*" (Emphasis added; internal quotation marks omitted.) *State* v. *Person*, supra, 236 Conn. 345; accord General Statutes § 53a-54a (a). Accordingly, telling the jury that the defendant's subjective belief does not matter, and that the pressures of one's life are not an excuse for taking the life of another, is contrary to an explicit element of § 53a-54a (a), which sets forth a standard that is "*subjective as to the defendant's belief*"; (emphasis added) *State* v. *Elliott*, supra, 177 Conn. 7; and which requires the jury to consider the circumstances as the defendant believed them to be. Indeed, the defendant's subjective state of mind is an important component to the extreme emotional disturbance defense, and any argument to the contrary is a clear misstatement of the law.[10]

[10] On appeal, the state argues that the statement "it really doesn't matter" whether the defendant believed the circumstances about his stepmother was intended to convey to the jury that any such belief would not constitute a reasonable excuse. That argument is not supported by the record. The prosecutor instead stated that the defendant's purported beliefs were "being used as *excuses* in this interview to explain away and [to] justify what he did. And, again, when you consider that idea of what a reasonable person would do in these circumstances, the state would submit [that] there is nothing *reasonable about the reaction that he had*, and, in fact, he told you exactly what he was reacting to." (Emphasis added.) The prosecutor thus argued that the jury should not believe that the defendant suffered from

Second, the prosecutor misstated and mischaracterized the law when he argued during rebuttal that the defense was unreasonable and inapplicable because the victim was not the main provocateur of the defendant's distress and that, instead, the jury should assess whether targeting the victim, as opposed to someone else, was a reasonable reaction to any disturbance that the defendant had suffered. Although the state argues that the prosecutor was not suggesting to the jury that it should consider whether the murder of this specific victim was reasonable but, rather, was suggesting that the defendant failed to establish a reasonable explanation for his overwhelming stress, it appears to us that the prosecutor's various references to whether it was reasonable to kill the victim, as opposed to his stepmother, reflects a fundamental misunderstanding of the affirmative defense. The prosecutor's comments regarding the victim can only be understood as asking the jury to consider whether there was a nexus between the defendant's disturbance and his conduct directed toward the victim, that is, whether it was reasonable for the defendant to kill this victim as a result of the disturbance. There are two problems with that argument. To begin, no such nexus is required to establish an extreme emotional disturbance defense. Instead, the assessment of reasonableness is made with respect to the excuse for the extreme emotional disturbance itself, not the criminal act or the choice of victim. Indeed, § 53a-54a (a) requires that the jury determine whether the defendant acted under the influence of extreme emotional distur-

extreme emotional disturbance or that, even if he did, the jury should reject the defense because the reaction he had, i.e., killing the victim, was not a reasonable one. As we discussed in this opinion, whether the defendant's reaction to the extreme emotional disturbance is reasonable is irrelevant because the second element of the defense is concerned with whether the explanation or excuse for the disturbance was reasonable. In order to resolve this element, the jury must consider what the defendant believed at the time, meaning what he believed really does matter.

bance and whether the disturbance itself, as opposed to the criminal act, had a reasonable explanation or excuse. In addition, neither the statute nor the relevant case law suggests that the choice of the murder victim must "[make] sense" for the extreme emotional disturbance defense to apply. Our case law makes clear that there is no such requirement. See *State* v. *Kaddah*, 250 Conn. 563, 580, 736 A.2d 902 (1999) ("[t]he [trial court's] reference to an 'event' as a cause and the long, *simmering* nature of such [an emotional] disturbance . . . removed any possibility that the jury mistakenly would believe that the victim, rather than the circumstances, contemporaneously must have caused the defendant's disturbance for the defense of extreme emotional disturbance to apply" (emphasis in original)); see also *People* v. *Casassa*, 49 N.Y.2d 668, 679 n.2, 404 N.E.2d 1310, 427 N.Y.S.2d 769 ("[w]e emphasize that [the extreme emotional disturbance] test is to be applied to determine whether [the] defendant's emotional disturbance, and not the act of killing, was supported by a reasonable explanation or excuse"), cert. denied, 449 U.S. 842, 101 S. Ct. 122, 66 L. Ed. 2d 50 (1980). In the present case, by asking the jury to consider whether the victim of the murder was a reasonable target when determining whether the defendant met the statutory requirements of an extreme emotional disturbance defense, the prosecutor suggested to the jury that the defendant was required to prove a causal connection that the law simply does not require. In addition, by focusing the reasonableness inquiry on the defendant's reaction to the disturbance (i.e., killing the victim) rather than the disturbance itself, the prosecutor improperly reframed the reasonableness question. By doing so, the prosecutor misstated the law to a significant degree.

Third, the prosecutor's use of hypotheticals during rebuttal to argue that the defendant's situation, as he believed it to be, was not a reasonable excuse or expla-

nation for his actions was improper for several reasons. The state claims that the prosecutor's hypotheticals were responsive to defense counsel's arguments that the defendant had a reasonable explanation or excuse for his extreme emotional disturbance and were simply rhetorical devices to demonstrate why the defendant had failed to show a reasonable explanation for his actions from the viewpoint of a reasonable person. We are not persuaded.

