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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

KEVIN EPPS *v.* COMMISSIONER OF CORRECTION (SC 19773)

Palmer, McDonald, Robinson, D'Auria, Kahn and Vertefeuille, Js.

Argued November 8, 2017—officially released January 16, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to the Appellate Court, *Gruendel*, *Sheldon* and *Mullins*, *Js.*, which affirmed the habeas court's judgment, and the respondent, on the granting of certification, appealed to this court. *Appeal dismissed.*

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, *Leon F. Dalbec, Jr.*, former senior assistant state's attorney, and *Erika L. Brookman*, assistant state's attorney, for the appellant (respondent).

Adele V. Patterson, senior assistant public defender, for the appellee (petitioner).

Opinion

PER CURIAM. The petitioner, Kevin Epps, was convicted of assault in the first degree and kidnapping in the first degree in connection with an incident in which he had inflicted horrific injuries on his then fiancée while the two were in his parked van.[1] In two decisions issued after the petitioner's conviction was rendered final, this court respectively (1) overruled the long-standing interpretation of our kidnapping statutes under which the crime of kidnapping did not require

[1] See generally *State* v. *Epps*, 105 Conn. App. 84, 86–87, 89, 936 A.2d 701 (2007), cert. denied, 286 Conn. 903, 943 A.2d 1102 (2008).

that the restraint used be more than that which was incidental to and necessary for the commission of another crime against the victim, and (2) deemed that holding to apply retroactively to collateral attacks on final judgments.[2] The petitioner thereafter sought a new trial on the kidnapping charge in light of those holdings in an amended petition for a writ of habeas corpus.

The habeas court granted the petition. It concluded that the petitioner's claim challenging the kidnapping instruction at his criminal trial for the first time in the habeas proceeding was not subject to a defense of procedural default and that the omission of a limiting instruction on the element of restraint in the kidnapping charge (*Salamon* claim); see footnote 2 of this opinion; was not harmless beyond a reasonable doubt. On appeal, the Appellate Court determined that the petitioner's claim was subject to a procedural default defense, but that the petitioner had overcome that defense, in part by demonstrating that the instructional error was not harmless beyond a reasonable doubt given the conflicting testimony at the criminal trial regarding the petitioner's restraint of his fiancée. *Epps* v. *Commissioner of Correction*, 153 Conn. App. 729, 737, 741–42, 104 A.3d 760 (2014). The respondent, the Commissioner of Correction, filed a petition for certification to appeal to this court, seeking to challenge the Appellate Court's interpretation and application of the procedural default defense.

While the respondent's petition was pending before this court, we issued our decision in *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016). In that case, we held that *Salamon* claims are not subject to procedural default and determined that habeas

[2] See *State* v. *Salamon*, 287 Conn. 509, 518, 542, 548, 949 A.2d 1092 (2008); *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 751, 12 A.3d 817 (2011).

relief was warranted because the omission of the *Salamon* limiting instruction was not harmless beyond a reasonable doubt. Id., 70–81. After reaching that conclusion, we observed, parenthetically, that this court had not had occasion to consider the position adopted by the United States Supreme Court in 1993, when that court retreated from 200 years of precedent assessing harm for constitutional error under the same standard in both direct appeals and collateral proceedings in favor of a stricter standard for relief in the latter. Id., 81–83; see *Brecht* v. *Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Shortly after we issued our decision, this court notified the parties to the present case that, in light of *Hinds*, the respondent had permission to file an amended petition for certification. Over the petitioner's objection, this court granted the respondent's amended petition, which raised the question "left unresolved" by *Hinds* regarding the proper measurement of harm in collateral proceedings like the present one and the question of whether, irrespective of which standard applied, harm had been established in the petitioner's criminal case.[3]

[3] Specifically, this court granted certification, limited to the following questions:

"1. Whether, in a question left unresolved by *Hinds* v. *Commissioner of Correction*, [supra, 321 Conn. 76–94], in a collateral proceeding, where the petitioner claims that the trial court erred by omitting an element of the criminal charge in its final instructions to the jury, is harm measured in accordance with *Brecht* v. *Abrahamson*, [supra, 507 U.S. 637], or is harm measured in accordance with *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)?

"2. If the *Brecht* standard for assessing harm is adopted by this court, did the evidence in this case establish that the absence of an instruction in accordance with *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), had no 'substantial and injurious effect or influence in determining the jury's verdict' finding the petitioner guilty of kidnapping?

"3. If the *Neder* standard for assessing harm is adopted by this court, did the Appellate Court err when it held that '[i]n the absence of a *Salamon* instruction, [it had] no reasonable assurance that the [petitioner's] kidnapping conviction was not based on restraint of the victim that was incidental to the assault of which the petitioner was convicted?' " *Epps* v. *Commissioner of Correction*, 323 Conn. 901, 150 A.3d 679 (2016).

After a careful review of the record, we have reconsidered our decision to permit the respondent to file the amended petition for certification and to grant that petition. The respondent had squarely argued to the habeas court that the petition should be assessed under the harmless beyond a reasonable doubt standard. The respondent never argued in the alternative that a higher standard of harmfulness should apply to collateral proceedings even if the petitioner's claim was not subject to procedural default, despite federal case law applying a higher standard since 1993. Accordingly, we conclude that this is not the proper case in which to fairly address this consequential issue and that certification was improvidently granted.[4]

The appeal is dismissed.

RUTH COHEN *v.* FRANKLIN COHEN
(SC 19640)

Rogers, C. J., and Palmer, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed from the trial court's decision to grant the plaintiff's motion to modify alimony on the ground that the defendant's income had substantially increased. The parties' separation agreement, which was incorporated into the dissolution judgment, provided that the defendant would pay the plaintiff alimony based on a certain percentage of

[4] Insofar as the respondent also asked this court to consider whether the petitioner was entitled to prevail under the less stringent *Neder* standard, the respondent has not effectively briefed that question by disregarding the requirements of that standard, under which a reviewing court must be satisfied "beyond a reasonable doubt that the omitted element *was uncontested* and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Emphasis added.) *Neder* v. *United States*, 527 U.S. 1, 17, 118 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); accord *State* v. *Thompson*, 305 Conn. 806, 815, 48 A.3d 640 (2012); *State* v. *Rodriguez–Roman*, 297 Conn. 66, 90, 3 A.3d 783 (2010); *State* v. *Flowers*, 278 Conn. 533, 544, 898 A.2d 789 (2006); *State* v. *Montgomery*, 254 Conn. 694, 738, 759 A.2d 995 (2000).

his income. Several years later, the defendant's income was significantly reduced, and the trial court granted his motion to modify alimony to a fixed weekly amount, finding that there had been a substantial change in circumstances since the time of the divorce. Subsequently, the plaintiff filed a motion to modify that prior modification order, claiming that the defendant's earnings at that time were substantially in excess of the earning capacity on which the prior modification order was based, and noting that the original alimony award was based on a percentage of the defendant's income. The defendant objected, claiming that the modification of alimony statute (§ 46b-86) required the trial court to compare the parties' current financial circumstances to their circumstances at the time of the last court order and, furthermore, that it was improper under *Dan* v. *Dan* (315 Conn. 1) to modify alimony solely on the basis of an increase in the supporting spouse's income. The trial court found that there had been a substantial change in circumstances because the income of both parties had substantially increased and granted the motion for modification, ordering the defendant to pay alimony based on a percentage of his income. The court reasoned that the modification was permitted under *Dan* because the alimony award based on the prior modification order was no longer sufficient to fulfill the underlying purpose of the original award, namely, to have the plaintiff share in the defendant's fluctuating income from employment. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly considered the parties' financial circumstances at the time of the divorce decree when it granted the plaintiff's motion to modify the prior modification order: the trial court did not improperly base its decision to modify alimony on a comparison between the parties' current financial circumstances and their circumstances at the time of the divorce decree, as that court's finding that the prior modification order was no longer sufficient to fulfill the underlying purpose of the original alimony award could only have been made on the basis of the change in the parties' financial circumstances since the date of that prior modification order, the most significant of which was the threefold increase in the defendant's income; furthermore, there was no merit to the defendant's claim that the trial court was barred from considering the purpose of the original alimony award in crafting an equitable modification because, although the trial court was not permitted the change the underlying purpose of the original alimony award by way of a modification, the underlying purpose of the original alimony award was properly considered once the court determined that the changed circumstances justifying the prior modification had ceased to exist.
2. The plaintiff's motion for modification was not legally insufficient on its face on the ground that it alleged only that the defendant's income had significantly increased without alleging that the prior modification order was insufficient to fulfill the underlying purpose of the original alimony award; the allegation that there had been a substantial change in circum-

stances because the defendant's income had substantially increased since the prior modification order was sufficient to justify reconsideration of that prior order, and the plaintiff was not required to enumerate in the motion itself the reasons why the substantial change in circumstances justified a modification or to cite the case law supporting the motion.

3. The trial court properly considered extrinsic evidence of the parties' intent when they entered into the separation agreement and properly took judicial notice of the plaintiff's previous financial affidavit in the court file to support its conclusion that the purpose of the original alimony award was to address the fluctuating nature of the defendant's income and to have the plaintiff share in that income: the trial court properly considered extrinsic evidence of the parties' intent, as the separation agreement did not indicate whether the purpose of the alimony award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or to provide her with the same standard of living she had enjoyed during the marriage; furthermore, it having been well established that a court has the power to take judicial notice of court files of other actions between the same parties and this court having determined that the trial court was authorized to consider the underlying purpose of the original alimony award, it was proper for the trial court to take judicial notice of items in the court file that shed light on that underlying purpose.

4. The defendant could not prevail on his claim that the trial court's modification order was impermissible in view of the court's finding that the underlying purpose of the original alimony award was to allow the plaintiff to share in the defendant's standard of living after the divorce because that purpose was not a legitimate purpose of the original award: although the defendant's claim that the trial court's modification order had an unlawful purpose effectively constituted a collateral attack on the original alimony award, inasmuch as the trial court was bound by the purpose of the original award in determining whether a modification was justified, this court addressed the defendant's claim because he could not prevail on it and in order to provide future litigants with guidance; furthermore, under this court's decision in *Dan*, it may be a legitimate purpose of an alimony award to allow the supported spouse to share the supporting spouse's standard of living after the divorce, and any modification of an alimony award should implement the original purpose of the award to the extent possible; moreover, the trial court was not required to presume, pursuant to this court's decision in *Dan*, that the exclusive purpose of the original alimony award was to allow the plaintiff to continue to enjoy the standard of living that she had enjoyed during the marriage, as the plaintiff, unlike the supported spouse in *Dan*, was merely attempting to reinstate the percentage provision of the original alimony award, thereby preserving its underlying purpose.

Argued October 17, 2017—officially released January 16, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Dennis Harrigan*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Shay, J.*, granted the defendant's motion for modification of alimony; subsequently, the court, *Colin, J.*, granted the plaintiff's motion for modification of alimony, from which the defendant appealed. *Affirmed.*

Samuel V. Schoonmaker IV, with whom, on the brief, were *Jonathan E. Von Kohorn* and *Wendy Dunne DiChristina*, for the appellant (defendant).

Thomas M. Cassone, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. The marriage of the plaintiff, Ruth Cohen, and the defendant, Franklin Cohen, was dissolved in 2002. At that time, the trial court, *Hon. Dennis Harrigan*, judge trial referee, incorporated their separation agreement, which contained a provision requiring the defendant to pay alimony to the plaintiff, into the divorce decree. In 2010, the defendant filed a motion to modify the alimony provision of the divorce decree on the ground that his income had declined significantly. The trial court, *Shay, J.*, granted that motion by way of a corrected memorandum of decision in 2012. In 2013, the plaintiff filed a motion to modify the 2012 modification order on the ground that the defendant's income had substantially increased. The trial court, *Colin, J.*, granted that motion. The defendant

then filed this appeal[1] claiming, among other things, that Judge Colin improperly (1) based his conclusion that there had been a significant change in the parties' financial circumstances warranting a modification of the 2012 modification order on a comparison of their current circumstances to their circumstances at the time of the divorce decree, instead of their circumstances at the time of the previous 2012 modification order, (2) considered the plaintiff's motion for modification when it was "legally insufficient" on its face, (3) considered certain evidence in support of his conclusion that the 2012 modification order should be modified, and (4) rendered an illegal "lifetime profit sharing order." We reject these claims and affirm the judgment of the trial court.

The record reveals the following procedural history and facts that were found by Judge Colin or are undisputed. The marriage of the parties was dissolved on January 4, 2002, after twenty-seven years of marriage. At the time of the dissolution judgment, the plaintiff was unemployed and had no income. The defendant was employed in the commercial mortgage business and had a net weekly income of $2961.98. The parties entered into a separation agreement, which the trial court, *Hon. Dennis Harrigan*, judge trial referee, approved and incorporated into the divorce decree. The separation agreement provided in relevant part that, "[c]ommencing January 1, 2002, the [defendant] shall pay during his lifetime to the [plaintiff], as alimony, 33 1/3 [percent] of the first $180,000 of the [defendant's] gross income from his employment and 33 1/3 [percent] of [one half] . . . of the income actually received from his limited partnership interest in [various entities] and 25 [percent] of the next $200,000 in earnings and 38

[1] The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[percent] of the next $370,000 in earnings . . . .'' The agreement further provided that ''[t]he [plaintiff] shall not be entitled to share in [the] earnings of the [defendant] in excess of $750,000 in any calendar year and in no event shall receive more than $250,000 as her share of commission payments in any calendar year.'' The alimony payments were to continue until the plaintiff's death, remarriage or cohabitation.

As the result of poor market conditions during the years 2008, 2009 and 2010, the defendant's income was significantly reduced. In 2010, he filed a motion to modify the alimony provision of the divorce decree by reducing the percentage of his income that he was required to pay the plaintiff. After an evidentiary hearing, the trial court, *Shay*, *J.*, found that there had been a substantial change in circumstances since the time of the divorce decree because the defendant's current net income had decreased to $1373.95 per week, and the plaintiff's net income had increased to $945.15 per week. Judge Shay granted the defendant's motion for modification and ordered that the defendant pay the plaintiff $250 per week until her death or remarriage.

In September, 2011, the plaintiff filed a motion to open and vacate that modification order on the basis of new evidence showing that the defendant's income was actually $8805.63 per week, not $1137.95 as Judge Shay had found. The plaintiff contended that, in light of the cyclical nature of the defendant's business, alimony expressed as a percentage of the defendant's income was more appropriate than a set dollar amount. The defendant agreed that an award based on a percentage of his income was appropriate. After an evidentiary hearing, Judge Shay issued a corrected memorandum of decision, finding that the plaintiff's current net income from employment was $392.09 per week and her investment income was $581 per week, for a total of $973.09 per week, and the defendant's current net income was

$1310.34 per week. Judge Shay further found, however, that the defendant's net income should be calculated on the basis of his income over a two year period and that, using that method, his earning capacity was $158,420 per year, or a net income of $2163 per week. On that basis, Judge Shay ordered the defendant to pay the plaintiff $2750 per month until her death or remarriage (2012 modification order).

In November, 2013, the plaintiff filed a motion to modify the 2012 modification order on the ground that the defendant's earnings in 2012 were more than $293,000, substantially in excess of his earning capacity of $158,420 as found by Judge Shay. In her motion, the plaintiff pointed out that the original alimony provision of the divorce decree had required the defendant to pay the plaintiff a percentage of his income. The defendant objected to the motion on the ground that it would be improper for the court to consider the divorce decree because, when considering a motion for modification of alimony orders pursuant to General Statutes § 46b-86, the trial court's "inquiry is necessarily confined to a comparison between the current conditions and the last court order." *Borkowski* v. *Borkowski*, 228 Conn. 729, 738, 638 A.2d 1060 (1994). The defendant further contended that a modification based solely on an increase in his income would be improper under this court's holding in *Dan* v. *Dan*, 315 Conn. 1, 14, 105 A.3d 118 (2014), that "an increase in the income of the supporting spouse, standing alone, is not a sufficient justification to modify an alimony award."

After an evidentiary hearing, the trial court, *Colin J.*, found that the plaintiff had a current net income from employment of $438.[2] In addition, she received $284 per week in social security benefits and $180 per month

[2] Hereinafter, all references to the trial court are to Judge Colin unless otherwise indicated.

from a pension, for a total weekly income of $763.54. The defendant had a current net weekly income of $6765. The trial court found that there had been a substantial change in circumstances in that "the incomes of both parties have substantially increased." The court then addressed the defendant's argument that, under *Dan* v. *Dan*, supra, 315 Conn. 14, an alimony modification cannot be based solely on an increase in the supporting spouse's income. The court concluded that *Dan* was distinguishable because (1) there had been no intervening modification of the original alimony award in *Dan*, (2) the supported spouse in *Dan* was seeking a modification that would have increased the amount that she was receiving to more than the amount of original alimony award, and (3) the intent of the original award in *Dan* was to allow the supported spouse to maintain the standard of living that she had enjoyed during the marriage, but, in the present case, the intent of the original award was to allow the plaintiff to share in the defendant's post-divorce earnings.

The court then noted that, under *Dan*, "[w]hen the initial award was not sufficient to fulfill the underlying purpose of the award . . . an increase in the supporting spouse's salary, in and of itself, may justify an increase in the award. For example, if the initial alimony award was not sufficient to maintain the standard of living that the supported spouse had enjoyed during the marriage because the award was based on a reduction in the supporting spouse's income due to unemployment or underemployment as a result of an economic downturn, and, after the divorce, the supporting spouse's income returns to its previous level, a modification might well be justified." *Dan* v. *Dan*, supra, 315 Conn. 15–16. After concluding that the 2012 modification order was "no longer sufficient to fulfill the underlying purpose of the original alimony award, namely, to have the plaintiff share in the defendant's fluctuating

income from employment," the trial court granted the plaintiff's motion for modification. The court ordered the defendant to pay the plaintiff "25 [percent] of the first $500,000 of the [his] gross income from employment. The defendant shall make minimum payments of $3333.33 per month on the first of each month, in advance. Then, if, as and when the defendant receives gross income from employment over $160,000 in any year, he shall pay to the [plaintiff] 25 [percent] of the gross income from employment within ten business days of the defendant's receipt of gross income from employment in excess of $160,000. The plaintiff shall not be entitled to share in the defendant's gross income from employment in excess of $500,000; as a result, the maximum amount of alimony that the plaintiff can receive under this order is $125,000 per year." The payments were to continue until the plaintiff's death or remarriage, and the order was retroactive to January 1, 2014.