As an initial matter, the prosecutor's introduction to the hypotheticals incorrectly framed the reasonableness inquiry of the defense. He stated: "So, ask yourself this as you consider the defendant's claimed defense, and think about the reasonable person in an everyday world and in an everyday society." This statement improperly focused the jury on the reasonable person standard without first telling the jury that it must put that reasonable person in the defendant's situation, believing what he believed.

The hypotheticals themselves also misled the jury as to the analysis it was required to perform. The prosecutor asked a series of questions aimed at establishing that the defense is not available to the reasonable person acting out of anger or annoyance. To the extent that the prosecutor was focused on the first element of the defense, which is not at all clear from the language used, we do not credit the suggestion that he was arguing that the evidence established only that the defendant acted out of annoyance or unhappiness, rather than as a result of extreme emotional disturbance. The fact remains that it was legally impermissible to ask the jury to consider this particular issue from the perspective of the reasonable person. And, to the extent that the prosecutor was focused on the second element of the defense, each hypothetical personalized the inquiry by asking the jury, "[d]o *you* . . . ?" (Emphasis added.) The question, however, is not what

each individual juror would do or what a reasonable person would do. Thus, each hypothetical invited the jury to disregard the defendant's subjective understanding of the circumstances. The hypotheticals also suggested to the jury that, if it accepted the extreme emotional disturbance defense, it would be exonerating the defendant. Each question asked the jury "[d]o you get to murder" or "[d]o you get to kill" someone in a particular circumstance, as if the defendant was seeking exoneration for the homicide. Of course, the extreme emotional disturbance defense asks no such question under either the first or second element. The defendant did not argue that the disturbance he claimed to have suffered justified his shooting of the victim, and there was no dispute that the killing was intentional and inexcusable despite his beliefs. The only question was whether his level of culpability was diminished due to his claimed extreme emotional disturbance. The prosecutor's use of the hypothetical questions to suggest that the answer to whether you get to kill or murder someone under the factual scenario presented was a categorical "no" served to distort the much more nuanced inquiry the jury was required to undertake.

Each hypothetical question also provided limited factual information that would lead the jury to consider the hypothetical in a vacuum and not in the appropriate context. As we previously discussed in this opinion, context is crucial when it comes to the extreme emotional disturbance defense. In fact, we have recognized the viability of the defense in cases involving facts that are remarkably similar to those in the hypotheticals used by the prosecutor in the present case.[11] For example, the prosecutor asked whether you could kill someone over a parking spot dispute. In *State* v. *Raguseo*, supra, 225 Conn. 114, the defendant invoked the extreme emotional disturbance defense after he had

[11] See footnote 14 of this opinion.

stabbed and killed the victim because "he was tired of people parking in his parking space." (Internal quotation marks omitted.) Id., 118. On appeal, "[t]he state concede[d] that there was substantial evidence that the defendant [had] acted under an extreme emotional disturbance. The defendant, on the other hand, also concede[d] that there was some evidence suggesting that he [had] not act[ed] under an extreme emotional disturbance." Id., 122–23. "In light of these concessions," we concluded that it was for the jury to determine whether the defendant proved the defense. Id., 123. Nevertheless, we recognized that it was entirely possible for a jury to conclude that a killing resulting from a dispute over a parking space could be the result of an extreme emotional disturbance. See id., 123–24. By suggesting otherwise, the prosecutor in the present case misled the jury. The fact that the misleading use of the hypotheticals occurred during rebuttal argument is also significant because the defense never had an opportunity to correct the misconceptions the prosecutor created. In sum, by asking the jurors to rely on their common sense and life experiences through analogizing to factual scenarios that did not relate to the facts of the case before them, the prosecutors distorted the analysis regarding the "situation under the circumstances as the defendant believed them to be" and improperly provided the jury with incomplete hypotheticals that failed to differentiate between the objective and subjective inquiries under § 53a-54a (a). Accordingly, we conclude that the prosecutors committed impropriety when they repeatedly misstated the law regarding the extreme emotional disturbance defense.[12]

[12] Before we turn to the question of whether the improprieties in the present case deprived the defendant of a fair trial, we pause briefly to admonish prosecutors and defense counsel alike that they must avoid imprecise and paraphrased recitations of the requirements of the extreme emotional disturbance affirmative defense. Cf. *State* v. *Courtney G.*, supra, 339 Conn. 358 ("[w]e take this opportunity to admonish prosecutors and defense counsel alike that they generally should avoid paraphrasing the reasonable doubt standard"). Using such imprecise or paraphrased language runs the

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Having concluded that prosecutorial impropriety occurred, we must now consider whether the prosecutors' misstatements of the law deprived the defendant of his due process right to a fair trial.

"To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Hinds*, 344 Conn. 541, 563, 280 A.3d 446 (2022).

To determine whether the impropriety deprived the defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). "These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case,

risk of confusing or misleading the jury on what is already a complex and nuanced defense. See, e.g., *State* v. *Raguseo*, supra, 225 Conn. 126 ("[t]he jury asked for reinstruction on [the extreme emotional disturbance] affirmative defense on three separate occasions"). If prosecutors or defense counsel decide to delve into the legal requirements of the extreme emotional disturbance defense in their closing arguments, they are obligated to ensure that their arguments accurately describe the nuances of that defense or to utilize the trial court's previously approved jury instructions on the defense.

[5] the strength of the curative measures adopted, and [6] the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 237, 210 A.3d 509 (2019).