On appeal, the defendant contends that the trial court improperly (1) based its conclusion that there had been a significant change in the parties' financial circumstances, warranting a modification of the 2012 modification order, on a comparison of their current circumstances to their circumstances at the time of the divorce decree, instead of their circumstances at the time of the previous 2012 modification order, (2) considered the plaintiff's motion for modification when it was "legally insufficient" on its face, (3) considered certain evidence in support of its conclusion that the 2012 modification order should be modified, and (4) rendered an illegal "lifetime profit sharing order." We reject all of these claims.

I

We first address the defendant's claim that the trial court improperly considered the parties' financial cir-

cumstances at the time of the divorce decree when it determined that (1) there was a substantial change in circumstances warranting consideration of the plaintiff's motion for modification, and (2) the 2012 modification order should be modified. We begin our analysis with a review of the legal principles governing the modification of alimony awards. "It is . . . well established that when a party, pursuant to § 46b-86, seeks a postjudgment modification of a dissolution decree . . . he or she must demonstrate that a substantial change in circumstances has arisen subsequent to the entry of the [decree]." *Borkowski* v. *Borkowski*, supra, 228 Conn. 736. "Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony . . . are relevant to the question of modification." (Internal quotation marks omitted.) Id., 737.

"The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties.

"Therefore, although the trial court may consider the same criteria used to determine the initial award without limitation . . . in doing so, its inquiry is necessarily confined to a comparison between the current conditions and the last court order. To permit the trial court to reconsider all evidence dating from before the original divorce proceedings, in determining the adjustment of alimony, would be, in effect, to undermine the policy behind the well established rule of limiting proof of the substantial change of circumstances to events occurring subsequent to the latest alimony order—the avoidance of relitigating matters already settled." (Cita-

tions omitted; footnote omitted; internal quotation marks omitted.) Id., 738.

In the present case, the defendant contends that the trial court ignored these principles when it concluded that there had been a substantial change in circumstances, which is "the threshold predicate for the trial court's ability to entertain [the plaintiff's] motion for modification [of alimony] . . . ." Id., 737. Specifically, the defendant points out that the court found that "the incomes of both parties have substantially increased." Because the plaintiff's income had, in fact, *decreased* from $973.09 per week at the time of the 2012 modification order to $763.54 per week in 2015, the defendant contends that the trial court could only have been comparing the plaintiff's current income to her income at the time of the divorce decree, which was zero. It follows, he further contends, that the trial court must also have been comparing the defendant's current income to his income at the time of the divorce decree when, under *Borkowski*, the court should have compared the financial circumstances of the parties at the time of the 2012 modification order to their current circumstances. See *Borkowski* v. *Borkowski*, supra, 738 (when determining whether there are substantially changed circumstances for purposes of establishing threshold predicate for consideration of motion for modification, trial court's "inquiry is necessarily confined to a comparison between the current conditions and the last court order").

We agree with the defendant that, when the trial court was considering whether there had been a substantial change in circumstances, it should have compared the parties' current financial circumstances in 2015 to their circumstances as found by Judge Shay in the 2012 modification order and not their circumstances at the time of the divorce decree. Although the trial court's memorandum of decision is not entirely clear on this point,

we also agree that it is reasonable to conclude that the trial court's statement that the plaintiff's income had substantially increased indicates that the court was comparing her current income to her income at the time of the divorce decree.[3] Even if we were to assume, however, that that was the case, we conclude that any error was harmless.

The trial court expressly stated that "the defendant's income has increased substantially and the [2012 modification order] is *no longer* sufficient to fulfill the underlying purpose of the original alimony award . . . ." (Emphasis added.) It is clear, therefore, that the court believed that the 2012 modification order *was* sufficient to fulfill the underlying purpose of the original alimony award, to the extent possible under the changed circumstances, at the time that it was rendered. If that was no longer the case, it could only have been because of the change in the parties' financial circumstances *since the date of the 2012 modification order*, the most significant of which was, by far, the increase in the defendant's income.[4] Accordingly, even if the trial court's threshold finding that there was a substantial change in circumstances was improperly based on a comparison of the parties' financial circumstances at the time of the divorce decree with their current circumstances, it is clear that the court would have reached the same conclusion if it had properly compared the parties' financial circumstances at the time of the 2012 modification order with their current circumstances.

[3] Indeed, in light of the fact that the trial court expressly noted that the plaintiff's net weekly income at the time of the 2012 modification order was $973, we find it improbable that the court mistakenly believed that the plaintiff's income had increased from the date of the 2012 modification order.

[4] As we have indicated, the trial court found that the defendant's weekly net income had increased from $2163 at the time of the 2012 modification order to $6765 in 2015 and that the plaintiff's net weekly income at the time of the 2012 modification order was $973 and was $763.54 in 2015.

With respect to the defendant's claim that the trial court improperly based its modification order on a comparison between the parties' financial circumstances at the time of the divorce decree and their current circumstances, we disagree. Judge Shay found in the 2012 modification order that there had been a substantial change in circumstances since the date of the divorce decree in part because "the [plaintiff] is now employed and has additional income from investments . . . ." Partly on the basis of this change in circumstances, Judge Shay reduced the alimony award from a percentage of the defendant's income, capped at $250,000, to a flat payment of $2750 per month. Thus, when Judge Colin stated in his 2015 decision that any alimony modification should reflect "the substantial change in the [plaintiff's] income," presumably since the date of the divorce decree, he was merely recognizing the continuing validity of Judge Shay's holding that the substantial increase in the plaintiff's income since the date of the divorce decree warranted a reduction in the original alimony award. It does not follow that Judge Colin's order modifying the 2012 modification order by increasing the alimony payment to a percentage of the defendant's income, with payments capped at $125,000, was based on a comparison of the defendant's income at the time of the divorce decree with his current income. Rather, as we have indicated, because Judge Colin believed that the 2012 modification order was sufficient when it was rendered to fulfill the purpose of the alimony award in the divorce decree, to the extent possible, his modification of the 2012 modification order could only have been based on changes in the parties' financial circumstances since the date of that order, the most significant of which was the threefold increase in the defendant's income.

Finally, to the extent that the defendant contends that, after Judge Shay issued the 2012 modification

order, the trial court was barred under *Borkowski* from considering the purpose of the original alimony provision in the divorce decree when it was crafting an equitable modification, we disagree.[5] The defendant effectively contends that, when Judge Shay issued the 2012 modification order, he intended to change the underlying purpose of the alimony award and that the new purpose should be controlling for purposes of all future motions for modification. There is an important distinction, however, between changing the purpose of an original alimony award when ruling on a motion for modification, which is generally prohibited, and finding that a modification of alimony is required because changed circumstances have made it impossible to fulfill the underlying purpose of the original award, which is a proper function of the court. See *Dan* v. *Dan*, supra, 315 Conn. 17 (court's ruling on motion for modification should not change underlying purpose of initial alimony award but may consider that underlying purpose); *Borkowski* v. *Borkowski*, supra, 228 Conn. 738 ("[t]he power of the trial court to modify the existing order does not . . . include the power to retry issues already decided"). Because the court is not permitted to change the underlying purpose of the original alimony award by way of modification, the purpose of a modification is controlling only as long as the circumstances requiring that modification continue to be present. Accordingly, if a trial court considering a subsequent motion for modification determines that the circumstances justifying a previous modification have ceased to exist, then the underlying purpose of the original alimony award still controls. We therefore conclude that the trial court properly considered the underlying purpose of the original alimony award upon determining that the

[5] We address the defendant's claim that the trial court in the present case improperly considered certain evidence to determine the purpose of the original alimony award in part III of this opinion.

changed circumstances justifying the 2012 modification order no longer existed.

II

We next address the defendant's claim that the plaintiff's motion for modification was "legally insufficient" on its face because it alleged only that the defendant's income had significantly increased and did not allege that the 2012 modification order was insufficient to fulfill the underlying purpose of the original alimony award or that there were other exceptional circumstances justifying a modification, as required by *Dan*. We disagree.

In support of this claim, the defendant points out that this court held in *Dan* that an increase in income, standing alone, does not justify a modification of an alimony award unless "the initial award was not sufficient to fulfill the underlying purpose of the award"; *Dan* v. *Dan*, supra, 315 Conn. 15–16; or if other exceptional circumstances exist. Id., 17. As we recognized in *Dan*, however, "it is well established that an increase in the income of the paying spouse, standing alone, is sufficient to *justify reconsideration* of a prior alimony order pursuant to § 46b-86 . . . ." (Citation omitted; emphasis in original.) Id., 9. In other words, a party seeking modification of an alimony award need only claim in the motion for modification that there has been a substantial change in circumstances to warrant reconsideration. We have never required a party seeking modification to cite in the motion for modification itself all of the reasons *why* the substantial change in circumstances justifies a modification or the case law supporting the motion. Accordingly, we conclude that the plaintiff's motion for modification, which alleged that there had been a substantial change in circumstances because the defendant's income had substantially

increased since the 2012 modification order, was not legally insufficient.

III

We next address the defendant's claim that, even if the plaintiff's motion for modification was legally sufficient, the trial court improperly considered certain evidence to support its conclusion that the purpose of the original alimony award was "to address the fluctuating nature of the defendant's income and to have the plaintiff share in that income [from employment] . . . ." Specifically, the defendant contends that (1) the trial court should not have considered extrinsic evidence of the parties' intent when they entered into the separation agreement without first finding that the agreement was ambiguous; see *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920, 929 (2015) ("[w]hen only one interpretation of a contract is possible, the court need not look outside the four corners of the contract" [internal quotation marks omitted]); and (2) the court improperly took judicial notice of the contents of the court file. See *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) ("[A]uthorities have drawn a distinction between 'legislative facts,' those which help determine the content of law and policy, and 'adjudicative facts,' facts concerning the parties and events of a particular case. The former may be judicially noticed without affording the parties an opportunity to be heard, but the latter, at least if central to the case, may not."). We disagree.

As we have indicated, this court held in *Dan* that the trial court should consider the purpose of the original alimony award when determining whether an increase in the supporting spouse's income, standing alone, justifies a modification. See *Dan* v. *Dan*, supra, 315 Conn. 11–15. In the present case, the original alimony award in the separation agreement unambiguously provided

that the defendant would pay the plaintiff a percentage of his income, up to a maximum of $250,000 annually. The agreement did not indicate, however, whether the purpose of the award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or, instead, to provide her with the same standard of living that she had enjoyed during the marriage. If the defendant's income prior to the divorce had been steady over a long period of time and the parties anticipated that he would have a similar income for the foreseeable future, it would be reasonable to conclude that the purpose of the original alimony award was simply to maintain the plaintiff's standard of living. On the other hand, if the defendant's income had fluctuated widely from year to year before the divorce, it would be reasonable to conclude that the purpose of the award was to allow the plaintiff to continue to share in the defendant's income after the divorce, in both bad times and good times. Because the separation agreement itself was silent on this point, we conclude that the trial court properly considered extrinsic evidence, including the defendant's testimony at the hearing on the plaintiff's motion for modification in 2015 that his income fluctuated widely from year to year on the basis of business conditions.

The defendant also claims that the trial court improperly took judicial notice of certain items in the court file, specifically, the plaintiff's 2002 financial affidavit. It is well established, however, that "[t]he trial court has the power to take judicial notice of court files of other actions between the same parties." *In re Mark C.*, 28 Conn. App. 247, 253, 610 A.2d 181, cert. denied, 223 Conn. 922, 614 A.2d 823 (1992). To the extent that the defendant contends that it was improper for the court to do so under the specific circumstances of this case because the court was barred from considering *any* evidence that predated the 2012 modification order,

we have already concluded that the trial court was authorized to consider the underlying purpose of the original alimony award. See part I of this opinion. Accordingly, we conclude that it was proper for the court to take judicial notice of items in the court file that shed light on that purpose.

IV

Finally, we address the defendant's claim that "[t]he trial court entered an impermissible lifetime profit sharing order based on its finding that the 'underlying purpose of the original alimony award [was] . . . to have the plaintiff share in [the defendant's] fluctuating income [from employment],' rather than to meet her needs." We disagree.

As a preliminary matter, we note that, inasmuch as the trial court was bound by the purpose of the original alimony award when determining whether a modification was justified; see *Dan* v. *Dan*, supra, 315 Conn. 15–16; the defendant's claim that the modification order had an unlawful purpose effectively constitutes a collateral attack on the original alimony award.[6] Collateral attacks on judgments are strongly disfavored. See, e.g., *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013). Nevertheless, because the defendant cannot prevail on this claim, and in order to provide future litigants with guidance on this issue, we address it. Cf. *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to prop-

[6] We have concluded in part I of this opinion that the trial court properly considered the purpose of the original alimony award when it modified the 2012 modification order.

erly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim").

This court concluded in *Dan* v. *Dan*, supra, 315 Conn. 11, that "[t]here is little, if any, legal or logical support . . . for the proposition that a legitimate purpose of alimony is to allow the supported spouse's standard of living to match the supporting spouse's standard of living *after* the divorce, when the supported spouse is no longer contributing to the supporting spouse's income earning efforts." (Emphasis in original.) Id., 11. The specific issue that was before this court in *Dan*, however, was whether an increase in the supporting spouse's income, standing alone, justifies increasing an alimony award *when the purpose of the alimony award was to allow the supported spouse to continue the standard of living that she enjoyed during the marriage.*[7] Id., 18–19. We did not intend to suggest in that case that parties are barred as a matter of law from voluntarily entering into a divorce agreement containing an alimony provision that is intended to allow the supported spouse to share, to any extent whatsoever, the supporting spouse's standard of living after the divorce. Indeed, there are circumstances under which both the supported spouse and the supporting spouse might reason-

[7] This court observed in *Dan* that, "[h]istorically, alimony was based [on] the continuing duty of a divorced husband to support an abandoned wife and should be sufficient to provide her with the kind of living [that] she might have enjoyed but for the breach of the marriage contract by the [husband]." (Internal quotation marks omitted.) *Dan* v. *Dan*, supra, 315 Conn. 10. The defendant in *Dan* contended that the purpose of the alimony award at issue in that case was to "ensure that [the plaintiff] receive[d] adequate support." (Internal quotation marks omitted.) The plaintiff did not dispute this claim, but claimed only that the original alimony award was no longer sufficient to meet her needs or to allow her to enjoy the standard of living that she enjoyed during the marriage. Id., 18. Thus, there was no claim or evidence that the underlying purpose of the original alimony award was to allow the plaintiff to share the defendant's standard of living after the divorce.

ably desire such an arrangement. For example, when, as in the present case, the level of the supporting spouse's income is highly sensitive to market conditions, the supporting spouse might reasonably agree to an arrangement that allows the supported spouse to share in the benefits of particularly good years in order to avoid being required to make a substantial flat payment in bad years. Such an arrangement would also avoid the need for frequent motions for modification based on the supporting spouse's fluctuating income. If the supporting spouse anticipates that there may be a significant increase in his average annual income after the divorce, he can protect himself by including an annual cap on alimony payments, as the defendant did in the present case.[8] Accordingly, we reject the defendant's claim that *Dan* held, as an inviolable rule of law, that it is not a legitimate purpose of alimony to allow the supported spouse to share the supporting spouse's standard of living after the divorce, even to a limited extent. Rather, the main teachings of *Dan* are that the *ordinary*, but not necessarily exclusive, purposes of alimony are either to allow the supported spouse to continue enjoying the standard of living that he or she enjoyed during the marriage or to allow the supported spouse to become self-sufficient; id., 10–11; and that any modification of an alimony award should implement the original purpose of the award to the extent possible.[9] See id., 15–16.

The defendant points out, however, that this court in *Dan* presumed that the alimony award in that case, which was based on a voluntary agreement between

[8] As we have indicated, the trial court also included a cap on alimony payments in the modification order that is the subject of this appeal, a cap that was one half of the amount provided for in the original alimony award.

[9] We emphasize, however, that we continue to believe that the trial courts should not, in the absence of good reasons, depart from the general rule that the purpose of alimony is to allow the supported spouse to continue to enjoy the standard of living that existed during the marriage.

the parties and included a percentage of any bonus income that the defendant received, as well as a flat payment of $15,000 per month; see *Dan* v. *Dan*, supra, 315 Conn. 4; was intended to allow the plaintiff to maintain the standard of living that she enjoyed during the marriage, not to allow her to share the defendant's standard of living after the divorce. See id., 18 ("it is reasonable to conclude, in the absence of any suggestion to the contrary, that the purpose of the original alimony award, which was based on the stipulation of the parties . . . was to allow the plaintiff to maintain the standard of living that she enjoyed during the marriage"). Because the award in the present case was also based on a percentage of his income, the defendant contends, the trial court in the present case should have made the same presumption.

As we have explained, however, the plaintiff in *Dan* made no claim that the purpose of the alimony award was to allow her to share the defendant's standard of living after the divorce, but claimed only that she was no longer able to enjoy the standard of living that she had enjoyed during the marriage. See footnote 7 of this opinion. Moreover, the plaintiff in *Dan* was not attempting to reinstate the provision of the original alimony award that required the defendant to pay her a percentage of his bonus income, which was the provision that allowed the plaintiff's income to track the defendant's income after the divorce, at least to some extent. See id., 4–5. Rather, she was attempting to *increase* the defendant's flat alimony payment on the ground that his base salary had increased from $696,000 at the time of the divorce to more than $3.24 million at the time of the motion for modification. Id., 5–6. Thus, in the absence of any other change in circumstances, the modification requested by the plaintiff in *Dan* could only have increased her standard of living to a level higher than that contemplated by the original alimony

award. In contrast, the plaintiff in the present case was merely attempting to reinstate the percentage provision of the original award, thereby preserving its underlying purpose. Accordingly, we conclude the trial court was not required under *Dan* to presume in the present case that the exclusive purpose of the original alimony award was to allow the plaintiff to continue to enjoy the standard of living that that she enjoyed during the marriage.