In the present case, it is undisputed that the impropriety was not invited by the defendant's simply raising the extreme emotional disturbance defense, particularly because defense counsel clearly and accurately stated the reasonableness inquiry during his closing argument. In addition, the state concedes that any impropriety was central to the critical issue in the case, namely, the defendant's state of mind and his understanding of the circumstances. Accordingly, the first and fourth factors favor the defendant.

As to the severity of the impropriety, we first consider whether defense counsel objected to the remark, requested curative instructions, or moved for a mistrial, and then "whether the impropriety was blatantly egregious or inexcusable." *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007). Here, defense counsel, after the prosecutor's rebuttal argument and outside the presence of the jury, objected on the ground that the prosecutors, "at one point in time . . . stated that the measure of reasonableness is not from the defendant's shoes [but] from a reasonably objective person,"[13] and

[13] The state argues that the defendant's appellate claims are "mostly unpreserved" because they exceed the single objection that was raised during trial. However, a defendant need not preserve claims of prosecutorial impropriety for this court to review them. See, e.g., *State* v. *Jordan*, 314 Conn. 89, 114, 101 A.3d 179 (2014) ("a defendant need not object to prosecutorial impropriety to preserve such a claim for review"). Instead, whether defense counsel makes a timely objection is considered in our *Williams* analysis because, if defense counsel does not object, we presume that "he . . . does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) Id. We previously have stated that "counsel's failure to object at trial, while not by itself *fatal* to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004).

requested a curative instruction "along the lines of, 'you have heard from both attorneys or both sides about . . . what the standard is, and I'm going to give you the law, and you are to follow the law.' " Defense counsel did not move for a mistrial.

Nevertheless, we conclude that defense counsel's somewhat muted response to the prosecutors' improper remarks was sufficient. The impropriety, moreover, was inexcusable. The defendant's only defense at trial was extreme emotional disturbance, and the entire trial focused on whether the defendant satisfied the statutory requirements of the defense. We expect prosecutors to be fully aware of the law when arguing to a jury. That is particularly true when, as in the present case, the court has given counsel its proposed charge, which accurately set forth the law on extreme emotional disturbance. Furthermore, the court's charge was in no way novel, as it was taken almost verbatim from the Judicial Branch's model criminal jury instructions. See Connecticut Criminal Jury Instructions 5.2-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 24, 2025). The record also reflects that defense counsel had no difficulty understanding the elements of the defense or the court's charge when he correctly explained the law to the jury.

Furthermore, the state's argument on appeal that the prosecutors should be afforded leeway because "closing arguments often have a rough and tumble quality about them" rings hollow in the present case. *State* v. *Tate*, 85 Conn. App. 365, 370, 857 A.2d 394, cert. denied, 272 Conn. 901, 863 A.2d 696 (2004). Whether the defendant proved his extreme emotional disturbance defense was the central issue at trial, and the court's proposed charge was known to counsel by the time of argument. The prosecutors had more than an adequate opportunity to carefully craft their closing remarks so as not to mislead the jury. There also was nothing in defense

counsel's closing argument that would have caught the prosecutor by surprise or caused him to deviate from his intended remarks during his rebuttal. To the contrary, as we previously noted, the state does not claim on appeal that any impropriety was invited by defense counsel. Furthermore, although the prosecutor briefly referenced defense counsel's closing argument during his rebuttal argument, the rebuttal largely appears to us to have been thought-out and planned, as reflected by the prosecutor's extensive use of detailed hypotheticals, as well as his coordinated use of the defendant's video-recorded statement.

We also are not persuaded by the state's argument that the prosecutor's use of the hypotheticals should be excused because prosecutors do not know what defense counsel is going to argue during summation, such that they must be able to make their closing arguments during "the heat of argument." As we previously noted, the prosecutor's rebuttal included only brief references to defense counsel's closing. In addition, defense counsel did not use any hypotheticals in his closing argument. Indeed, it appears to us that the prosecutor chose hypotheticals from cases in which the extreme emotional disturbance defense had been discussed and even recognized as a viable defense.[14] Therefore, we cannot dismiss the hypotheticals as unplanned misstatements made during the heat of argument. Accordingly, any misstatement of the law regarding the defense was inexcusable such that defense counsel's failure to object to it more strenuously during trial does

[14] See, e.g., *State* v. *Aviles*, 277 Conn. 281, 284–85, 307–309, 891 A.2d 935 (defendant raised extreme emotional disturbance as defense to murder of victim during drug sale dispute), cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006); *State* v. *Raguseo*, supra, 225 Conn. 118–19, 121–24 (defendant raised extreme emotional disturbance as defense to murder of victim over parking space dispute); *State* v. *Elliott*, 177 Conn. 1, 2–3, 411 A.2d 3 (1979) (defendant killed his brother and claimed extreme emotional disturbance arising out of, among other concerns, child custody problems).

not significantly undermine the defendant's due process claim.

To be sure, the prosecutors did reference and articulate the correct legal standard for an extreme emotional disturbance defense at some points during their closing and rebuttal arguments.[15] Given the complexity of the subjective/objective test that the jury was required to apply, however, we conclude that the prosecutors' misstatements of the law were not cured by any correct statements of the law the prosecutors made during their arguments, particularly when the prosecutors' misstatements were inexcusable. See *State* v. *Albert D.*, supra, 196 Conn. App. 167 ("[w]hile the [explicit misstatements of the law] may have been intertwined with proper remarks relating to the jury's role in assessing credibility, we are persuaded that the jury likely could have misunderstood the reason for the experts' general testimony"). To the contrary, any correct statement of the law was overshadowed by the various misstatements we discussed previously.

We next examine the third *Williams* factor, the frequency of the impropriety. We acknowledge that the

[15] For example, during rebuttal argument, the prosecutor urged the jury, in considering the extreme emotional disturbance defense, to "pay very [close] attention to what the court instructs because, in determining the reasonableness of the defendant's explanation or excuse, [it] must measure that reasonableness from the viewpoint of a reasonable person in the defendant's situation." At other times, though, the prosecutors, during both closing and rebuttal arguments, properly referred to the reasonable person in the defendant's circumstances but referenced the actions such person would have taken, which, as we discussed, is not the correct inquiry. For example, during closing argument, the prosecutor argued that "the lens through which you would look at the *defendant's actions* would be those of . . . a reasonable person. *What would a reasonable person do* in the circumstances that the defendant was confronted with?" (Emphasis added.) The prosecutor continued, "please remember the idea of reasonableness and *what a reasonable person would have done* in the defendant's position." (Emphasis added.) Similarly, during rebuttal, the prosecutor argued that "the determination you're going to have to make here is whether *the defendant's conduct is reasonable based on what a reasonable person would do* in the situation that he perceived himself to be in." (Emphasis added.)

prosecutors' improper comments were not made throughout the entire trial but occurred only during closing and rebuttal arguments. Any impropriety during rebuttal argument is particularly troubling, however, as defense counsel did not have an opportunity to respond to such comments. See, e.g., *State* v. *Dabate*, supra, 351 Conn. 454 ("[t]he inflammatory aspect of [the improprieties] was compounded by the fact that the prosecutor made them during rebuttal summation, which meant that the defense could not respond"); see also *State* v. *Sullivan*, 351 Conn. 798, 813, 334 A.3d 446 (2025). In the present case, most of the prosecutors' misstatements of the law occurred during rebuttal. Indeed, as the defendant notes in his brief, if defense counsel had been afforded an opportunity to respond to the rebuttal, he could have rightfully argued that many of the hypotheticals, depending on the circumstances, could have amounted to a scenario consistent with extreme emotional disturbance. Consequently, this factor also favors the defendant.

As to the strength of the curative measures implemented by the trial court and whether they mitigated any adverse effect of the improprieties, we note that the court gave the exact curative instruction requested by defense counsel, which the jury is presumed to have followed. See, e.g., *State* v. *Courtney G.*, supra, 339 Conn. 364 ("[g]iven the isolated nature of the prosecutor's comment and the trial court's prompt and effective curative instruction, which specifically targeted the prosecutorial impropriety, we conclude that this impropriety was not frequent or severe and was cured by the trial court" (footnote omitted)); *State* v. *O'Brien-Veader*, 318 Conn. 514, 550, 122 A.3d 555 (2015) ("to the extent there was any harm, it was mitigated by the trial court's prompt curative instruction directing the jury to disregard the improper questions, which we presume the jury followed"). Notwithstanding that

defense counsel at the time did not request a mistrial in response to the prosecutors' improper comments, we are not convinced that the court's instructions adequately removed the prejudice caused by the impropriety. See, e.g., *State* v. *Alexander*, 254 Conn. 290, 303, 755 A.2d 868 (2000) ("[an impropriety] may be, in light of all of the facts and circumstances, so egregious that no curative instruction could reasonably be expected to remove [its] prejudicial impact" (internal quotation marks omitted)). We recognize that this conclusion may be somewhat in tension with the well established principle that "jurors are presumed to follow the instructions given by the judge." (Internal quotation marks omitted.) *State* v. *Williams*, 258 Conn. 1, 15 n.14, 778 A.2d 186 (2001). But, given the prosecutors' numerous misstatements and the complexity of the extreme emotional disturbance defense, together with the fact that the trial court's instructions did not specifically address the misstatements, we cannot be assured under the particular facts of the present case that the prejudicial impact of the impropriety was cured by the trial court's instructions. As noted, the prosecutors' misstatements of the law severely distorted the required legal analysis of the extreme emotional disturbance defense—the defendant's only defense to the murder charge against him—in a number of ways, including by urging the jury to disregard the defendant's subjective belief, by insisting that there had to be a logical nexus between the extreme emotional disturbance and the murder victim, and by focusing on the reasonableness of the crime rather than the reasonableness of the explanation or excuse. Accordingly, although the trial court provided the jury with the proper legal standard in its extreme emotional disturbance instruction, and promptly reminded the jury that it must follow the court's instructions on the law and disregard counsel's statements that were inconsistent with those instructions, its charge did not

explain that it is not the act of killing that must be supported by a reasonable excuse but, rather, the extreme emotional disturbance. Nor did it explain that the choice of the defendant's victim was not part of the jury's reasonableness analysis. Similarly, the court did not instruct the jury to disregard the prosecutor's hypotheticals. We therefore are not persuaded that the court's curative instructions, together with its accurate charge on the defense, eliminated the prejudicial impact of the impropriety given the challenging legal concepts involved in evaluating an extreme emotional disturbance defense.[16] Cf. *State* v. *Courtney G.*, supra, 339 Conn. 358 ("prosecutors and defense counsel . . . should avoid paraphrasing the reasonable doubt standard" because it is "both critically important and, at the same time, defies easy explication" (internal quotation marks omitted)).