The judgment is affirmed.

In this opinion the other justices concurred.

IN RE EGYPT E. ET AL.*
(SC 19913)
(SC 19914)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson and Espinosa, Js.**

Syllabus

The respondent parents, M and N, appealed from the judgments of the trial court terminating their parental rights with respect to their two minor children, E and A, on the statutory (§ 17a-112 [j] [3] [C]) ground that their acts of parental commission or omission had denied the children the care, guidance or control necessary for their physical, educational, moral or emotional well-being. M and N brought A to the hospital for a shoulder injury, and it was determined that A had multiple bruises and bone fractures that were consistent with child abuse. The petitioner, the Commissioner of Children and Families, removed the children from the family home, and they have since remained in foster care with a nonrelative. M and N initially gave inadequate and inconsistent explanations for A's injuries, but M later admitted to the police that he had engaged in certain conduct that was consistent with A's injuries. M eventually pleaded guilty under the *Alford* doctrine to certain criminal

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** The listing of justices reflects their seniority status on this court as of the date of oral argument.

charges on the basis of that conduct, but both M and N refused to acknowledge that M was responsible for A's injuries. Although N divorced M in an effort to have the children returned to her, she made daily telephone calls to him while he was incarcerated, in which she professed her love for him, and provided misleading statements, during a court-ordered evaluation, regarding her feelings toward M. In terminating the parental rights of M and N as to both children, the trial court found that the criteria of § 17a-112 (j) (3) (C) had been proven. M and N appealed to this court, which reversed the judgments of the trial court and remanded the cases for a new trial because the record did not clearly indicate that M and N had received proper notice of the finding that reunification efforts were not necessary. On remand, the trial court granted the petitioner's motion to file amended termination petitions alleging, inter alia, that the court previously had approved a permanency plan of termination and adoption. The trial court found that M and N had failed to acknowledge or admit the cause of A's injuries until the conclusion of the second trial on the termination petitions, and, consequently, they had made no plan to keep E safe. In light of these omissions, the trial court concluded that M and N were unable to provide E with the care, guidance, or control necessary for her well-being. M and N appealed, claiming that the trial court improperly terminated their parental rights as to E pursuant to § 17a-112 (j) (3) (C) because there was no evidence that acts of parental commission or omission had caused E to suffer any type of harm prior to her removal from the family home and, therefore, that the termination of their parental rights improperly was based on a finding of predictive harm. *Held* that the trial court properly found that the criteria of § 17a-112 (j) (3) (C) had been proven as to E on the basis of the postremoval acts of parental omission by M and N: although the plain and unambiguous language of § 17a-112 (j) (3) (C) contemplates the termination of parental rights for harmful acts of parental commission or omission that already have occurred, the filing of the amended petition to terminate the parental rights of M and N established a new adjudicatory date under the relevant rule of practice (§ 35a-7 [a]), and, therefore, the trial court properly considered the harmful acts of parental omission that occurred after the removal of E from the home of M and N, which included their persistent failure to acknowledge the cause of A's injuries and failure to take the therapeutic steps that would prevent a similar tragedy from occurring in the future; furthermore, the omissions of M and N clearly fell within the purview of § 17a-112 (j) (3) (C), as that statute encompasses a broad range of parental behaviors, including those that constitute a failure to protect a child by acknowledging the existence of a dangerous situation, and the evidence was sufficient to establish that the omissions of M and N were harmful to E, who, although physically uninjured, suffered the emotional and psychological trauma attendant to her removal from her biological parents' home, followed by years of foster placement during

which she lacked the care, guidance or control of her biological parents and the stability and permanence necessary for a young child's healthy development; moreover, M and N could not prevail on their claim that expert testimony from two psychologists regarding the negative effects that children suffer when deprived of care and guidance from their biological parents was insufficient to establish that E had been psychologically harmed, as expert testimony in termination proceedings is accorded great weight, and M and N provided no reason for this court to conclude that E was not susceptible to this type of trauma in light of other evidence in the record that E specifically was harmed by the extended period of separation from M and N.

(*One justice dissenting*)

Argued September 20, 2017—officially released January 10, 2018***

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Frazzini, J.*, granted the petitioner's motion to consolidate the petitions; thereafter, the cases were transferred to the Child Protection Session at Middletown and tried to the court, *C. Taylor, J.*; judgments terminating the respondents' parental rights, from which the respondent parents separately appealed to this court, which reversed the judgments of the trial court and remanded the cases for a new trial; subsequently, the cases were tried to the court, *Hon. Barbara M. Quinn*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgments terminating the respondents' parental rights, from which the respondent parents separately appealed. *Affirmed.*

Stein M. Helmrich, for the appellant (respondent mother).

Dana M. Hrelic, with whom were *Brendon P. Levesque* and, on the brief, *Scott T. Garosshen*, for the appellant (respondent father).

*** January 10, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Michael Besso, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ROGERS, C. J. This case chiefly concerns the scope of the ground for termination of parental rights contemplated by General Statutes § 17a-112 (j) (3) (C), regarding acts of parental commission or omission that deny a child the care necessary for the child's physical or emotional well-being.[1] The respondent parents, Morsy E. and Natasha E., appeal[2] from the judgments of the trial court terminating their parental rights as to their two daughters, Egypt E. and Mariam E., after finding that ground proven by clear and convincing evidence. The respondents claim that the court improperly terminated their parental rights as to Egypt because that child, unlike her sister, did not suffer any harm prior to her removal from the respondents' home, which they

[1] General Statutes § 17a-112 (j) (3) (C) provides that a trial court may terminate parental rights if "the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ." To terminate parental rights, the court also must find that reasonable efforts have been made to reunify a parent and child, unless the parent is unable or unwilling to benefit from those efforts or the court finds that such efforts are unnecessary; General Statutes § 17a-112 (j) (1); and that termination of parental rights is in the best interest of the child. General Statutes § 17a-112 (j) (2).

Since the filing of the termination of parental rights petitions in the present cases, § 17a-112 was the subject of certain amendments that have no bearing on the merits of this appeal. E.g., Public Acts 2016, No. 16-105, §§ 1 and 2. For purposes of clarity, we refer to the current revision of the statute.

[2] The respondents appealed from the judgments of the trial court to the Appellate Court. Thereafter, we granted the respondents' motions, pursuant to Practice Book § 65-2, to transfer the appeals to this court.

contend was a necessary predicate for termination of their parental rights pursuant to § 17a-112 (j) (3) (C). The respondents claim, therefore, that the termination of their parental rights improperly was based on a finding of predictive harm, a type of harm not contemplated by § 17a-112 (j) (3) (C). We agree with the respondents that a termination of parental rights pursuant to § 17a-112 (j) (3) (C) may not be based upon predictive harm. Under the unusual procedural circumstances underlying this appeal, however, we conclude that the court properly found that § 17a-112 (j) (3) (C) was proven on the basis that Egypt had been harmed by the respondents' postremoval acts of parental commission or omission. Specifically, because the petitions to terminate the respondents' parental rights were amended, and, therefore, the adjudicatory date was extended to encompass events subsequent to the filing of the original petitions, the court properly considered the conduct following the removal of the children, which had an actual, harmful effect on the well-being of Egypt. Accordingly, we affirm the judgments of the trial court.[3]

We begin by emphasizing that these cases are before this court for the second time on appeal following a retrial on the termination petitions. On June 1, 2015, the trial court, *C. Taylor*, *J.*, terminated the respondents' parental rights as to Egypt and Mariam after finding, inter alia, that the petitioner, the Commissioner of Children and Families, had proven by clear and convincing

[3] The respondents also claim that, because the termination of their parental rights as to Egypt was improper, the judgment terminating their parental rights as to Mariam should be reversed. In light of our conclusion that the trial court properly terminated the respondents' parental rights as to Egypt, we need not consider this claim. Furthermore, Natasha's claim that there was insufficient evidence that reasonable efforts were made to reunify her with both children and that she was unable to benefit from those efforts is moot because she failed to challenge the trial court's approval of the permanency plan of termination and adoption. See footnote 14 of this opinion.

evidence that the respondents' acts of parental commission or omission had denied each child the care, guidance or control necessary for her physical, educational, moral or emotional well-being. *In re Egypt E.*, Superior Court, judicial district of New Britain, Juvenile Matters, Child Protection Session at Middletown, Docket Nos. H14-CP-13010981A, H14-CP-13010982A, 2015 WL 4005340, *16–17 (June 1, 2015). The respondents appealed, challenging the court's findings that reasonable efforts at reunification had been made and that they had been unable or unwilling to benefit from those efforts. See *In re Egypt E.*, 322 Conn. 231, 241–42, 140 A.3d 210 (2016). This court reversed the judgments, reasoning that, although the trial court's additional, unchallenged finding that reunification efforts were not necessary normally would have rendered the matter moot, the trial court record did not indicate clearly that the respondents had received proper notice of that finding, thereby giving them the opportunity to challenge it on appeal. Id., 243–44. We therefore remanded the case for a new trial on the termination petitions to be held no later than the fall of 2016. Id., 244.

On August 5, 2016, the petitioner moved to amend the termination petitions, seeking to add a new ground for termination, namely, the respondents' failure to rehabilitate; see General Statutes § 17a-112 (j) (3) (B); to supplement her allegations as to reasonable efforts to reunify the respondents and the children, and to add an allegation that, on June 1, 2015, the trial court had approved a permanency plan of termination and adoption, rather than reunification, pursuant to General Statutes (Supp. 2014) § 46b-129 (k).[4] On September 13, 2016,

[4] Pursuant to General Statutes § 17a-111b (a) (2), "[t]he Commissioner of Children and Families shall make reasonable efforts to reunify a parent with a child unless the court . . . has approved a permanency plan other than reunification pursuant to subsection (k) of section 46b-129."

Pursuant to General Statutes § 17a-112 (j) (1), before a trial court may grant a petition for termination of parental rights, it must make a finding that reasonable efforts have been made to reunify the parent and the child,

the trial court denied the motion to amend insofar as it sought to add the ground of failure to rehabilitate, but granted it as to the other amendments sought by the petitioner. Accordingly, September 13, 2016, the date of the last amendment, became the adjudicatory date for the petitions.[5] See Practice Book § 35a-7 (a) (in adjudicatory phase of proceedings on petition for termination of parental rights, trial court is limited to considering evidence of events preceding latest amendment of petition); see also *In re Romance M.*, 229 Conn. 345, 358–59, 641 A.2d 378 (1994); *In re Mariah S.*, 61 Conn. App. 248, 254 n.4, 763 A.2d 71 (2000), cert. denied, 255 Conn. 934, 767 A.2d 104 (2001).

A second trial on the termination petitions was held before a new trial court, *Hon. Barbara M. Quinn*, judge trial referee, in October and November of 2016. At the conclusion of that trial, the court again terminated the respondents' parental rights on the basis of their acts of parental commission or omission. This appeal followed.

The following facts, which were found by the trial court, and procedural history are relevant to the appeal. Egypt and Mariam were born in 2012 and 2013, respectively, to Morsy and Natasha. On September 1, 2013, Morsy and Natasha brought Mariam, then about seven weeks old, to the Connecticut Children's Medical Center (hospital) on the advice of their pediatrician. That morning, according to the couple, they had noticed that

"unless the court finds in [the termination] proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required . . . ."

[5] At the beginning of the new trial, counsel for the petitioner sought confirmation of the adjudicatory date for the petitions, observing that, pursuant to the rules of practice, it would be September 13, 2016. When the trial court asked if any other party would like to be heard on that matter, Morsy's counsel and counsel for the children explicitly agreed, while Natasha's counsel did not object.

the infant's right shoulder was inflamed and made a " 'crunching sound' " when manipulated. Upon examination by a physician's assistant, various testing and the taking of X-rays, it was determined that Mariam had multiple bone fractures, including a "displaced fracture" of the right clavicle, two fractures of the left tibia and fractures of the left shoulder blade, left femur and right tibia. Mariam also had several bruises on various parts of her body which, according to the physician's assistant, are suspicious for child abuse when present on a child who is not independently mobile. Mariam was tested for osteogenesis imperfecta, a series of genetic bone diseases. The testing ruled out those diseases.[6]

Mariam had been in the exclusive care of Morsy and Natasha during the period in which medical professionals deemed the injuries to have occurred. Hospital staff notified the Department of Children and Families (department) and the police department in the town where the family resided about the child's injuries, and representatives of each entity arrived and questioned Morsy and Natasha. Egypt was examined for fractures or other injuries at that time, but none were found.

On that same day, the petitioner placed a ninety-six hour hold on both children and removed them from the respondents' custody. On September 5, 2013, the petitioner filed petitions alleging neglect and motions for orders for temporary custody, which subsequently were granted. The children have remained in foster care with a nonrelative since that time. The petitioner filed

[6] Thereafter, Natasha sought a second opinion on whether Mariam suffered from a bone disease. Tests were again performed the following month and produced the same results. A report memorializing the results of the testing was in evidence, and it indicates that the normal test results were discussed with Natasha. The parties further stipulated that the doctor who had performed these tests testified at the first trial on the termination petitions and that both respondents were present and had heard her testimony.

petitions to terminate the respondents' parental rights as to both children, alleging § 17a-112 (j) (3) (C) as a ground for termination, on October 4, 2013.

At the hospital, and in the days following the discovery of Mariam's injuries, Morsy and Natasha gave inadequate and shifting explanations for those injuries. They first said they knew of nothing that could have caused the injuries, then they suggested that they could have been caused by Egypt, who was then thirteen months old, when she bounced Mariam too vigorously in her "bouncy seat." Subsequently, they offered that something may have happened when the children were in the care of Natasha's father and stepmother for a brief period of time ten days earlier. Neither explanation was consistent with the nature and timing of the injuries.

During questioning by the police on September 2, 3 and 5, 2013, Morsy initially stated that he had dropped Mariam onto the floor in the family's condominium. Thereafter, he explained that he had dropped her twice while he was on the stairs. Finally, as recounted in a police report, Morsy said that, during the middle of the evening before the family had arrived at the hospital, Mariam had been crying and "he picked her up under her arms. He said [that] she was facing him, and he had his fingers on her back with his thumbs anterior to her shoulders. At this time, he stated [that] he may have grabbed her too hard, and described her as crying before and after this event. In addition, Morsy . . . reported [that] he placed [Mariam] hard into a bouncy chair onto the floor . . . and indicated [that] he could not recall when this exactly happened. Lastly, Morsy . . . described and demonstrated [that] while he was changing [Mariam's] diaper, he grabbed both [of] her legs, with his thumbs on the anterior distal thighs just above the knees [and] his fingers wrapped around her posterior lower legs, and straightened her legs by pressing down with his thumbs. He said he could not recall

when this specifically happened, but admitted he may have done this with more force than he was demonstrating during the interview." This explanation, unlike the others, was consistent with Mariam's injuries. Morsy was arrested on October 18, 2013, charged with various offenses, and ultimately pleaded guilty pursuant to the *Alford* doctrine to two counts of reckless endagement in the second degree.[7] Subsequent to admitting his culpability to the police, however, Morsy recommenced denying any knowledge of how Mariam's injuries had occurred. Natasha, for her part, also refused to acknowledge Morsy's responsibility for the injuries despite his admissions and criminal conviction.

At the time of the children's removal, Morsy and Natasha were given specific steps to aid them in reunifying with their children. The specific steps directed Natasha, inter alia, to take part in parenting and individual counseling toward the goal of her being able to protect her children. As to Morsy, the specific steps directed him to take part in parenting and individual counseling toward the goals of controlling his anger, recognizing how that anger impacts his ability to care for his children and learning how to protect the children and keep them safe. The respondents chose therapists and participated in the recommended counseling, but, nevertheless, each one continued to deny that Morsy had caused Mariam's injuries.

[7] Morsy initially was charged was assault in the first degree in violation of General Statutes § 53a-59, reckless endangerment in the first degree in violation of General Statutes § 53a-63 and risk of injury to a child in violation of General Statutes § 53-21. On August 27, 2015, he pleaded guilty pursuant to the *Alford* doctrine; see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (allowing defendant to enter guilty plea without admitting guilt based on acknowledgement that state has strong evidence to support conviction); to two counts of reckless endangerment in the second degree in violation of General Statutes § 53a-64 and two counts of interfering with an officer in violation of General Statutes § 53a-167a. He was later sentenced, with a maximum release date of June 4, 2018.

In regard to Natasha, the trial court described her progress toward the therapeutic goals as "negligible." Specifically, she "clung to all other possible explanations for [the injuries], including medical explanations, stating that unless she saw someone injuring her child, she could not know what happened. She expended considerable emotional effort to protect her own feelings for Morsy at the expense of the safety of her children." Although Natasha knew that she had not caused the injuries herself, and that Morsy was the only other adult in the couple's condominium when the injuries had occurred, her stated position, according to her counselor, was that she " 'wasn't going to accuse anybody because she didn't see anybody do it and that was pretty much her stance [for] the entire time' the counselor worked with her." Natasha took a similar position during a court-ordered psychological evaluation. At the time of the first trial, despite having heard all of the evidence, she refused to believe that Morsy played any role in causing the injuries.

Natasha divorced Morsy in June, 2014, in an effort to have her children returned to her. Nevertheless, the court found, "she had made absolutely no progress toward complying with the specific step of learning how to keep her children safe. She repeatedly, throughout the time of Morsy's incarceration, made daily telephone calls to him and professed her love for him."[8] During her court-ordered psychological evaluation, she misled the evaluator about her feelings toward Morsy and her intention to separate from him. According to the court, Natasha "pa[id] lip service to the concept of keeping her children safe," but she "has never accepted

[8] In evidence were telephone logs and computer disks memorializing more than 700 telephone conversations between Morsy and Natasha during his period of incarceration, which, at the time of trial, he was yet to complete. During those telephone conversations, the two professed their love for each other and their desire to reunite the family upon his release from prison.

the need to truly separate herself from Morsy to be able to protect [them] from future harm."

Morsy similarly participated in various types of counseling, both prior to and during his incarceration. During that counseling, however, he was unable to acknowledge his role in Mariam's injuries. He was not willing to admit responsibility for the injuries during the first termination trial, at his criminal sentencing or at a subsequent parole hearing.

On October 14, 2016, the department, in support of the amended termination petitions, alleged the following facts as establishing, in relation to Egypt, the respondents' acts of commission or omission pursuant to § 17a-112 (j) (3) (C): that Mariam had suffered multiple fractures and bruising throughout her body, which were diagnostic for nonaccidental inflicted injuries, while in the exclusive care of the respondents; that the respondents, to date, had not adequately explained and/or acknowledged responsibility for inflicting the injuries or for failing to protect Mariam; that the respondents were unwilling to separate from each other; that Natasha could not provide the care, or a plan of care, to ensure Egypt's safety and well-being; that Morsy admittedly lacked the necessary parenting skills to provide Egypt with safe discipline and structure, or to safely provide for Egypt's emotional needs; that Egypt required continual care by a competent adult who could safely provide structure, discipline and boundaries while also providing a nurturing, trusting and stable environment, and who is capable of placing Egypt's safety above his or her own needs; and that, as a result of the respondents' actions, it has been necessary to remove Egypt from an unsafe, disrupted home environment.

A six day trial was held on the petitions in October and November, 2016. The court heard the following

testimony: the physician's assistant, who first saw Mariam for her injuries on September 1, 2013, described those injuries, the respondents' lack of an adequate explanation for them and the results of the further testing that was ordered; a medical doctor qualified as an expert in child abuse pediatrics, who had consulted with the medical team that had treated Mariam, stated that the infant's fractures were diagnostic for inflicted injuries not caused by normal handling, described the types of blows, bending or forceful manipulation that could have produced the fractures and opined that the injuries were inflicted within the twenty-four hour period preceding the family's arrival at the hospital; two department social workers, who were assigned to the case, described the decisions to invoke a ninety-six hour hold, then to seek temporary custody of the children and eventually to pursue termination of parental rights, given the respondents' incomplete and inconsistent explanations for Mariam's injuries and their failure truly to acknowledge any responsibility for them; two police officers, who had investigated Mariam's injuries and questioned Morsy and Natasha, described Morsy's shifting stories and ultimate admissions, Natasha's lack of an explanation for the injuries and her unusual demeanor and loyalty to her husband; and Natasha's therapist, who confirmed that Natasha, although previously claiming to have separated from Morsy, had rekindled her relationship with him and had never truly acknowledged that Morsy was responsible for Mariam's injuries.

The trial court also heard testimony from two psychologists, Barbara Berkowitz, Ph.D., a clinical psychologist who had performed the court-ordered psychological evaluation of Natasha,[9] and David Mantell, Ph.D,

[9] Berkowitz also evaluated the children and their maternal grandmother, with whom Natasha resided at the time, but did not evaluate Morsy. Morsy, for unexplained reasons, had refused to participate in the evaluation sessions.

a forensic psychologist, who testified as an expert witness for the petitioner. When asked to opine on whether reunification of the children with the respondents was appropriate in light of the respondents' failure to acknowledge the cause of Mariam's injuries, which had occurred while she was in their exclusive care, and Natasha's continuing commitment to Morsy, Berkowitz testified that "if [Morsy] is continuing to maintain his innocence despite his conviction and incarceration . . . and [if] there is no explanation about the injuries, it would be, not just imprudent, but unconscionable to reunify the children . . . [with] the two people that are the [only] two possible perpetrators." Berkowitz added that, without acknowledging and admitting the cause of the injuries, treatment of someone like Natasha would be difficult in that "the treating professional has both hands tied behind his or her back . . . ." As to the situation when the partner of an abuser is in denial about what occurred, Berkowitz noted that it is "not a good situation [and is] not safe for the children."

Berkowitz proceeded to agree that keeping children away from their biological parents could have adverse effects, and that, all else being equal, the first choice is always to keep families together. When the children's safety is a concern, however, the need to ensure it, unfortunately, can make removal, and the resulting harm, necessary. "[T]here's always consequences," she opined, "but [you] have to look at what's overall in the best interests of the children." When children are not raised by their biological parents, Berkowitz explained, "there are always clinical issues," such as separation and loss issues, self-esteem issues and relationship issues, but "[t]o return a child to an unchanged situation . . . is to return a child to a situation where the same kinds of awful things might happen again."

Mantell agreed with Berkowitz that acknowledging the cause of the injuries inflicted upon a child was a

necessary starting point for any effective treatment that would prevent that harm from reoccurring. According to Mantell, generalized acknowledgments of possible involvement were insufficient for purposes of developing an abuse specific treatment plan. Mantell testified further that, to keep children safe and to prevent reoccurrence of injuries, preventive and defensive actions are necessary, and understanding how the abuse occurred is a necessary predicate to such actions.

Mantell, like Berkowitz, testified that a child's biological home generally is assumed to be the preferred child rearing location.[10] Accordingly, he opined, a child's removal from that home entails harm to his or her well-being. Specifically, a child who is removed at birth is deprived of the opportunity to experience the special conditions that exist with his or her biological parents, and a child who is removed after birth will experience a trauma, causing a psychological wound, when the bonds that child has formed with the parents are broken. Mantell agreed that, when a child's biological home is unsafe, there is a need to balance the harms of removal against ensuring the child's basic safety and that if, over time, the reasons for removal are not addressed and corrected, continuing removal is justified. He confirmed, however, that in "many" cases in which children suffer inflicted injuries in their biological homes, they ultimately are returned to the caretakers who inflicted the injuries.

[10] Mantell explained his reasoning: "The assumptions are that there's a biological kinship that will promote mutual identification between the adult and the child, that with that biological identification comes as accompaniments emotional [and] psychological identifications that provide a child with a sense of identity and security, that children under those circumstances, it is assumed, are more likely to be valued, nurtured, protected and [will] develop more normally." In Mantell's view, a child who remains in his or her biological home is "likely to have a better life than [one] who grow[s] up in other circumstances."

Morsy and Natasha testified in opposition to the petitions. They each discussed a car accident that Morsy had experienced a week before Mariam was injured, in which he had suffered a concussion and after which he was prescribed pain medications. Morsy admitted that his initial explanations for Mariam's injuries were untrue and that he previously had difficulties believing that he caused the injuries, but testified that, now that he had heard all of the trial evidence, he believed that he was responsible. When shown a copy of the police report memorializing his statement that, on the night before the family arrived at the hospital, he had held Mariam forcefully by the areas of her body that were injured, he recalled grabbing her as described but could not remember applying force or causing the injuries. Morsy attributed his current realization that he had caused the injuries to hearing the testimony of the pediatrician who had consulted with Mariam's medical team and that of Mantell, which "really opened [his] eyes."

Natasha testified that, although for the prior three years she had been unsure about what had happened to Mariam, she now acknowledged that Morsy had inflicted the child's injuries. She too attributed her realization to having heard the testimony of the consulting pediatrician, although she acknowledged that previously she had seen that pediatrician's 2013 report and, further, that the potential medical causes for the injuries had been excluded much earlier. See footnote 6 of this opinion. Natasha agreed with the petitioner's counsel that the "worst thing" for her two daughters has been being separated from her, and that, due to the separation, the girls have been deprived of her parental guidance and have suffered harm to their emotional well-being.

In a memorandum of decision dated January 6, 2017, the trial court rendered judgments terminating the respondents' parental rights as to both Egypt and

Mariam. The court extensively discussed Natasha's inability, throughout the history of the case, to accept Morsy's role in Mariam's injuries, noting that, even at the conclusion of the retrial when she testified, her "confused beliefs were still palpably evident in her conduct and demeanor . . . ." The court described that Morsy "reluctantly" admitted responsibility for the injuries on the last day of the retrial and that this admission was unacceptably general and still evinced an unwillingness to face the details of what had occurred. Additionally, the court observed, neither of the respondents, at present, seemed to comprehend why removing Egypt from the home was necessary to protect her, instead "cling[ing] to the fact that Egypt was uninjured as a way to protect themselves from the awareness of the truth of Mariam's significant injuries and their failure to provide safety for both children."

The trial court found that Natasha had taken no action to inform herself about Mariam's injuries, that she could not confront the truth and that she had made "absolutely no progress" toward the goal of learning how to keep her children safe. It found further that Natasha's failure to acknowledge what had occurred meant that she could not be safely reunited with her children. The court found that Morsy similarly could not comply with the specific steps that he had been given. As the court explained, "[b]oth parents in their own individual ways demonstrate a remarkable capacity for self-deception. Even as each admitted [that] he or she now was ready to acknowledge Morsy as the source of the injuries to Mariam, each stated that awareness in very similar detached words. Such observable . . . lack of candor keeps them, the court concludes, from putting the needs of their children first, admitting their faults and thereby permitting the possibility of careful reunification with their children.

"This is the fatal flaw that has prevented reunification throughout these lengthy proceedings. It is at the heart of [the respondents'] inability and unwillingness to benefit from the services offered to them. It means that their children, even now, could not reasonably and safely be returned to them."

Thereafter, the trial court found, by clear and convincing evidence, that the department had made reasonable efforts to reunify both respondents with their children through counseling, visitation, education and other services, but also that the respondents were unable or unwilling to benefit from those efforts. The court further noted the earlier June 1, 2015 finding that reunification efforts were not required, and that that finding had remained unchallenged. Regarding the statutory ground for the termination of the respondents' parental rights as to Egypt, the court found, by clear and convincing evidence, that § 17a-112 (j) (3) (C) had been proven, in particular, through the respondents' omissions. Specifically, both parents, because of their denials and failures to acknowledge or admit the cause of the injuries to Mariam, had made no progress toward developing a plan to keep Egypt safe. In light of their omissions, according to the court, neither parent was able to provide Egypt "the care, guidance or control necessary for [her] physical, educational, moral or emotional well-being" as contemplated by § 17a-112 (j) (3) (C).[11] (Internal quotation marks omitted.) Finally, the court made the findings mandated by § 17a-112 (k) and found further that termination of the respondents'

[11] As to Mariam, the court found § 17a-112 (j) (3) (C) satisfied in that there was clear and convincing evidence that she had suffered nonaccidental, serious physical injuries while in the care of the respondents, which were not explained or acknowledged by them until the last day of trial, and that the respondents had failed to show that Mariam could be returned safely to their care. Neither of the respondents has challenged these findings on appeal.

parental rights was in the best interests of both children. This appeal followed.

The respondents claim that the trial court improperly terminated their parental rights, as to Egypt, pursuant to § 17a-112 (j) (3) (C) because there was no evidence that acts of parental commission or omission caused Egypt to suffer any type of harm prior to the department removing her from the respondents' home. Specifically, they claim, the statute's language is retrospective and contemplates harm that already has occurred to the child that is the subject of the petition, and not merely to that child's sibling, a situation that is addressed by a different statutory ground for termination not alleged in the amended petition.[12] The respondents contend that there was no indication that their home was anything other than a loving, caring and stable environment prior to Mariam being injured and both children then being removed. Accordingly, they claim, the trial court's conclusion that § 17a-112 (j) (3) (C) was satisfied, as to Egypt, improperly was predicated on a finding of prospective, predictive harm to that child. We are not persuaded. Rather, under the unusual procedural circumstances of this case, we conclude that the court properly found § 17a-112 (j) (3) (C) proven as to Egypt on the basis of the respondents' postremoval acts of parental omission, specifically, their failures to acknowledge and address the cause of Mariam's injuries, which thereby required Egypt to suffer the trauma attendant to prolonged separation from her biological

[12] See General Statutes § 17a-112 (j) (3) (F) (permitting termination of parental rights when parent deliberately has killed, or caused serious bodily injury to, another child of the parent). Although the petitioner alleged this ground for the termination of Morsy's parental rights as to Egypt in the first trial, the trial court found it unproven. See *In re Egypt E.*, supra, 2015 WL 4005340, *17–18. Thereafter, in the retrial, the petitioner withdrew the allegations as to § 17a-112 (j) (3) (F) and proceeded on § 17a-112 (j) (3) (C) alone.

parents' home[13] and deprived her of the care, guidance or control of her biological parents, as well as stability and permanency, for an extended three year period. Although those harmful acts of parental omission postdated the removal of Egypt from the respondents' household, they nevertheless predated the adjudicatory date established by the amended termination petition. Accordingly, the court properly considered them and concluded that they fell within the purview of § 17a-112 (j) (3) (C).[14]

We begin with the applicable standard of review and general governing principles. Although the trial court's

[13] On appeal, the respondents have not challenged the finding of neglect as to Egypt, which resulted in the department being granted custody of the child for the duration of these proceedings. Accordingly, we need not determine whether the initial separation of Egypt from the respondents beyond the preliminary ninety-six hour hold period was proper. We emphasize, however, that the *initial* removal of Egypt from the respondents' home does not form the basis of our conclusion that the respondents' acts of omission harmed Egypt's physical or emotional well-being.

[14] Natasha claims additionally that the trial court improperly terminated her parental rights, as to both children, because there was insufficient evidence that reasonable efforts were made to reunify her with the children and that she was unable or unwilling to benefit from those efforts. See General Statutes § 17a-112 (j) (1). This claim necessarily fails because, as the amended petitions and the court's memorandum of decision make clear, a permanency plan of termination and adoption, rather than reunification, previously had been approved by the court, thereby making reasonable efforts to reunify unnecessary. See footnote 4 of this opinion; see also General Statutes § 17a-111b (a) (2). Because the finding that reasonable efforts were unnecessary remains unchallenged, any claim that such efforts were insufficient or that Natasha could not benefit from those efforts is moot. See *In re Egypt E.*, supra, 322 Conn. 243; see also *In re Jorden R.*, 293 Conn. 539, 557, 979 A.2d 469 (2009).

Both respondents further argue that, in the event this court reverses the judgment of termination of parental rights as to Egypt on the basis of the claims made herein, we also should reverse the judgment as to Mariam and remand the case for a redetermination of whether termination of their parental rights remains in Mariam's best interests. In the respondents' view, such relief is warranted because of the strong sibling bond between the two children, which the trial court recognized. Because, as we explain herein, we disagree that the trial court improperly terminated the respondents' parental rights as to Egypt, we need not consider their claim that a

subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. Id., 587. On review, we must determine "whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) Id., 588. To the extent we are required to construe the terms of § 17a-112 (j) (3) (C) or its applicability to the facts of this case, however, our review is plenary. *In re Elvin G.*, 310 Conn. 485, 499, 78 A.3d 797 (2013).

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Citation omitted; internal quotation marks omitted.) Id., 500. Subdivision (3) of § 17a-112 (j) "carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the

reversal of the judgment as to her also should require a reversal of the judgment as to Mariam.

termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 500–501.

The present case concerns § 17a-112 (j) (3) (C), which provides that a ground for termination of parental rights is established when a trial court finds, by clear and convincing evidence, that "the child [at issue] has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ."

To begin, we agree with the respondents that the focus of the statute clearly is retrospective, contemplating termination of rights for harmful acts of parental commission or omission that already have occurred.[15] This is apparent from the plain and unambiguous language of the provision, which requires the petitioner to show that, as a result of the parental acts of commission or omission, the "care, guidance or control" necessary for the child's well-being "*has been denied*." (Emphasis added.) General Statutes § 17a-112 (j) (3) (c); see also *In re Kelly S.*, 29 Conn. App. 600, 614, 616 A.2d 1161 (1992) (General Statutes [Rev. to 1991] § 45a-

[15] In fact, the petitioner does not contest that the statute requires actual, rather than speculative or predictive harm, but argues that actual harm to Egypt was proven. As explained hereinafter, we agree with the petitioner.

717 [f] [2], pertaining to termination proceeding before Probate Court when "the child has been denied" care necessary for emotional well-being, does not apply in cases of speculative harm). This is consistent, for the most part, with the other statutory grounds for removal. Specifically, unlike our statutes governing the temporary removal of a child from a parent's custody, which allow for such removal upon a showing that there is a *risk* of harm; see General Statutes § 17a-101g (e); General Statutes § 46b-129 (b); the statute governing termination of parental rights, a most drastic and permanent remedy, generally requires a showing, by clear and convincing evidence, that some type of physical or psychological harm to the child already has occurred.[16] See General Statutes § 17a-112 (j) (3) (A) through (G).

Aside from its retrospective focus, the language of § 17a-112 (j) (3) (C) and the decisions interpreting it make clear that the types of parental behaviors and resultant harms that the statute is intended to reach are many and varied. By virtue of the language, "act or acts of parental commission or omission," both positively harmful actions of a parent and a parent's more passive failures to take action to prevent harm from occurring are encompassed by § 17a-112 (j) (3) (C). The contemplated harmful acts include, but explicitly are not limited to, "sexual molestation or exploitation, severe physical abuse or a pattern of abuse," and the resultant harm to a child's well-being may be "physical, educational, moral or emotional . . . ." General Stat-

[16] We agree with the respondents that there is no evidence that, in October, 2013, when the petitioner initially sought to terminate their parental rights, Egypt, as opposed to Mariam, had suffered any harm to her physical, educational, moral or emotional well-being as a result of the respondents' acts of parental commission or omission. Had we reviewed this claim in the appeal from the first termination trial, therefore, in which the operative petitions, and hence the adjudicatory dates, were contemporaneous with the removal of the children, the result, as to Egypt, likely would not have been affirmed.

utes § 17a-112 (j) (3) (C). In sum, § 17a-112 (j) (3) (C) clearly was drafted in a manner such as would give it a broad and flexible range.