As to the final *Williams* factor, the strength of the state's case, the state relies heavily on the defendant's demeanor during his interview with the police to argue on appeal that it was reasonable for the jury to conclude that the defendant did not act under extreme emotional disturbance at the time of the murder. Specifically, the state emphasizes that the defendant appeared casual with the officers and spoke clearly and calmly during the interview. The state also relies on the defendant's past relationship with the victim and the alleged lack of evidence that the defendant had suffered from extreme emotional disturbance. To be sure, the video footage supports the state's observations about the defendant's

[16] We in no way fault the trial court for the curative measure it took, given that it gave the specific curative instruction requested by defense counsel. Nevertheless, we note that, had defense counsel requested a more forceful admonishment—for example, had he specifically requested, and the trial court agreed to give, an instruction that the prosecutors' statements of the law were incorrect and that explicitly corrected the prosecutors' misstatements—that curative instruction would have been appropriate under these circumstances and might have been sufficient to cure any prejudice.

demeanor during the interview. Nevertheless, we disagree with the state's contention that, on the basis of that evidence, "the jury was likely to reject the defense regardless of any impropriety." Indeed, notwithstanding the defendant's relatively calm demeanor in the video footage, given his explanation of his long-standing belief that the victim and his stepmother were conspiring to ruin his life, which belief was corroborated by other evidence, it would have been reasonable for the jury to conclude that the defendant *was* suffering from extreme emotional disturbance at the time of the homicide, particularly because his stepmother testified that she had not spoken to the defendant for at least twenty years.[17] Although the defendant spoke clearly and calmly during the interview, he also spoke incoherently, rambling about his relationship with his stepmother, claiming that she was stalking him, and alleging that she had forced him to have sexual relations with another man and had approached him at the cemetery "with her eyes glowing yellow . . . ." He additionally spoke about scriptures and implored the police multiple times throughout the three hour interview to arrest his stepmother. Certainly, the trial court, which heard all of the evidence as it was presented, thought that there was sufficient evidence for the jury to accept the defendant's defense insofar as it overruled the prosecutor's objection to the defendant's request to charge on the extreme emotional disturbance defense. Therefore, this factor does not weigh in either party's favor.

Accordingly, considering the *Williams* factors in their totality, we conclude that there is a reasonable likelihood that the jury's verdict would have been different in the absence of the impropriety. Therefore, the defendant has established that the prosecutorial impropriety deprived him of a fair trial in violation of his due

[17] See footnote 7 of this opinion.

process rights. As a result, the defendant is entitled to a new trial on the murder charge.

II

Although our conclusion in part I of this opinion that the defendant is entitled to a new trial is dispositive of this appeal, we address the merits of the defendant's additional claim that the trial court abused its discretion when it admitted evidence of his use of homophobic language during his video-recorded statement to the police because it is likely to arise on remand. See, e.g., *State* v. *Raynor*, 337 Conn. 527, 552–53, 254 A.3d 874 (2020). The following additional facts and procedural history are relevant to this claim.

During the defendant's police interview, he stated that he believed that his stepmother had recorded a sexual encounter between him and another man and had used the video recording to sabotage his housing and job opportunities. Throughout the interview, the defendant referred to the recording as the "cock sucking faggot tape" and repeatedly used the term "faggot."

Prior to the start of evidence, defense counsel objected to the admission of the interview without the redaction of the slurs, stating that, although its admission was probative, it became increasingly prejudicial the more often the defendant used the slurs. The prosecutor responded that, although the admission of the interview without redactions could be prejudicial, it could be cured with a curative instruction, and contended that its admission was relevant to the extreme emotional disturbance defense or, alternatively, the defendant's motive and intent in committing the murder.

The trial court admitted the interview in full, stating that, although it agreed with the defendant that the multiple slurs would be cumulative, because the defense was an extreme emotional disturbance defense, the entire

interview was "certainly relevant to that issue—what was he upset about, how upset was he, who was he upset at, and was his reaction then reasonable." The court iterated: "[I]t appears from the [recording] that [the defendant] is upset that his [stepmother] sort of drove him into his homosexual act, that she's using this to . . . torture him, to disrupt his life . . . . [I]t has probative value in light of the fact [that] there's an extreme emotional disturbance defense. If there wasn't that defense, it would simply be prejudicial, it wouldn't be probative, and I wouldn't let it in. But I'm going to allow it with a curative—with an instruction [that the jury is] not to use it in any prejudicial way against [the defendant]."

Prior to playing the video, the trial court gave the following instruction: "[D]uring the interview, you will hear that the defendant used profanity and derogatory language at certain points . . . . That evidence is being offered for a limited purpose, that is, to show the emotional state of the defendant. It may not be used for any other purpose, and you should also not penalize the defendant for his use of such language." During its final charge to the jury, the court additionally stated: "[A]ny profanity or derogatory language used by the defendant in his [video-recorded] interview with the police was admitted for the limited purpose of showing the defendant's emotional state. It may not be used for any other purpose. You shall not consider such evidence in finding any other facts or as to any other issue. You also may not penalize the defendant for using such language."

We begin by setting forth the relevant legal principles that guide our analysis. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be

without such evidence." (Internal quotation marks omitted.) *State* v. *Best*, 337 Conn. 312, 317, 253 A.3d 458 (2020). "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4-3.