The Appellate Court decisions[17] applying § 17a-112 (j) (3) (C), or the correspondent statute for proceedings in the Probate Court, and concluding that an act of parental commission or omission had been proven demonstrate the statute's wide applicability. Recognized acts of parental commission or omission under the statute[18] have included physically assaulting a child, resulting in severe injury; *In re Clark K.*, 70 Conn. App. 665, 676, 799 A.2d 1099, cert. denied, 261 Conn. 925, 806 A.2d 1059 (2002); *In re Cheyenne A.*, 59 Conn. App. 151, 159, 756 A.2d 303, cert. denied, 254 Conn. 940, 761 A.2d 759 (2000); sexually abusing a child; *In re Carissa K.*, 55 Conn. App. 768, 781, 783, 740 A.2d 896 (1999); attempting to suffocate a child, although the child, fortunately, was not severely injured; *In re Quidanny L.*, 159 Conn. App. 363, 365–66, 369, 122 A.3d 1281, cert. denied, 319 Conn. 906, 122 A.3d 639 (2015); exposing a child to a parent's erratic, violent and mentally ill behaviors; *In re Nicolina T.*, 9 Conn. App. 598, 602–603, 607, 520 A.2d 639, cert. denied, 203 Conn. 804, 525 A.2d 519 (1987); threatening and yelling obscenities at a child; *In re Christine F.*, 6 Conn. App. 360, 362, 505 A.2d 734, cert. denied, 199 Conn. 808, 809, 508 A.2d 769,

[17] This court has not had much occasion to interpret § 17a-112 (j) (3) (C) or the corresponding Probate Court statutes. In one case, we held, as a matter statutory construction, that the legislature did not intend for the statute to apply to parental acts of commission or omission predating a child's birth. See *In re Valerie D.*, 223 Conn. 492, 512–13, 613 A.2d 748 (1992). In another, we held that a parent's life-threatening attacks on her children, caused by a psychotic episode, provided overwhelming evidence of acts of parental commission or omission adversely affecting the children's physical, emotional and psychological well-being. See *In re Theresa S.*, 196 Conn. 18, 26–27, 491 A.2d 355 (1985).

[18] We note that, although some of the listed behaviors, standing alone, satisfied § 17a-112 (j) (3) (C), most were considered to do so in combination with other parental acts or omissions.

770 (1986); severely neglecting a child's developmental and nutritional needs; *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 185–86, 193, 485 A.2d 1362 (1985); physically and emotionally abusing siblings or killing the child's other parent; *In re Sean H.*, 24 Conn. App. 135, 145, 586 A.2d 1171, cert. denied, 218 Conn. 904, 588 A.2d 1078 (1991); abusing a sibling in a child's presence or earshot and ordering the child to participate in such abuse; *In re Payton V.*, 158 Conn. App. 154, 162, 118 A.3d 166, cert. denied, 317 Conn. 924, 118 A.3d 549 (2015); *In re Nelmarie O.*, 97 Conn. App. 624, 629, 905 A.2d 706 (2006); refusing to believe a child's reports of sexual abuse and blaming the child for her foster care placement; *In re Lauren R.*, 49 Conn. App. 763, 772–73, 715 A.2d 822 (1998); and engaging in repeated criminal behavior resulting in prolonged incarceration, with little effort to engage in visitation with a child. *In re Brian T.*, 134 Conn. App. 1, 18, 38 A.3d 114 (2012). Pertinently, the statute frequently has been applied to parents who have failed to protect their children from abuse inflicted by third parties and failed to acknowledge that such abuse has occurred. See *In re Jorden R.*, 107 Conn. App. 12, 19, 944 A.2d 402 (2008), rev'd in part and vacated in part on other grounds, 293 Conn. 539, 979 A.2d 469 (2009); *In re Sheena I.*, 63 Conn. App. 713, 723, 778 A.2d 997 (2001); *In re Antonio M.*, 56 Conn. App. 534, 542–43, 744 A.2d 915 (2000); *In re Tabitha T.*, 51 Conn. App. 595, 603, 722 A.2d 1232 (1999); *In re Anna B.*, 50 Conn. App. 298, 307, 717 A.2d 289 (1998); *In re Lauren R.*, supra, 772–73; *In re Felicia D.*, 35 Conn. App. 490, 502, 646 A.2d 862, cert. denied, 231 Conn. 931, 649 A.2d 253 (1994); *In re Mark C.*, 28 Conn. App. 247, 254–55, 610 A.2d 181, cert. denied, 223 Conn. 922, 614 A.2d 823 (1992); *In re Christine F.*, supra, 362. In all of the foregoing cases, the children at issue suffered physical, emotional and/or psychological harm as a result of their parents' various acts of commission or omission.

In light of the foregoing, we conclude that the respondents' omissions in this case, namely, their continuing failures, over the course of three years, truly to acknowledge the cause of Mariam's injuries and to take the therapeutic steps that would prevent a similar tragedy from occurring in the future, clearly fell within the purview of § 17a-112 (j) (3) (C).[19] As we explained, the statute encompasses a broad range of parental behaviors, particularly, those that constitute a failure to protect a child by, among other things, acknowledging the existence of a dangerous situation. Moreover, contrary to the respondents' assertions, there was sufficient evidence presented to establish that these omissions were harmful to Egypt who, although physically uninjured, nevertheless suffered the emotional and psychological trauma attendant to a sudden removal from her biological parents' home, followed by years of foster placement during which she lacked the care, guidance or control of her biological parents and the stability and permanence necessary for a young child's healthy development.[20] Accordingly, we will not disturb the trial

[19] As to the respondents' claim that such acts properly are characterized as a failure to rehabilitate; see General Statutes § 17a-112 (j) (3) (B); we do not disagree but observe, nevertheless, that our jurisprudence is replete with cases in which particular parental behaviors have been held to satisfy more than one statutory ground for termination. See, e.g., *In re Kezia M.*, 33 Conn. App. 12, 16, 632 A.2d 1122, cert. denied, 228 Conn. 915, 636 A.2d 847 (1993).

[20] We note in this regard that the harm caused to Egypt, upon which we rely to find that § 17a-112 (j) (3) (C) was satisfied, is not merely that caused by her removal from the home, as such would render this statutory ground for termination proven in most any child protection case. Rather, it is the harm caused by the respondents' continuing, longstanding refusal to acknowledge any responsibility for the circumstances necessitating that removal and their prolonged failure to make any progress toward remedying those circumstances.

As earlier noted, Mantell testified that in "many" cases in which children suffer inflicted injuries in their biological homes they ultimately are returned to the caretakers who inflicted the injuries. A department social worker testified similarly, but additionally provided that in those situations there is acknowledgement and remedying of the situation that led to the assault. Cf. *In re Anna B.*, supra, 50 Conn. App. 301–302 (department declined to

court's conclusion that the statutory ground for termination had been proven. [21]

The respondents argue that the testimony of Berkowitz and Mantell, who spoke of the negative effects that children suffer when they are deprived of the care and guidance of their biological parents, was insufficient to establish that Egypt had been psychologically harmed during the three years she was not in their custody. According to the respondents, the two experts spoke only in generalities and not in regard to Egypt specifically. We disagree because, "in [a] termination proceeding, [p]sychological testimony from professionals is rightly accorded great weight"; (internal quotation marks omitted) *In re Elijah C.*, 326 Conn. 480, 501, 165

return children who were sexually assaulted to their home, although it had been wiling to consider such return, because mother failed to remove perpetrator as requested). In short, the prolonged separation of Egypt from the respondents was not inevitable, but, rather, was a result of the respondents' continuing omissions as described herein.

[21] The court's memorandum of decision, in finding § 17a-112 (j) (3) (C) proven, does not contain explicit findings as to the harm suffered by Egypt as a result of the respondents' acts of parental omission, but, rather, consistent with the statutory language, is more focused on those acts of omission themselves. Earlier in the proceedings, at the conclusion of the petitioner's case, the respondents had filed a joint motion for a directed judgment, requesting that the court dismiss the petition for the termination of their parental rights as to Egypt. They contended that a termination of rights premised on § 17a-112 (j) (3) (C) required, as a matter of law, that some type of harm already had befallen the child who was the subject of the petition and, here, there was no evidence that Egypt had suffered any such harm. In opposing the motion, the petitioner argued that moral or emotional harm could suffice and cited, inter alia, the testimony of Berkowitz and Mantell.

On November 7, 2016, the trial court, ruling from the bench, summarily denied the respondents' motion, "find[ing] that there [was] adequate evidence in the record . . . to find that the [petitioner] has made out a prima facie case for . . . [the] claims." The respondents did not request further clarification of the ruling, nor did they seek an articulation. Accordingly, we have reviewed the entire record to determine whether the ruling had a proper evidentiary basis. Notably, the evidence that we discuss herein was not contested by the respondents, and it was, to some degree, supplied by Natasha herself.

A.3d 1149 (2017); see also *In re Shane M.*, supra, 318 Conn. 590 (same); and the respondents have provided no reason for us to conclude that Egypt would be exempt from experiencing the traumas that, as the psychological experts explained, generally befall children in Egypt's circumstances. Again, Berkowitz testified that "[t]here's *always* consequences" when children are removed from their parents' custody, and "there are *always* clinical issues" when children are not raised by their biological parents. (Emphasis added.) Mantell explained that removing a child from her biological home entails harm to her well-being, and that, when a child who is old enough to have bonded with her parents, as Egypt was, is then removed from her home, the resultant trauma will cause a psychological wound.

Additionally, the record in this case does include evidence that Egypt, in particular, was harmed by the extended period of separation during which she was deprived of her biological parents' care, guidance or control. Specifically, Natasha responded affirmatively that the "worst thing" for her daughters was to be separated from her, and she agreed that, due to that separation, they had been deprived of her parental guidance and suffered harm to their emotional well-being.[22] Moreover, information in the reports memorializing Berkowitz' psychological evaluations of Natasha, the children and the children's maternal grandmother is indicative of Egypt's emotional suffering. Those reports were part

[22] We acknowledge that Natasha provided this testimony to establish that it was not in her daughters' best interests for her parental rights to be terminated. The testimony is also evidence, however, that Natasha was aware that separation was detrimental to her daughters. Nonetheless, she persisted in a course of conduct that prevented reunification by refusing to engage meaningfully in steps to create a safe home environment to which the children could return. Specifically, she failed to acknowledge the role that Morsy played in Mariam's injuries and her own responsibility for ensuring a safe environment for children.

of the evidence before the trial court.[23] In light of the foregoing, we reject the respondents' contention that there was insufficient evidence of harm to Egypt's well-being.

As a final matter, the respondents contend that the trial court, relying on Mariam's serious physical injuries, improperly placed on them the burden of showing that their parental rights, as to Egypt, should not be terminated. Section 17a-112 (j) (3) (C) provides, in its termi-

[23] Natasha and the maternal grandmother saw the children during visitation sessions and spoke to Berkowitz about their impressions. As to the maternal grandmother, Berkowitz' report indicates that she was "worried that Egypt was emotionally suffering by being away from her parents." The grandmother informed Berkowitz that Egypt "was particularly close to her father, [who at the time of the evaluation] she no longer sees at all," that Egypt frequently asked for her father during visitation sessions, and that Egypt was " 'losing her spark' due to the separation from her parents."

Natasha, for her part, expressed to Berkowitz her belief that reunification was in her children's best psychological interests because " 'they love me. I'm their mommy; no one in the world will take care of them as well as I do, or love them as much.' " She stated that her strongest concern, at the time, was the mental well-being of the children. Although Natasha believed that the children, physically, were alright, she "believed she could see 'trauma emotionally with Egypt. She asks for her father at every visit. She is very attached to him.' " Natasha also opined that Egypt was unhappy and needed an outlet, such as art therapy, to express herself.

In reporting on an interaction session between the children and Natasha that she had observed, Berkowitz indicated that Egypt seemed more distressed than Mariam and noted parenthetically that "Egypt was used to being raised by her mother, and is developmentally old enough to experience more distress from the separation." Berkowitz noted further that Egypt was asking for her father, whom she called " 'Baba,' " during the interaction session, "seeming to reflect the close father-daughter bond [that Natasha and her mother] had reported."

Egypt's total separation from her father was due, at some point, to Morsy's incarceration, but ultimately it was his failure to take responsibility for causing Mariam's injuries that limited the efficacy of the services available to him while incarcerated, influenced the denial of his parole, and thereby prevented reunification with Egypt. See *In re Katia M.*, 124 Conn. App. 650, 666, 670, 6 A.3d 86, cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010) (although incarceration alone may not form basis for termination of parental rights and it limits services that department can provide incarcerated parent, it does not excuse parent's failure to use resources offered).

nal clause, that serious physical injury to a child shall constitute "prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights," effectively rendering additional proof of such parental acts or omissions unnecessary. The Appellate Court has described this statutory language as "shift[ing] the burden from the petitioner to the [respondent] to show why a child with clear evidence of physical injury that is unexplained should not be permanently removed from [the respondent's] care." *In re Sean H.*, supra, 24 Conn. App. 144. The trial court here quoted the Appellate Court in the portion of its opinion finding that § 17a-112 (j) (3) (C) was proven as to Mariam, who clearly had suffered serious physical injuries. Thereafter, in the separate section of its opinion analyzing whether § 17a-112 (j) (3) (C) had been proven as to Egypt, who suffered no such injuries, the court briefly referred again to a burden shift.

After examining the broader context of the trial court's reference, we disagree with the respondents that the court considered Mariam's physical injuries to constitute prima facie evidence of the respondents' acts of parental commission or omission as to Egypt. Moreover, we conclude that the court held the petitioner to the requisite standard of proof. Specifically, in the immediately preceding paragraphs of the opinion, the court first quoted § 17a-112 (j) (3) (C), but placed emphasis on portions of the statute other than its terminal clause. It then discussed the respondents' behaviors solely in the period of time subsequent to Mariam's injuries and concluded that it was "their failure to act, their omissions, which for each of them establishes *by clear and convincing evidence* this specific ground for termination of parental rights. [Particularly] [i]n Natasha's case, it is her failure to come to terms with what has happened to her youngest daughter and her former husband's culpability [for] those injuries. For Morsy, it

is his failure to even now admit fully what he did." (Emphasis added.) Because the court's decision, considered as a whole, discloses no improper allocation of the burden of proof or reliance on Mariam's injuries to find that § 17a-112 (j) (3) (C) was proven as to Egypt, we conclude that there is no merit to the respondents' claim.

The judgments are affirmed.

In this opinion PALMER, EVELEIGH, ROBINSON and ESPINOSA, Js., concurred.

McDONALD, J., dissenting. The majority concludes that the trial court properly found that the petitioner, the Commissioner of Children and Families, had proven by clear and convincing evidence that Egypt E. had been denied, by reason of the acts of parental commission or omission by the respondents, Morsy E. and Natasha E., the care, guidance, or control necessary for her well-being, as required by General Statutes § 17a-112 (j) (3) (C), on the basis of the respondents' conduct after Egypt was removed from their custody by the Department of Children and Families. Specifically, the majority cites the respondents' failure "to acknowledge and address the cause of [their minor child] Mariam's injuries, which thereby required Egypt to suffer the trauma attendant to prolonged separation from her biological parents' home and deprived her of the care, guidance or control of her biological parents, as well as stability and permanency, for an extended three year period." (Footnote omitted.) Although I have no doubt that the petitioner properly could have relied on the evidence cited by the majority in support of a statutory ground for termination of the respondents' parental rights, that ground is not § 17a-112 (j) (3) (C), the only ground alleged in the operative petition. Indeed, I surmise that the petitioner was aware of this dilemma when she unsuccessfully

sought to amend the petition to allege, as an additional ground, the respondents' failure to rehabilitate under § 17a-112 (j) (3) (B), following our decision reversing and remanding this case in the first appeal. See *In re Egypt E.*, 322 Conn. 231, 140 A.3d 210 (2016); see generally *In re Gabriella A.*, 319 Conn. 775, 800, 127 A.3d 948 (2015) (termination proper when respondent mother's inability to acknowledge impact that her past trauma had on her parenting ability prevented her rehabilitation).

Certainly, in many cases, the petitioner may establish multiple grounds for termination of a respondent's parental rights. See, e.g., *In re Brian T.*, 134 Conn. App. 1, 3, 38 A.3d 114 (2012) (failure to rehabilitate and denial of care, guidance or control); *In re Kezia M.*, 33 Conn. App. 12, 19, 21–22, 632 A.2d 1122 (abandonment and lack of parent-child relationship), cert. denied, 228 Conn. 915, 636 A.2d 847 (1993). And, to be clear, the petitioner is not required to present a *completely independent* factual basis for each ground alleged. The legislature, however, created the separate statutory grounds for termination to address different conduct. The majority's analysis effectively collapses those grounds and renders the legislature's attempt to differentiate conduct meaningless. A parent's failure to rehabilitate while his or her child is in the department's custody necessarily extends the period of separation. Because such separation invariably is harmful to the child, under the majority's analytical framework, the two grounds are established by virtue of the same conduct.