"[T]his court has identified four situations in which the potential prejudicial effect of relevant evidence would suggest its exclusion. . . . These are: (1) [when] the facts offered may *unduly* arouse the [jurors'] emotions, hostility or sympathy, (2) [when] the proof and answering evidence it provokes may create a side issue that will *unduly* distract the jury from the main issues, (3) [when] the evidence offered and the counterproof will consume an *undue* amount of time, and (4) [when] the defendant, having no reasonable ground to anticipate the evidence, is *unfairly* surprised and unprepared to meet it. . . . [T]he primary responsibility for conducting the balancing test to determine whether the evidence is more probative than prejudicial rests with the trial court, and its conclusion will be disturbed only for a manifest abuse of discretion. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Delacruz-Gomez*, 350 Conn. 19, 24–25, 323 A.3d 308 (2024).

In the present case, the defendant argues that the homophobic slurs he used during the interview were not relevant because, contrary to the trial court's reasoning, an extreme emotional disturbance defense does not depend on a provocation from a specific person. Alternatively, the defendant claims that, if the evidence was relevant to support the extreme emotional disturbance defense, it was substantially more prejudicial

than probative because slurs are inherently prejudicial, and their probative value was significantly reduced in light of other details in the defendant's interview, such as the defendant's stating that his problems with his stepmother led him to "suck a dick." The defendant then contends that the admission was harmful because the use of the term "faggot" tended to stir strong emotions in the jurors insofar as it "was a closely contested case [in which] the evidence pointed to significant mental trauma and stressors that caused [the defendant] to act out in an irrational manner . . . ." We are not persuaded.

We cannot conclude that the trial court abused its broad discretion when it determined that the portions of the defendant's interview that included the slurs were relevant and that, especially if accompanied by cautionary instructions, any danger of unfair prejudice did not outweigh their probative value. First, we agree with the trial court that the defendant's entire interview was relevant to the extreme emotional disturbance defense. Everything the defendant said during the interview gave the jury context to determine whether the defendant satisfied the first element of the defense. In fact, during trial, defense counsel also agreed that the interview in its entirety was probative of the extreme emotional disturbance defense.

Second, the defendant's repeated use of homophobic slurs was not more prejudicial than probative. Although we agree with the defendant that the use of slurs is inherently prejudicial and can incite strong feelings in the jurors, in the present case, the defendant's choice of language and the number of times he used a slur aided the jury in its analysis regarding whether the defendant was suffering from extreme emotional disturbance or whether the disturbance was contrived. See *United States* v. *Mackie*, 893 F. Supp. 12, 14 (E.D. La. 1995) (finding that, "although the slurs may be offen-

sive, redaction of the slurs would not only severely damage 'the flow' of the conversation but also [would] remove relevant evidence from the jury's consideration"). Indeed, the trial court took note of the potential prejudice stemming from the interview but ultimately concluded that the frequency with which the defendant used slurs outweighed any danger of attendant prejudice, particularly in light of the court's cautionary instructions.

Accordingly, we cannot conclude that the trial court abused its discretion when it admitted the defendant's entire interview without redacting the homophobic slurs.[18]

The judgment is reversed as to the defendant's murder conviction and the case is remanded for a new trial on that charge.

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

ALEXANDER, J., with whom MULLINS, C. J., joins, concurring in part and dissenting in part. I respectfully disagree with part I of the majority opinion, which holds that multiple misstatements of the law concerning the affirmative defense of extreme emotional disturbance under General Statutes § 53a-54a (a) by the prosecutors during closing and rebuttal arguments deprived the defendant, Robert Parris, of a fair trial.[1] My application of the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), leads me to conclude

[18] Should the entire statement, including the portions containing the slurs, be admitted into evidence at a new trial, we encourage the court to follow the example set by the trial court during the first trial and to provide similar curative instructions.

[1] I agree with part II of the majority opinion, which concludes that the trial court did not abuse its discretion by admitting the defendant's video-recorded interview with the police in its entirety, without redaction of certain homophobic language that he had used during that interview.

that these apparent misstatements of the law, however inartful, did not violate the defendant's right to a fair trial. Any prejudice resulting from these misstatements was not severe because they were accompanied by several correct statements of the law and were mitigated by directions from both the trial court and the prosecutors to follow the court's legal instructions with respect to the extreme emotional disturbance defense. Because I would affirm the judgment of conviction, I respectfully dissent in part.

I agree with the facts and procedural history as set forth in the majority opinion and that the general principles governing our review of prosecutorial impropriety claims are well established. See, e.g., *State* v. *Sullivan*, 351 Conn. 798, 809–11, 334 A.3d 446 (2025). It is axiomatic that, during closing arguments, a prosecutor may not "misstate the law or . . . distort the government's burden of proof . . . because such statements are likely to improperly mislead the jury." (Internal quotation marks omitted.) *State* v. *Courtney G.*, 339 Conn. 328, 357, 260 A.3d 1152 (2021); see, e.g., *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012); *State* v. *Rizzo*, 266 Conn. 171, 262 n.49, 833 A.2d 363 (2003). A two step process governs this court's analysis of prosecutorial impropriety claims. First, we must determine whether impropriety occurred in the first instance, and, second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. See, e.g., *State* v. *Dabate*, 351 Conn. 428, 437, 331 A.3d 1159 (2025).