A parental act of commission or omission, however, is one that causes harm to the child's well-being independent of the child's removal and continuing separation from the respondent parent. Compare *In re Shane M.*, 318 Conn. 569, 589, 122 A.3d 1247 (2015) (sufficient personal rehabilitation requires respondent to correct factors that led to initial commitment, including

acknowledgment of underlying personal issues that form basis for department's involvement), and *In re Kelly S.*, 29 Conn. App. 600, 613–14, 616 A.2d 1161 (1992) (petitioner should have alleged failure to rehabilitate and not parental act of commission or omission when child was removed from parent at birth and, although parent's denial of her serious mental health issues prevented her from benefiting from treatment or providing parental care necessary for her high-risk infant with special needs, there was no proof of specific conduct that caused serious injury to child), with *In re Felicia D.*, 35 Conn. App. 490, 502, 646 A.2d 862 (parental act of commission or omission established when child suffered serious head injuries from third party while in mother's care, mother failed to take action to protect child and violated terms of protective supervision, and mother failed to acknowledge that likely perpetrator of injuries to child was her husband), cert. denied, 231 Conn. 931, 649 A.2d 253 (1994), and *In re Sean H.*, 24 Conn. App. 135, 144–45, 586 A.2d 1171 (parental act of commission or omission established when father stabbed mother to death in full view of children, leaving children homeless, with no caregiver, and permanent emotional injury), cert. denied, 218 Conn. 904, 588 A.2d 1078 (1991). Indeed, the placement of a child in a competent foster home while the child was in the petitioner's custody is evidence that the child is being provided the care, guidance, or control necessary for his or her well-being. See, e.g., *In re Kezia M.*, supra, 33 Conn. App. 19–20; *In re Kelly S.*, supra, 613–16. The majority cannot point to any direct act or omission by the respondents that is specific to Egypt, but, rather, point only to the respondents' failure to accept responsibility for their respective roles in causing harm to Mariam. It is only by focusing on the *consequence* of that failure, namely, the respondents' continued separation from Egypt, that allows the majority to avoid the fatal flaw of terminating

the respondents' parental rights with respect to Egypt based on predictive harm.

The issue of whether the trial court properly denied the petitioner's request to amend the petition to add the ground of failure to rehabilitate is not before this court. This court should not hammer a square peg into a round hole to work around the fact that the petitioner was only able to proceed on the basis of § 17a-112 (j) (3) (C). See, e.g., *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 671–73, 420 A.2d 875 (1979) (requiring strict compliance with statutory criteria for termination of parental rights). To do so would not only permit the petitioner to prevail on an unalleged ground for termination, but would also relieve her of the obligation to prove all of the elements of that ground, namely, that the respondents had been provided with specific court-ordered steps necessary to achieve rehabilitation and that they had failed to attain a sufficient degree of personal rehabilitation as would reasonably encourage a belief that at some future date they could assume a responsible position in Egypt's life. See, e.g., *In re Shane M.*, supra, 318 Conn. 591. In addition, it collapses the distinctions between the two independent statutory grounds and frustrates the policy objectives that undergird the legislative scheme. I recognize that reversing the judgment in the present case would further delay establishing the stability that is undoubtedly in Egypt's best interest. However regrettable that outcome would be in this case, it is outweighed by the concern that it sets a bad precedent to effectively permit the petitioner to prevail on a ground neither alleged in the petition nor supported by the requisite proof. I am not persuaded that the facts in the present case are so unique that our courts will not be required to apply this precedent in future cases. Accordingly, I respectfully dissent.

EMILY BYRNE *v.* AVERY CENTER FOR OBSTETRICS AND GYNECOLOGY, P.C.
(SC 19873)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson and D'Auria, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant health care provider for, inter alia, negligence and negligent infliction of emotional distress in connection with the defendant's allegedly improper release of certain confidential medical records in responding to a subpoena issued in the course of a separate paternity action filed against the plaintiff. The defendant filed a motion for summary judgment arguing, inter alia, that it was entitled to judgment on the plaintiff's negligence claims because Connecticut's common law did not recognize a cause of action against health care providers for breach of the duty of confidentiality in the course of responding to a subpoena. The trial concluded that this state had not yet recognized a common-law privilege for communications between physicians and their patients, and, accordingly, granted summary judgment in favor of the defendant on the plaintiff's negligence claims. On the plaintiff's appeal, *held* that, in light of applicable principles of public policy, case law from other jurisdictions, relevant provisions of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq., and the statute (§ 52-146o) recognizing an evidentiary privilege arising from the physician-patient relationship, a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law, and that, because there was a genuine issue of material fact as to whether the defendant violated that duty of confidentiality by the manner in which it disclosed the plaintiff's medical records in response to the subpoena, the trial court improperly granted summary judgment for the defendant on the plaintiff's negligence claims; moreover, the defendant could not prevail on its claim that summary judgment should nevertheless be granted in this case because the plaintiff's medical records were disclosed in response to a subpoena and § 52-146o does not require a patient's consent for such a disclosure, as the mere existence of a subpoena does not preclude recovery for breach of confidentiality, the fact that a disclosure is in response to a subpoena does not necessarily ensure compliance with § 52-146o, and the defendant apparently complied neither with the

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

face of the subpoena nor with the federal regulation (45 C.F.R. § 164.512 [e]) governing responses to such subpoenas.

(*One justice concurring separately*)

Argued May 1, 2017—officially released January 16, 2018

Procedural History

Action to recover damages for breach of contract, negligence, negligent misrepresentation and negligent infliction of emotional distress, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold, J.*, granted the defendant's motion for summary judgment on the counts alleging negligence and negligent infliction of emotional distress; subsequently, the court granted the plaintiff's motion for an immediate appeal, and the plaintiff appealed. *Reversed*; *further proceedings*.

Bruce L. Elstein, for the appellant (plaintiff).

James F. Biondo, for the appellee (defendant).

Opinion

EVELEIGH, J. The plaintiff, Emily Byrne,[1] appeals from the judgment of the trial court rendered in favor of the defendant, Avery Center for Obstetrics and Gynecology, P.C., on two counts of the operative complaint alleging, respectively, negligence and negligent infliction of emotional distress.[2] On appeal, the plaintiff

[1] We note that Byrne filed a petition for bankruptcy and that Douglas J. Wolinsky, the trustee subsequently appointed by United States Bankruptcy Court for the District of Vermont, was added as a plaintiff in the present case. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 436 n.2, 102 A.3d 32 (2014). For the sake of convenience, we refer to Byrne as the plaintiff in this opinion.

[2] We note that the trial court's partial award of summary judgment in the present case would not ordinarily constitute a final judgment for the purpose of appeal. *Kelly* v. *New Haven*, 275 Conn. 580, 594, 881 A.2d 978 (2005). The plaintiff has, however, obtained permission to appeal from the trial court's decision to the Appellate Court pursuant to Practice Book § 61-4. This appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

asserts that the trial court incorrectly granted summary judgment in favor of the defendant on these counts because it incorrectly concluded that the defendant, as a health care provider, owed the plaintiff no common-law duty of confidentiality. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

This case returns to us for a second time. The facts and procedural history are set forth in this court's prior decision. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 436–44, 102 A.3d 32 (2014). "Before July 12, 2005, the defendant provided the plaintiff [with] gynecological and obstetrical care and treatment. The defendant provided its patients, including the plaintiff, with notice of its privacy policy regarding protected health information and agreed, based on this policy and on law, that it would not disclose the plaintiff's health information without her authorization.

"In May, 2004, the plaintiff began a personal relationship with Andro Mendoza, which lasted until September, 2004.[3] . . . In October, 2004, she instructed the defendant not to release her medical records to Mendoza. In March, 2005, she moved from Connecticut to Vermont where she presently lives. On May 31, 2005, Mendoza filed paternity actions against the plaintiff in Connecticut and Vermont." (Footnote in original; internal quotation marks omitted.) Id., 437. Thereafter, the defendant received a subpoena instructing the custodian of its records to appear before the issuing attorney on July 8, 2005, at the New Haven Regional Children's Probate Court and to produce "all medical records" pertaining to the plaintiff. "The defendant did not alert the plaintiff of the subpoena, file a motion to quash it

[3] "We note that the operative complaint in the present case alleges that the plaintiff discovered she was pregnant around the same time she terminated her relationship with Mendoza." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.4.

or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. In September, 2005, [Mendoza] informed [the] plaintiff by telephone that he reviewed [the] plaintiff's medical [record] in the court file. On September 15, 2005, the plaintiff filed a motion to seal her medical file, which was granted. The plaintiff alleges that she suffered harassment and extortion threats from Mendoza since he viewed her medical records.[4] . . .

"The plaintiff subsequently brought this action against the defendant. Specifically, the operative complaint in the present case alleges that the defendant: (1) breached its contract with her when it violated its privacy policy by disclosing her protected health information without authorization; (2) acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o[5] and

[4] "We also note that, according to the operative complaint, Mendoza has utilized the information contained within these records to file numerous civil actions, including paternity and visitation actions, against the plaintiff, her attorney, her father and her father's employer, and to threaten her with criminal charges." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.5.

[5] General Statutes § 52-146o provides: "(a) Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure.

"(b) Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or

the [federal] regulations implementing [the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq.], (3) made a negligent misrepresentation, upon which the plaintiff relied to her detriment, that her medical file and the privacy of her health information would be protected in accordance with the law; and (4) engaged in conduct constituting negligent infliction of emotional distress. After discovery, the parties filed cross motions for summary judgment." (Footnotes altered; internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437–39.

"With respect to the plaintiff's negligence based claims in counts two and four of the complaint, the trial court agreed with the defendant's contention that 'HIPAA preempts "any action dealing with confidentiality/privacy of medical information,' " which prompted the court to treat the summary judgment motion as one seeking dismissal for lack of subject matter jurisdiction. In its memorandum of decision, the trial court first considered the plaintiff's negligence claims founded on the violations of the regulations implementing HIPAA. The court first observed the 'well settled' proposition that HIPAA does not create a private right of action, requiring claims of violations instead to be raised through . . . administrative channels. The trial court then relied on *Fisher* v. *Yale University*, Superior

such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected."

We note that the legislature made certain technical changes to § 52-146o subsequent to the events underlying the present appeal. See, e.g., Public Acts 2013, No. 13-208, § 63. For the sake of simplicity, all references to § 52-146o within this opinion are to the current revision of the statute.

Court, judicial district of New Haven, Complex Litigation Docket, Docket No. X10-CV-04-4003207-S (April 3, 2006), and *Meade* v. *Orthopedic Associates of Windham County*, Superior Court, judicial district of Windham, Docket No. CV-06-4005043-S (December 27, 2007), and rejected the plaintiff's claim that she had not utilized HIPAA as the basis of her cause of action, but rather, relied on it as ' "evidence of the appropriate standard of care" for claims brought under state law, namely, negligence.' Emphasizing that the courts cannot supply a private right of action that the legislature intentionally had omitted, the trial court noted that the 'plaintiff has labeled her claims as negligence claims, but this does not change their essential nature. They are HIPAA claims.' The trial court further determined that the plaintiff's statutory negligence claims founded on a violation of § 52-146o were similarly preempted because the state statute had been superseded by HIPAA, and thus the plaintiff's state statutory claim 'amount[ed] to a claim for a HIPAA violation, a claim for which there is no private right of action.'

"The trial court concluded similarly with respect to the plaintiff's common-law negligence claims, observing that, under the regulatory definitions implementing HIPAA's preemption provision[6] . . . to 'the extent that

[6] Title 45 of the Code of Federal Regulations (2016), § 160.202, implement's HIPPA's preemption provision, 42 U.S.C. § 1320d-7, and provides: "For purposes of this subpart, the following terms have the following meanings:

"*Contrary*, when used to compare a provision of [s]tate law to a standard, requirement, or implementation specification adopted under this subchapter, means:

"(1) A covered entity or business associate would find it impossible to comply with both the [s]tate and [f]ederal requirements; or

"(2) The provision of [s]tate law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191, or sections 13400-13424 of Public Law 111-5, as applicable.

"*More stringent* means, in the context of a comparison of a provision of [s]tate law and a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter, a [s]tate law that meets one or more of the following criteria:

common-law negligence permits a private right of action for claims that amount to HIPAA violations, it is a contrary provision of law and subject to HIPAA's preemption rule. Because it is not more stringent, according to the definition of 45 C.F.R. § 160.202, the preemption exception does not apply.' For the same reasons, the trial court dismissed count four of the complaint, claiming negligent infliction of emotional distress.

"(1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:

"(i) Required by the Secretary in connection with determining whether a covered entity or business associate is in compliance with this subchapter; or

"(ii) To the individual who is the subject of the individually identifiable health information.

"(2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable.

"(3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.

"(4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

"(5) With respect to recordkeeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.

"(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

"*Relates to the privacy of individually identifiable health information* means, with respect to a [s]tate law, that the [s]tate law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.

"*State law* means a constitution, statute, regulation, rule, common law, or other [s]tate action having the force and effect of law." (Emphasis in original.)

"With respect to the remainder of the pending motions, the trial court first denied, on the basis of its previous preemption determinations, the plaintiff's motion for summary judgment, which had claimed that the defendant's conduct in responding to the subpoena violated the HIPAA regulations, specifically 45 C.F.R. § 164.512 (e), as a matter of law. The trial court denied, however, the defendant's motion for summary judgment with respect to the remaining counts of the complaint, namely, count one alleging breach of contract and count three alleging negligent misrepresentation, determining that genuine issues of material fact existed with respect to contract formation through the defendant's privacy policy, and whether the plaintiff had received and relied upon that policy. Thus, the trial court denied the defendant's motion for summary judgment as to counts one and three of the complaint, and dismissed counts two and four of the complaint for lack of subject matter jurisdiction." (Citations omitted; footnotes added and omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 439–44.

Thereafter, pursuant to Practice Book § 61-4, the plaintiff obtained permission to file an appeal from the judgment of the trial court dismissing counts two and four of the complaint to the Appellate Court. The appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal to this court, the plaintiff asserted that the trial court improperly concluded that her state law claims for negligence and negligent infliction of emotional distress were preempted by HIPAA. Id., 436. In examining the plaintiff's claim, this court explained: "We note at the outset that whether Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality, including in the context of responding to a subpoena, is not an issue

presented in this appeal. Thus, assuming, without deciding, that Connecticut's common law recognizes a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas, we agree with the plaintiff and conclude that such an action is not preempted by HIPAA and, further, that the HIPAA regulations may well inform the applicable standard of care in certain circumstances." (Footnote omitted.) Id., 446–47.

This court concluded that, "to the extent that Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA does not preempt the plaintiff's state common-law causes of action for negligence or negligent infliction of emotional distress against the health care providers in this case and, further, that regulations of the Department of Health and Human Services (department) implementing HIPAA may inform the applicable standard of care in certain circumstances." Id., 436. Accordingly, this court reversed the judgment of the trial court and remanded the case to that court for further proceedings. Id., 463.

On remand, the defendant filed a motion for summary judgment on the counts of the operative complaint alleging negligence and negligent infliction of emotional distress. As grounds for its motion, the defendant claimed that no Connecticut court had ever recognized a common-law cause of action against a health care provider for breach of its duty of confidentiality for its response to a subpoena. The trial court granted the defendant's motion for summary judgment, determining that "no courts in Connecticut, to date, recognized or adopted a common-law privilege for communications between a patient and physicians. Any recognition of this cause of action is best addressed to our Supreme and Appellate Courts or the legislature. Accordingly the motion for summary judgment is granted as to counts two and

four of the plaintiff's operative complaint." This appeal followed. See footnote 2 of this opinion.

We begin with general principles and the standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016); see also *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 255, 125 A.3d 172 (2015).

In the present appeal, the plaintiff asserts that the trial court incorrectly granted summary judgment in favor of the defendant on the counts of the operative complaint alleging negligence and negligent infliction of emotional distress. Specifically, the plaintiff asserts that Connecticut's common law recognizes a duty of confidentiality arising from the physician-patient relationship and that this duty extends to compliance with a subpoena. The plaintiff further asserts that recognition of such a duty is supported by public policy considerations, as reflected in § 52-146o and HIPAA, and case law from other jurisdictions. In response, the defendant asserts that there is no common-law duty of confidentiality between a health care provider and a patient in the context of responding to a subpoena. The defendant further asserts that such a duty is not supported by public policy considerations or recognized in other

jurisdictions. We conclude that recognizing a cause of action for the breach of the duty of confidentiality in the physician-patient relationship by the disclosure of medical information is not barred by § 52-146o or HIPAA and that public policy, as viewed in a majority of other jurisdictions that have addressed the issue, supports that recognition.

The dispositive issue in this appeal is whether a patient has a civil remedy against a physician if that physician, without the patient's consent, discloses confidential information obtained in the course of the physician-patient relationship. Although we have not had the opportunity to address this question before, this court has recognized that "[t]he principle of confidentiality lies at the heart of the physician-patient relationship . . . ." *Jarmie* v. *Troncale*, 306 Conn. 578, 607, 50 A.3d 802 (2012). "Physician-patient confidentiality is described as a 'privilege.' . . . When that confidentiality is diminished to any degree, it necessarily affects the ability of the parties to communicate, which in turn affects the ability of the physician to render proper medical care and advice." Id., 608–609. "[T]he purpose of the privilege is to give the patient an incentive to make full disclosure to a physician in order to obtain effective treatment free from the embarrassment and invasion of privacy which could result from a doctor's testimony." *State* v. *White*, 169 Conn. 223, 234–35, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975), citing C. McCormick, Evidence (2d Ed. 1972) § 98, p. 213. Additionally, the Appellate Court has recognized the fiduciary nature of the physician-patient relationship, which is based on trust and confidence that develops as medical service is provided. *Rosenfield* v. *Rogin, Nassau, Caplan, Lassman & Hirtle, LLC*, 69 Conn. App. 151, 163, 795 A.2d 572 (2002) ("There is a marked resemblance between the continuous treatment of a patient's condition by a physician

and the continuous representation of a client by an attorney. . . . In both situations, the relationship between the parties is demarcated by the fiduciary relationship of trust and confidence, which continues to develop as the service is provided." [Citations omitted.]).

The importance of confidentiality in the physician-patient relationship has been recognized by courts in numerous jurisdictions throughout the country. Courts have repeatedly used the common law to recognize "a patient's valid interest in preserving the confidentiality of medical facts relayed to a physician." *Bratt* v. *International Business Machines Corp.*, 392 Mass. 508, 522, 467 N.E.2d 126 (1984). "A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled." *Hague* v. *Williams*, 37 N.J. 328, 336, 181 A.2d 345 (1962). "The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health." Id., 335–36. "Notwithstanding the concern that application of the patient-physician privilege may bar the admissibility of probative testimony, there is a clear recognition that, in general, a physician does have a professional obligation to maintain the confidentiality of his patient's communications. . . . This obligation to preserve confidentiality is recognized as part of the Hippocratic Oath." (Citation omitted.) *Stempler* v. *Speidell*, 100 N.J. 368, 375, 495 A.2d 857 (1985).