At the outset, I assume, without deciding, that the challenged comments of the prosecutors misstated the law governing the affirmative defense of extreme emotional disturbance under § 53a-54a (a).[2] "Proof of this

[2] I also agree with the majority's conclusion that other challenged comments, including those referring to the defendant's story in support of his extreme emotional disturbance defense as "contrived" and that it would

defense by a preponderance of the evidence . . . entitles the defendant to a conviction of manslaughter in the first degree, instead of a conviction of murder." (Citation omitted; footnote omitted.) *State* v. *Person*, 236 Conn. 342, 351, 673 A.2d 463 (1996). "[T]he statute sets forth a standard that is objective in its overview, but subjective as to the defendant's belief." *State* v. *Elliott*, 177 Conn. 1, 7, 411 A.2d 3 (1979). Under the objective component, the reasonableness of the defendant's emotional disturbance[3] is "to be determined from the viewpoint of a person in the defendant's situation under the circumstances *as the defendant believed them to be* . . . ." (Emphasis added.) General Statutes § 53a-54a (a). Contrary to the majority, I conclude that these assumed misstatements of the law did not deprive the defendant of a fair trial.

To prove that prosecutorial impropriety deprived the defendant of a fair trial, "the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial

be "horrible" for the defendant to raise this defense, did not constitute prosecutorial impropriety.

[3] A person acts under the influence of an extreme emotional disturbance when his "self-control and reason are overborne by intense feelings such as passion, anger, distress, grief, excessive agitation or other similar emotions. . . . [A] homicide influenced by an extreme emotional disturbance [however] is not one [that] is necessarily committed in the hot blood state but rather can be one brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then [to] react violently, seemingly without provocation." (Citation omitted; internal quotation marks omitted.) *State* v. *Person*, supra, 236 Conn. 351–52.

[impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different [in the absence of] the sum total of the improprieties. . . .

"To aid this court in determining whether a prosecutorial impropriety so infected the proceedings with unfairness as to deprive a defendant of a fair trial, this court applies the [*Williams*] factors . . . . These factors include (1) the extent to which the [impropriety] was invited by defense conduct or argument, (2) the severity of the [impropriety], (3) the frequency of the [impropriety], (4) the centrality of the [impropriety] to the critical issues in the case, (5) the strength of the curative measures adopted, and (6) the strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Sullivan*, supra, 351 Conn. 821–22. The *Williams* factors may be intertwined and overlap, and "none . . . is determinative on its own." *State* v. *Dabate*, supra, 351 Conn. 467 n.25.

In applying the *Williams* factors, I acknowledge that most seem to favor the defendant. The prosecutors' misstatements of the law were not invited by defense argument or conduct. The challenged comments, especially the illustrative hypotheticals in the rebuttal argument, were not isolated; they were significant, rhetorical points in the prosecutors' response to the affirmative defense of extreme emotional disturbance. Cf. *State* v. *Albert D.*, 196 Conn. App. 155, 178–79, 229 A.3d 1176 (prosecutor's brief misstatements of law in "quick succession" during rebuttal argument were not frequent or severe), cert. denied, 335 Conn. 913, 229 A.3d 118 (2020). Many of the challenged comments were rendered potentially more "inflammatory . . . by the fact that the prosecutor made them during rebuttal [argument], which meant that the defense could not respond." *State* v. *Dabate*, supra, 351 Conn. 454; see *State* v. *Sullivan*, supra, 351 Conn. 813. Defense counsel in the pres-

ent case deemed them severe enough to warrant an objection and a request for a curative instruction, which the trial court granted. See *State* v. *Sullivan*, supra, 822–23. Further, the state's evidence with respect to overcoming the extreme emotional disturbance defense was not overwhelming. That issue turned on the extent to which the jury would credit the defendant's statements during his video-recorded interview with the police, many of which reflected his mental health issues and misperceptions of reality. But cf. *State* v. *Courtney G.*, supra, 339 Conn. 365–66 (lack of physical evidence in child sexual assault cases does not render state's case "automatically weak" (internal quotation marks omitted)).

The *Williams* analysis is not, however, a mathematical exercise, and it is not dispositive that most of the factors appear to favor the defendant in this case. With respect to the severity of the misstatements of the law, a review of the prosecutors' closing and rebuttal arguments indicates that the prosecutors also recited the appropriate legal standard and advised the jury to follow the law as charged by the trial court. During rebuttal argument, the prosecutor stated that "the determination you're going to have to make here is whether the defendant's conduct is reasonable based on what a reasonable person would do in the situation that [the defendant] perceived himself to be in," and that, "in determining the reasonableness of the defendant's explanation or excuse, you must measure that reasonableness from the viewpoint of a reasonable person in the defendant's situation." Although the prosecutor's statements of the law could have been more artfully phrased to clarify that it was the defendant's subjective belief as to the situation that set the parameters for the reasonableness of the emotional disturbance that precipitated the response, overall, they conveyed to the jury that it was the circumstances and perception of the defendant that mattered most in the analysis.

Mitigating the severity of the misstatements of the law are the prosecutors' multiple exhortations to the jury to follow the law as instructed by the trial court. At the start of closing argument, the prosecutor explained that, although the summations would address the law, it would be the "judge's instructions on the law that controls" in the event of any "conflicts . . . ." Highlighting the anticipated extreme emotional disturbance defense, the prosecutor then advised the jury that it would "*get an instruction on the law from the judge*" and that it should "*pay very careful attention to that instruction*," reiterating that request a short time later. (Emphasis added.) In discussing the burden of proof applicable to the defense, the prosecutor stated that the defendant bore the burden of proving mitigation by a preponderance of the evidence and that the jury should "*pay attention to that when the judge gives that instruction*." (Emphasis added.) Although I assume the prosecutor's next comment to be a misstatement of the legal standard, which focused on how a "reasonable person" would react in the circumstances of the case, that comment was also phrased as something to "*keep in mind* [*when*] *listening to* [*the judge's*] *instruction* . . . ." (Emphasis added.)

With respect to the prosecutor's rebuttal argument, during which the majority of the challenged comments and hypotheticals occurred, the prosecutor stated that he agreed with defense counsel that it was the jurors' "*duty to follow the law as* [*the trial court*] . . . *give*[*s*] *it to you*" and "to determine the facts that are present[ed] in the courtroom and [to] apply the law, *most importantly*, that [the trial court] gives you to those facts." (Emphasis added.) A short time later, after asking the jury to weigh the evidence on the defense of extreme emotional disturbance and asking the first series of hypotheticals about why the defendant had chosen to kill this particular victim, the prosecutor

urged the jury, "when you determine this defense . . . *pay very* [*close*] *attention to what the* [*trial court*] *instructs*." (Emphasis added.) After explaining his view of the objective element, the prosecutor immediately asked the jury again to "[*l*]*isten to what the court says*." (Emphasis added.)

Most significant, the trial court implemented curative measures that addressed the prosecutors' misstatements of the law. In response to an objection by defense counsel, the court granted his request to admonish the jury to the effect that "you have heard from both attorneys or both sides about . . . what the standard is, and I'm going to give you the law and you are to follow the law." The trial court then instructed the jury accordingly, highlighting, both generally and specifically, the affirmative defense of extreme emotional disturbance. The court emphasized that, "[i]f anything [the attorneys] said [during closing and rebuttal arguments] differs from what I say, you're to disregard what they said and [to] follow my instructions . . . on all issues of law, and particularly on the issue of extreme emotional disturbance." There is nothing in the record to rebut the well settled presumption that the jury followed that instruction. See, e.g., *State* v. *Dabate*, supra, 351 Conn. 466.

Given the unchallenged jury charge on the law generally, and the trial court's identification of the extreme emotional disturbance defense as a key legal issue subject to its instructions, I see no reason to depart from Connecticut's ample body of case law holding that even general curative instructions protect a defendant's right to a fair trial by mitigating any potential harm from a prosecutor's misstatement of the law. See, e.g., *State* v. *Albert D.*, supra, 196 Conn. App. 179–80 (Prejudice from prosecutor's misstatement of law concerning expert witnesses was "reduced by the court's final instructions to the jury following closing arguments . . . that it was

solely the jury's function to assess credibility and that none of the arguments made by the attorneys constituted evidence. Moreover, the court correctly instructed the jury that the law required the experts to testify in general terms."); *State* v. *Dawson*, 188 Conn. App. 532, 567–70, 205 A.3d 662 (2019) (prosecutor's misstatement of law of constructive possession three times during closing argument did not deprive defendant of fair trial, given trial court's correct statement of law to jury and prosecutor's reminder to jury to follow court's instructions), rev'd in part on other grounds, 340 Conn. 136, 263 A.3d 779 (2021); *State* v. *Gonzalez*, 188 Conn. App. 304, 338, 341–42, 204 A.3d 1183 (2019) (in rejecting claim that prosecutor's shorthand definition of home invasion charge misled jury, court relied on unchallenged jury charge and prosecutor's emphasis that trial court would provide full instructions), aff'd, 338 Conn. 108, 257 A.3d 283 (2021); *State* v. *Nicholson*, 155 Conn. App. 499, 517–19, 109 A.3d 1010 (prosecutor's misstatement regarding right to use deadly physical force for purposes of justification defense was rendered harmless by court's general instructions and reminder to follow court's instruction on law of self-defense), cert. denied, 316 Conn. 913, 111 A.3d 884 (2015). Thus, my *Williams* analysis leads me to conclude that the defendant's right to a fair trial was protected by the curative instruction that was targeted to address the apparent misstatements of the law by the prosecutors in their closing and rebuttal arguments.

Although any impropriety in the prosecutors' closing and rebuttal arguments did not deprive the defendant of a fair trial in this case, one final observation is warranted. The majority posits that the nature of the challenged hypotheticals, along with the accompanying explanation of the governing legal principles, suggests that they were prepared in advance and were not the product of the rough and tumble of oral argument for

which we need to allow "generous latitude . . . ." (Internal quotation marks omitted.) *State* v. *Sullivan*, supra, 351 Conn. 810. I agree with that observation. Nevertheless, I do not ascribe any nefarious purpose to the prosecutors from this preparation; there is nothing in the record to suggest that these comments were anything more than a misstatement of a relatively complex area of the criminal law, as was discussed at oral argument before this court. Given this complexity, I agree with the majority that prosecutors must be extremely cautious in how they communicate relevant legal concepts and make sure to adhere to the principles as described in the trial court's jury instructions or other legal authorities. See, e.g., *State* v. *Courtney G.*, supra, 339 Conn. 358.

Because I would affirm the judgment of conviction, I respectfully dissent in part.