Indeed, this court has explained that "[t]he principle of confidentiality lies at the heart of the physician-patient relationship and has been recognized by our

legislature. [Section] 52-146o was enacted in 1990; see Public Acts 1990, No. 90-177; to address the need 'to protect the confidentiality of communications in order to foster the free exchange of information from patient to physician . . . .' " *Jarmie* v. *Troncale*, supra, 306 Conn. 607–608, quoting *Edelstein* v. *Dept. of Public Health & Addiction Services*, 240 Conn. 658, 666, 692 A.2d 803 (1997).

Section 52-146o (a) provides: "Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure."

Subsection (b) of § 52-146o further provides as follows: "Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider

in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected."

At the outset, we recognize that, although § 52-146o creates an evidentiary privilege arising from the physician-patient relationship, it does not explicitly provide a cause of action or any other remedy for improper disclosure of the confidential communications obtained in the course of that relationship. Contrary to HIPAA, which "expressly provides a method for enforcing its prohibition upon use or disclosure of [an] individual's health information—the punitive imposition of fines and imprisonment for violations"; (internal quotation marks omitted) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 452; § 52-146o does not provide for any penalty for its violation.[7]

[7] We also note that nothing in the legislative history surrounding the enactment of § 52-146o demonstrates that recognition of a cause of action for breach of the physician-patient duty of confidentiality would thwart the purpose of the act. Section 52-146o was enacted in 1990. See Public Acts 1990, No. 90-177 (P.A. 90-177). The statutory language, in its original form, is substantially similar to the current version of § 52-146o. In describing the bill, Senator Richard Blumenthal explained: "This bill would provide protection against disclosure by a health care provider of records and other communications between the patient and physician or other health care provider without the consent of the individual who is being treated. This kind of protection ordinarily exists at present, but in rare circumstances, where the health care provider is approached by an insurance adjuster or a lawyer, on occasion, the records are provided without the consent of the patients. This bill would prevent that kind of disclosure and would codify what now is and should be the existing practice." 33 S. Proc., Pt. 8, 1990 Sess., p. 2620. Representative Janet Polinsky likewise explained that "the bill is designed to insure that patient/doctor confidentiality is maintained and only disclosed pursuant to particular rules when there is a court case going on and not one person [comes] in and [gets] it." 33 H.R. Proc., Pt. 14, 1990 Sess., p. 4860. During a committee hearing on the underlying bill, Attorney Carl Secola remarked that "I think that a very basic tenet of any patient, physician relationship is that there has to be that trust between the patient and the physician so that the patient feels comfortable talking to the

"An exhaustive search of Connecticut case law reveals no hard and fast test that courts apply when determining whether to recognize new causes of action. We do have the inherent authority, pursuant to the state constitution, to create new causes of action. . . . Moreover, it is beyond dispute that we have the power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law." (Citation omitted.) *ATC Partnership* v. *Coats North America Consolidated, Inc.*, 284 Conn. 537, 552–53, 935 A.2d 115 (2007). "When we acknowledge new causes of action, we also look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action. . . . To determine whether existing remedies are sufficient to compensate those who seek the recognition of a new cause of action, we first analyze the scope and applicability of the current remedies under the facts alleged by the plaintiff. . . . Finally, we are mindful of growing judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent." (Citations omitted.) Id., 553.

We begin by examining the currently available judicial sanctions. In *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 433, this court

physician, telling them whatever's bothering them. It enables the physician to treat the patient properly and I don't think a patient should have to worry about possible consequences later on down the line that someone is going to obtain completely immaterial, irrelevant and most importantly, personal and confidential information that has absolutely nothing to do with that action." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1990 Sess., p. 1163. We conclude, therefore, that the legislative history of P.A. 90-177 manifests the legislature's intention that the confidentiality of medical records be maintained and protected by a requirement that the health care provider be required to follow a specific procedure prior to disclosing the records. See 33 H.R. Proc., supra, p. 4861, remarks of Representative Edward C. Krawiecki (explaining that "[t]his sets parameters on how you get information").

undertook a thorough analysis of the criminal and civil sanctions provided by HIPAA. "It is by now well settled that the statutory structure of HIPAA . . . precludes implication of a private right of action. [Section] 1320d-6 [of title 42 of the United States Code] expressly provides a method for enforcing its prohibition upon use or disclosure of individual's health information—the punitive imposition of fines and imprisonment for violations." (Footnote omitted; internal quotation marks omitted.) Id., 451–52. In that case, we further explained that "one commenter during the rulemaking process had raised the issue of whether a private right of action is a greater penalty, since the proposed federal rule has no comparable remedy." Id., 453. "[HIPAA] provides for only two types of penalties: fines and imprisonment. Both types of penalties could be imposed in addition to the same type of penalty imposed by a state law, and should not interfere with the imposition of other types of penalties that may be available under state law. Thus, we think it is unlikely that there would be a conflict between state and federal law in this respect . . . ." Id., 453 n.19, quoting Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,582 (December 28, 2000).

As explained previously in this opinion, when acknowledging new causes of action, "we are mindful of growing judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent." *ATC Partnership* v. *Coats North America Consolidated, Inc.*, supra, 284 Conn. 553. Therefore, we next turn to federal law and law from other jurisdictions regarding the duty of health care providers to maintain the confidentiality of medical records.

Federal law regarding the privacy of medical information is codified in HIPAA. As we explained in *Byrne*,

"[r]ecognizing the importance of protecting the privacy of health information in the midst of the rapid evolution of health information systems, Congress passed HIPAA in August 1996. . . . Within the Administrative Simplification section, Congress included another provision . . . outlining a two-step process to address the need to afford certain protections to the privacy of health information maintained under HIPAA. First, [Congress] directed [the department] to submit . . . within twelve months of HIPAA's enactment detailed recommendations on standards with respect to the privacy of individually identifiable health information. . . . Second, if Congress did not enact further legislation pursuant to these recommendations within thirty-six months of the enactment of HIPAA, [the department] was to promulgate final regulations containing such standards. . . . Because Congress ultimately failed to pass any additional legislation, the department's final regulations implementing HIPAA, known collectively as the Privacy Rule, were promulgated in February 2001, with compliance phased in over the next few years." (Citations omitted; internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 448–49; see also *South Carolina Medical Assn.* v. *Thompson*, 327 F.3d 346, 348 (4th Cir.), cert. denied, 540 U.S. 981, 124 S. Ct. 464, 157 L. Ed. 2d 371 (2003).

In *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 458–59, this court "conclude[d] that, if Connecticut's common law recognizes claims arising from a health care provider's alleged breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA and its implementing regulations do not preempt such claims. We further conclude that, to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering ser-

vices to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena." Therefore, this court has previously concluded that recognition of a private cause of action for breach of the duty of confidentiality of medical records is not preempted by, or inconsistent with, HIPAA.

Indeed, this court further explained that "[t]he availability of such private rights of action in state courts, to the extent that they exist as a matter of state law, do not preclude, conflict with, or complicate health care providers' compliance with HIPAA. On the contrary, negligence claims in state courts support at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record." (Internal quotation marks omitted.) Id., 459; see also *Yath* v. *Fairview Clinics, N.P.*, 767 N.W.2d 34, 49–50 (Minn. App. 2009) (concluding that state statutory cause of action for improper disclosure of medical records was not preempted by HIPAA because, "[a]lthough the penalties under the two laws differ, compliance with [the Minnesota statute] does not exclude compliance with HIPAA," and "[r]ather than creating an 'obstacle' to HIPAA, [the Minnesota statute] supports at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record"). Therefore, we conclude that the federal law regarding privacy and confidentiality of medical records supports our recognition of a common-law cause of action for breach of the duty of confidentiality of medical records by a health care provider.

Although the question of whether to recognize a common-law cause of action for breach of the duty of confidentiality of medical records by a health care provider is one of first impression in this court, many other

jurisdictions have addressed this question.[8] A review of case law from other jurisdictions that have addressed this issue demonstrates that a majority of jurisdictions have recognized a common-law cause of action for breach of the confidentiality of medical records by health care providers. "Although the common law did not bestow a privilege on the doctor-patient relationship and no cause of action existed for divulgence of any confidences, the clear modern consensus of the case law has imposed a legal duty of confidentiality or a fiduciary duty under the common law's continuing power and competence to answer novel questions of law arising under ever changing conditions of the society." (Footnotes omitted; internal quotation marks omitted.) D. Elder, Privacy Torts (2017) § 5:2; see also annot., 48 A.L.R. 4th 668, § 2 (a) (1986) ("Although at common law neither the patient nor the physician has the privilege that a communication of one to the other not be disclosed to a third party, courts have generally upheld or recognized the right of a patient to recover damages from a physician for unauthorized disclosure concerning the patient on the ground that such disclosure constitutes an actionable invasion of the patient's privacy . . . . Another basis of a physician's liability for unauthorized disclosure of confidential information about a patient is breach of the physician-patient confidential relationship. Although a few jurisdictions have refused to recognize this cause of action . . . it gener-

[8] In *Skrzypiec* v. *Noonan*, 228 Conn. 1, 9, 633 A.2d 716 (1993), this court affirmed the judgment of the trial court in favor of the defendant on a firefighter's claim for negligence and violation of General Statutes (Rev. to 1993) §§ 52-146d and 52-146e against his psychiatrist for improper release of confidential medical information regarding psychiatric treatment. In *Skrzypiec*, this court affirmed the judgment of the trial court on the ground that the jury could have found that the plaintiff suffered no harm as a result of the alleged breach. Id., 11. Therefore, it assumed but did not decide whether the psychiatrist owed the plaintiff a duty to honor his request for confidentiality in the context of a request for disclosure under the Workers' Compensation Act, General Statutes (Rev. to 1987) § 31-294. Id., 9 n.6.

ally has been held or recognized that a patient may have such a cause of action against the physician . . . .'' [Footnotes omitted.]).

A review of cases from other jurisdictions reveals that courts have recognized causes of action for breach of confidentiality of medical records by health care providers on a variety of bases. The most common basis for recognizing such a cause of action is that health care providers enjoy a special fiduciary relationship with their patients and that recognition of the privilege is necessary to ensure that this bond remains.

For instance, the Court of Appeals of New York explained that ''in New York, the special relationship akin to a fiduciary bond, which exists between the physician and patient, is reflected in [N.Y. C.P.L.R. 4504 (McKinney 2007)]. The basis of the evidentiary privilege is that patients will be forthcoming and encouraged to provide complete data to assist a medical provider in diagnosis and treatment . . . . An additional motivation for the existence of the privilege is the avoidance of a Hobson's choice for physicians: choosing between honoring their professional obligation with respect to their patients' confidences or their legal duty to testify truthfully. By law and by oath, a physician warrants that any confidential medical information obtained through the relationship will not be released without the patient's permission. The physician-patient relationship thus operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations . . . .'' (Citation omitted.) *Aufrichtig* v. *Lowell*, 85 N.Y.2d 540, 546, 650 N.E.2d 401, 626 N.Y.S.2d 743 (1995).

Similarly, the Massachusetts Supreme Judicial Court addressed whether a patient has a nonstatutory, civil remedy against a physician for the disclosure of confidential medical information without the patient's con-

sent in *Alberts* v. *Devine*, 395 Mass. 59, 479 N.E.2d 113, cert. denied sub nom. *Carroll* v. *Alberts*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985). In that case, the court recognized that "[f]ew cases consider the out-of-court physician-patient privilege. That is undoubtedly due to the fact that the confidentiality of the relationship is a cardinal rule of the medical profession, faithfully adhered to in most instances, and thus has come to be justifiably relied upon by patients seeking advice and treatment. . . . Of the courts that have considered the question, most have held that a patient can recover damages if the physician violates the duty of confidentiality that plays such a vital role in the physician-patient relationship." (Citation omitted; internal quotation marks omitted.) Id., 66.

The Massachusetts Supreme Judicial Court reasoned as follows: "We continue to recognize a patient's valid interest in preserving the confidentiality of medical facts communicated to a physician or discovered by the physician through examination. The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health. . . . To foster the best interest of the patient and to insure a climate most favorable to a complete recovery, men of medicine have urged that patients be totally frank in their discussions with their physicians. To encourage the desired candor, men of law have formulated a strong policy of confidentiality to assure patients that only they themselves may unlock the doctor's silence in regard to those private disclosures. The result which these joint efforts of the two professions have produced . . . has been urged or forecast in una voce by commentators

in the field of medical jurisprudence." (Citation omitted; internal quotation marks omitted.) Id., 65–66.

In considering whether to recognize the new cause of action, the Massachusetts Supreme Judicial Court reasoned as follows: "[T]he [l]egislature has demonstrated its recognition of a policy favoring confidentiality of medical facts by enacting [statutes] to limit the availability of hospital records. Furthermore, [the legislature has also created] an evidentiary privilege as to confidential communications between a psychotherapist and a patient. The fact that no such statutory privilege obtains with respect to physicians generally and their patients . . . does not dissuade us from declaring that in this Commonwealth all physicians owe their patients a duty, for violation of which the law provides a remedy, not to disclose without the patient's consent medical information about the patient, except to meet a serious danger to the patient or to others." (Citation omitted.) Id., 67–68.

In *Alberts*, the defendant asserted that the plaintiff's claims were barred because there was no Massachusetts precedent recognizing a civil remedy against a health care provider for breach of the duty of confidentiality. Id., 68. The Massachusetts Supreme Judicial Court recognized that "[i]t is true, as [the defendant] argues, that no Massachusetts case before this one recognizes such a theory of liability. However, as we said in *George* v. *Jordan Marsh Co.*, [359 Mass. 244, 249, 268 N.E.2d 915 (1971)], a case in which we recognized for the first time the tort of infliction of emotional distress, '[t]hat is true only because the precise question has never been presented to this court for decision. That argument is therefore no more valid than would be an argument by the plaintiff that there is no record of any Massachusetts law denying recovery on such facts. No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial

precedent. It would indeed be unfortunate, and perhaps disastrous, if we were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to answer a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve.' In *Smith* v. *Driscoll*, [94 Wn. 441, 442, 162 P. 572 (1917)], although the court found it unnecessary to determine 'whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications,' the court 'assumed' that 'for so palpable a wrong, the law provides a remedy.' We, too, believe that for so palpable a wrong, the law provides a remedy." *Alberts* v. *Devine*, supra, 395 Mass. 68–69. Accordingly, the Massachusetts Supreme Judicial Court concluded "that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician." Id., 69.

Similarly, the Court of Appeals of South Carolina has also recognized "the [common-law] tort of breach of a physician's duty of confidentiality." *McCormick* v. *England*, 328 S.C. 627, 643, 494 S.E.2d 431 (App. 1997). In *McCormick*, the court explained the fiduciary nature of the physician-patient relationship as follows: "A person who lacks medical training usually must disclose much information to his or her physician which may have a bearing upon diagnosis and treatment. Such disclosures are not totally voluntary; therefore, in order to obtain cooperation, it is expected that the physician will keep such information confidential." Id., 635; see also 61 Am. Jur. 2d 299, Physicians, Surgeons, and Other

Healers § 167 (1981) ("[b]eing a fiduciary relationship, mutual trust and confidence are essential").

The Court of Appeals of South Carolina further reasoned that "[t]he belief that physicians should respect the confidences revealed by their patients in the course of treatment is a concept that has its genesis in the Hippocratic Oath, which states in [relevant] part: 'Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret.' " *McCormick* v. *England*, supra, 328 S.C. 635, quoting Taber's Cyclopedic Medical Dictionary (17th Ed. 1993), p. 902.

Explaining that "[t]he modern trend recognizes that the confidentiality of the physician-patient relationship is an interest worth protecting," the Court of Appeals of South Carolina concluded that "[a] majority of the jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest." *McCormick* v. *England*, supra, 328 S.C. 636.

The Supreme Court of Missouri similarly explained that "[w]e believe a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with . . . treatment of [a] patient. This duty arises out of a fiduciary relationship that exists between the physician and the patient. If such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician. In addition to a physician's legal fiduciary duty, a physician also has a separate ethical duty to maintain the confidentiality of information

received from a patient. While the ethical principles may evidence public policy that courts may consider in framing the specific limits of the legal duty of confidentiality, this legal duty is to be distinguished from the ethical duty. The civil action for damages in tort is the sanction that puts teeth into the physician's duty of confidentiality." (Footnote omitted.) *Brandt* v. *Medical Defense Associates*, 856 S.W.2d 667, 670–71 (Mo. 1993).

The foregoing cases from other jurisdictions reveal that a majority of jurisdictions that have considered the question have recognized a cause of action against a physician for the unauthorized disclosure of confidential medical information obtained in the context of the physician-patient relationship. "In the absence of express legislation, courts have found the basis for a right of action for wrongful disclosure in four main sources: (1) state physician licensing statutes, (2) evidentiary rules and privileged communication statutes which prohibit a physician from testifying in judicial proceedings, (3) [common-law] principles of trust, and (4) the Hippocratic Oath and principles of medical ethics which proscribe the revelation of patient confidences. . . . The jurisdictions that recognize the duty of confidentiality have relied on various theories for the cause of action, including invasion of privacy, breach of implied contract, medical malpractice, and breach of a fiduciary duty or a duty of confidentiality." (Citation omitted; footnote omitted.) *McCormick* v. *England*, supra, 328 S.C. 636–37.

Other jurisdictions that have considered the issue have continued to allow state law causes of action arising from the breach of patient confidentiality by health care providers after the enactment of HIPAA. These cases rely on the premise that "such state-law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance." *R.K.* v. *St. Mary's Medical Center, Inc.*, 229 W. Va. 712,

721, 735 S.E.2d 715 (2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1738, 185 L. Ed. 2d 788 (2013).

In a case with very similar facts to the present case, the Appellate Division of the Superior Court of New Jersey allowed a plaintiff to proceed with a common-law civil action seeking to recover damages against her physician for the disclosure of certain medical records to her husband's attorney in response to a subpoena in the absence of the plaintiff's authorization or a notice to the plaintiff or her attorney. *Crescenzo* v. *Crane*, 350 N.J. Super. 531, 534–35, 796 A.2d 283 (App. Div.), cert. denied, 174 N.J. 364, 807 A.2d 196 (2002). The court rejected the doctor's claim that the subpoena itself was a determination by the court that would authorize disclosure without consent because it commanded him to produce the documents and he was subject to a contempt citation if he did not comply. Id., 540–41. In reaching this conclusion, the court reasoned as follows: "That a physician may find himself in a difficult position when confronted with the imposing language of a subpoena does not warrant a resolution of the problem by simply providing the records without a release or further inquiry, especially when regulatory provisions governing a doctor's conduct recognize and are designed to preserve the confidentiality of a patient's records. We have identified practical alternatives to simply yielding the records—a release, contact with the patient or contact with the attorney—none of which impose[s] a significant or undue burden on the doctor when confidentiality is at stake. We hold that [the] plaintiff may proceed with her cause of action against the doctor." Id., 542.

Although many jurisdictions had recognized an independent tort for the unauthorized disclosure of medical information to a third party prior to the enactment of HIPAA, the trend toward recognition of the cause of action and allowance of such claims has continued after

its enactment in 1996. See *Sorensen* v. *Barbuto*, 143 P.3d 295, 300 (Utah App. 2006) (holding that "ex parte communication between a physician and opposing counsel constitutes a breach of the physician's fiduciary duty of confidentiality" and concluding that "the trial court erred in dismissing [the plaintiff's] claim for breach of confidentiality [and, because] we have determined that a duty exists, the trial court [also] erred in dismissing [the plaintiff's] claim for negligence"); see also, e.g., *Biddle* v. *Warren General Hospital*, 86 Ohio St. 3d 395, 401, 715 N.E.2d 518 (1999) ("[w]e hold that in Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship").

Our research reveals four jurisdictions that have declined to recognize a cause of action for breach of the physician's duty of confidentiality. See annot., 48 A.L.R 4th, supra, § 7, pp. 691–92. ("[i]n a few jurisdictions, the courts have held that liability for a physician's unauthorized disclosure of confidential information about a patient cannot be based upon a breach of the confidential relationship of physician and patient, where the particular jurisdiction follows the common-law rule that neither patient nor physician has a privilege that a communication of one to the other not be disclosed to a third party, and has no statute providing for such a privilege"); see also *Mikel* v. *Abrams*, 541 F. Supp. 591, 599 (W.D. Mo. 1982) (refusing to follow cases from other states and declining to recognize cause of action for breach of confidential or privileged relationship because no Missouri case had recognized cause of action before), aff'd, 716 F.2d 907 (8th Cir. 1983); *Logan* v. *District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (noting that "[o]ther jurisdictions have recognized a cause of action for unauthorized disclosure of information obtained through the physician-

patient relationship" but concluding that plaintiff had failed to persuade court "that such a cause of action should or would be recognized by the courts of this jurisdiction" and that plaintiff's invasion of privacy claim was "sufficient to redress any breach of the confidentiality of the physician-patient relationship"); *Collins* v. *Howard*, 156 F. Supp. 322, 324 (S.D. Ga. 1957) (The court refused to recognize a cause of action for breach of confidentiality, concluding as follows: "There is no confidential relationship between doctor and patient or hospital and patient in Georgia. The [common-law] rule is followed and no statute has been enacted creating the relationship. . . . In the absence of a statute providing for such privilege, none exists." [Citation omitted.]); *Quarles* v. *Sutherland*, 215 Tenn. 651, 655–57, 389 S.W.2d 249 (1965) (declining to recognize cause of action for breach of confidentiality where state had no common-law or statutory privilege for communications between patient and physician). As this court recognized in *Edelstein* v. *Dept. of Public Health & Addiction Services*, supra, 240 Conn. 662, § 52-146o "created a broad physician-patient privilege," and, therefore, the rationale of these jurisdictions that decline to recognize a common-law action for breach of the duty of confidentiality is not persuasive in Connecticut. Accordingly, we agree with the majority of jurisdictions that have considered the issue, and conclude that the nature of the physician-patient relationship warrants recognition of a common-law cause of action for breach of the duty of confidentiality in the context of that relationship.

We conclude that a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort

against the health care provider, unless the disclosure is otherwise allowed by law.

In the present case, the defendant asserts that, even if this court recognizes a cause of action for breach of the duty of confidentiality in the physician-patient relationship, the defendant's motion for summary judgment in the present case should be granted because the plaintiff's medical records were disclosed in response to a subpoena and § 52-146o (b) does not require the patient's consent for such a disclosure. We disagree.

Section 52-146o (b) provides in relevant part that "[c]onsent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court. . . ." The language of § 52-146o (b) demonstrates that the disclosure must comply with statutes and regulations or the rules of court. Although we recognize, as other jurisdictions do, that the common-law duty of confidentiality is not absolute, we cannot conclude that any disclosure of medical records in response to a subpoena complies with § 52-146o (b) because a subpoena, without a court order, is not a statute, regulation of a state agency, or rule of court. See Practice Book § 7-18 ("Hospital, psychiatric and medical records shall not be filed with the clerk unless such records are submitted in a sealed envelope clearly identified with the case caption, the subject's name and the health care provider, institution or facility from which said records were issued. Such records shall be opened only pursuant to court order."); see also Practice Book § 25-55 ("A party who plans to offer a hospital record in evidence shall have the record in the clerk's office twenty-four hours prior to trial. The judge shall order that all such records be available for inspection in the clerk's office to any counsel of record under the supervision of the clerk. . . . Such records shall be submitted

in accordance with the provisions of Section 7-18."). We also cannot conclude that the mere existence of a subpoena, regardless of the method by which a health care provider chooses to comply, precludes a common-law action for breach of confidentiality.[9]

In the present case, the defendant received a subpoena instructing the custodian of its records to appear, together with the plaintiff's medical records, at the New Haven Regional Children's Probate Court on July 8, 2005. The defendant did not alert the plaintiff of the subpoena, file a motion to quash it or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. The plaintiff was later notified by Mendoza that he was able to review her medical record in the court file. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437.

From our review of the record in the present case, it appears that the defendant did not even comply with

[9] The defendant asserts that the Appellate Court's decision in *Alexandru* v. *West Hartford Obstetrics & Gynecology, P.C.*, 78 Conn. App. 521, 524–25, 827 A.2d 776, cert. denied, 266 Conn. 912, 832 A.2d 68 (2003), is applicable to the present case. We disagree. In *Alexandru*, the Appellate Court concluded that the defendant medical provider did not violate § 52-146o when it disclosed the plaintiff's medical records during a deposition by a physician who had been obtained as the plaintiff's medical expert. Id., 522–25. In affirming the judgment of the trial court granting summary judgment to the defendant, the Appellate Court explained that "[t]he plaintiff's medical records were disclosed by her medical expert at a deposition process governed by the rules of federal procedure attended by her counsel and with no objection to either disclosure or the process." Id., 523. Furthermore, the Appellate Court noted that the plaintiff had exercised a valid authorization for her medical records to be released to her attorney and that "[h]aving authorized release of that information to her attorney, she impliedly gave consent to her attorney to utilize the information on her behalf in advancing her claims in the federal action." Id., 525. As we have explained previously herein, there is a genuine issue of material fact regarding whether the disclosure of the plaintiff's medical records in the present case was in compliance with applicable regulations and the rules of court. Accordingly, we find *Alexandru* inapplicable.

the face of the subpoena, which required the custodian of records for the defendant to appear in person before the attorney who issued the subpoena. Instead, the defendant mailed a copy of the plaintiff's medical records directly to the court.

Furthermore, in *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 458–59, this court concluded "that, if Connecticut's common law recognizes claims arising from a health care provider's alleged breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA and its implementing regulations do not preempt such claims. We further conclude that, to the extent it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena."[10]

[10] In support of its claim, the defendant cites to *Givens* v. *Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 407–408 (Tenn. 2002). In *Givens*, the Supreme Court of Tennessee concluded "that an implied covenant of confidentiality can arise from the original contract of treatment for payment [between a physician and a patient]." The court further concluded "it is clear that whatever the terms of this implied covenant of confidentiality may be, a physician cannot withhold such information in the face of a subpoena or other request cloaked with the authority of the court. Undoubtedly, any such contract would be contrary to public policy as expressed in the rules governing [pretrial] discovery and in the relevant medical confidentiality statutes." Id., 408. We agree with the Supreme Court of Tennessee that a physician cannot withhold information lawfully obtained through a subpoena. The plaintiff's complaint in the present case, however, does not raise that issue. Instead, the plaintiff's complaint alleges that the defendant negligently disclosed her medical information in response to a subpoena because it failed to follow HIPAA regulations and our rules of court.

Furthermore, in *Givens*, the plaintiff alleged that the physician violated the duty of confidentiality by disclosing her medical information in response to a technically defective subpoena. Id., 408. The Supreme Court of Tennessee refused to conclude that a physician is under a duty to discover technical defects in a subpoena. Id. We conclude that *Givens* is distinguishable from the present case because, in the present case, the plaintiff does not allege

The regulations promulgated under HIPAA require specific steps prior to making any disclosure of protected health information pursuant to a subpoena. Section 164.512 (e) (1) of title 45 of the Code of Federal Regulations[11] provides in relevant part: "A covered

that the defendant failed to make the proper legal determination regarding the subpoena, but instead, asserts that the defendant failed to follow the procedures health care providers are obligated to follow under HIPAA. Accordingly, we find *Givens* inapposite.

[11] Section 164.512 (e) of title 45 of the Code of Federal Regulations provides: "*Standard: Disclosures for judicial and administrative proceedings*.

"(1) *Permitted disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

"(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

"(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

"(A) The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

"(B) The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e) (1) (v) of this section.

"(iii) For the purposes of paragraph (e) (1) (ii) (A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

"(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

"(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

"(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

"(1) No objections were filed; or

"(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

"(iv) For the purposes of paragraph (e) (1) (ii) (B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health

entity may disclose protected health information in the course of any judicial or administrative proceeding . . . (ii) [i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal. . . .'' The regulation, however, allows for such a disclosure only if the patient has received adequate notice of the request or a qualified protective order has been sought. See 45 C.F.R. § 164.512 (e); see also 45 C.F.R. § 164.512 (e) (1) (iv). The defendant's own admissions establish that it did not comply with this regulation when it responded to the subpoena in the present case.

We conclude that a duty of confidentiality arises from the physician-patient relationship and that unautho-

information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

''(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

''(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

''(v) For purposes of paragraph (e) (1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e) (1) (ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

''(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

''(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

''(vi) Notwithstanding paragraph (e) (1) (ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e) (1) (ii) of this section without receiving satisfactory assurance under paragraph (e) (1) (ii) (A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e) (1) (iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e) (1) (v) of this section.

''(2) *Other uses and disclosures under this section.* The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.''

rized disclosure of confidential information obtained in the course of that relationship gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law. In the present case, there is a genuine issue of material fact as to whether the defendant violated the duty of confidentiality by the manner in which it disclosed the plaintiff's medical records in response to the subpoena. Accordingly, we conclude that the trial court incorrectly granted summary judgment in favor of the defendant in the present case.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

ROBINSON, J., concurring. I agree with the court's well-reasoned conclusion that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law." I write separately only to emphasize my continuing reticence to recognize new causes of action under Connecticut's common law insofar as it "is not the duty of this court to make law. That is a task properly left to the legislature. To do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of [state] government." (Internal quotation marks omitted.) *Campos* v. *Coleman*, 319 Conn. 36, 64, 123 A.3d 854 (2015) (*Zarella*, *J.*, dissenting) (disagreeing with majority's decision to adopt common-law cause of action for minor child's loss of parental consortium). Our decision to recognize a new cause of action in the present case is wholly

consistent with my view, eloquently stated by Justice Zarella, that, although "this court has the authority to change the common law to conform to the times . . . [i]n a society of ever increasing interdependence and complexity, however, it is an authority this court should exercise only sparingly." Id., 65; accord *Sepega* v. *DeLaura*, 326 Conn. 788, 843, 167 A.3d 916 (2017) (*Robinson*, *J.*, concurring) ("Legislative action, as in some of our sister states, would be ideal for making the appropriate findings and articulating the contours of Connecticut's firefighter's rule. . . . Nevertheless, until such time as our legislature can act, I would adopt a formulation of the firefighter's rule as a matter of common law that encourages citizens to seek help in emergencies, while not slamming the courthouse door to appropriate claims of our first responders." [Citation omitted.]); *Sepega* v. *DeLaura*, supra, 835 n.15 (*Robinson*, *J.*, concurring) ("the legislature is the appropriate forum for any reexamination of the legislative facts underlying our common-law decisionmaking").

In viewing our decision in the present case to be an appropriate exercise of our common-law authority to recognize new causes of action, I emphasize in particular that it complements both the limited federal administrative remedies provided by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq., as well as our state legislature's recognition of the importance of confidentiality in a physician-patient relationship through the 1990 adoption of General Statutes § 52-146o, subsection (a) of which furnishes an evidentiary physician-patient privilege in civil, administrative, legislative, and probate proceedings, with limited exceptions provided by subsection (b) of the statute. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 458–59, 102 A.3d 32 (2014). Moreover, although this case presents a legal issue of first impression, providing a common-law remedy for the breach of the physician's

duty of confidentiality does not disturb the settled expectations of physicians or patients given the long-standing ethical and legal bases for that duty.[1] Cf. *Campos* v. *Coleman*, supra, 319 Conn. 76–77 (*Zarella*, *J.*, dissenting) (stating that majority's decision to overrule *Mendillo* v. *Board of Education*, 246 Conn. 456, 717 A.2d 1177 [1998], which had declined to recognize derivative cause of action for loss of parental consortium by minor children, raised numerous policy and political questions "that [turn] on a number of socioeconomic factors, and it should therefore be left to the legislature"). Put differently, I believe that the expectations of our citizens would be more unsettled had we, in essence, declared the doors of our courthouses closed to patients whose health care providers improperly breached their confidences. Accordingly, I conclude that we properly exercise our common-law authority to recognize a cause of action in the present case, and I agree with the majority's determination that a genuine issue of material fact exists, requiring that we remand the case to the trial court for further proceedings on this point.

Accordingly, I concur in the judgment of the court.

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[1] As the majority aptly points out, and in contrast to the divided case law that confronted us in *Campos* v. *Coleman*, supra, 319 Conn. 73–76 (*Zarella*, *J.*, dissenting), I also emphasize the extremely broad support for recognition of a cause of action in the case law of our sister states. See, e.g., *Horne* v. *Patton*, 291 Ala. 701, 708–709, 287 So. 2d 824 (1973); *Alberts* v. *Devine*, 395 Mass. 59, 69, 479 N.E.2d 113, cert. denied sub nom. *Carroll* v. *Alberts*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985); *McCormick* v. *England*, 328 S.C. 627, 644, 494 S.E.2d 431 (App. 1997); *Fairfax Hospital* v. *Curtis*, 254 Va. 437, 442, 492 S.E.2d 642 (1997); but see *Quarles* v. *Sutherland*, 215 Tenn. 651, 657, 389 S.W.2d 249 (1965).

ORDERS

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REDDING LIFE CARE, LLC *v.* TOWN OF REDDING

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 193 (AC 37928), is granted, limited to the following issues:

"1. Does Connecticut recognize a qualified expert testimonial privilege in pretrial discovery (and at trial) permitting an unretained expert to withhold testimony

regarding an opinion that the expert has previously rendered and documented in a written report?

"2. If Connecticut recognizes this privilege, what is its scope?

"3. Does the Supreme Court have jurisdiction to grant certification to appeal from the Appellate Court's final determination of a writ of error?"

McDONALD, MULLINS and KAHN, Js., did not participate in the consideration of or decision on this petition.

Elliott B. Pollack and *Michael J. Marafito*, in support of the petition.

Proloy K. Das, *Robert E. Kaelin* and *Joseph B. Schwartz*, in opposition.

Decided January 3, 2018

STATE OF CONNECTICUT *v.* DANOVAN T.

The defendant's petition for certification to appeal from the Appellate Court, 176 Conn. App. 637 (AC 38727), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Richard Emanuel, in support of the petition.

Matthew A. Weiner, assistant state's attorney, in opposition.

Decided January 3, 2018

A BETTER WAY WHOLESALE AUTOS, INC.
v. KIARA RODRIGUEZ ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 176 Conn. App. 392 (AC 38839), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Kenneth A. Votre, in support of the petition.

Daniel S. Blinn and *Brendan L. Mahoney*, in opposition.

Proloy K. Das and *Melissa A. Federico*, in opposition.

Decided January 3, 2018

JEFFREY F. GOSTYLA *v.* BRYAN CHAMBERS

The plaintiff's petition for certification to appeal from the Appellate Court, 176 Conn. App. 506 (AC 38943), is denied.

Martin McQuillan, in support of the petition.

John W. Mills, in opposition.

Decided January 3, 2018

ALISSA FRIEDMAN *v.* EDWARD DOOVEN ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 176 Conn. App. 901 (AC 38948), is denied.

Anthony J. Musto, in support of the petition.

Decided January 3, 2018

MARVIN WILSON *v.* COMMISSIONER OF CORRECTION

The petitioner Marvin Wilson's petition for certification to appeal from the Appellate Court, 176 Conn. App. 901 (AC 39277), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided January 3, 2018

CLAUDIA PUFF *v.* GREGORY PUFF

The plaintiff's petition for certification to appeal from the Appellate Court, 177 Conn. App. 103 (AC 37640), is denied.

Samuel V. Schoonmaker IV, in support of the petition.

Decided January 3, 2018

CLAUDIA PUFF *v.* GREGORY PUFF

The defendant's petition for certification to appeal from the Appellate Court, 177 Conn. App. 103 (AC 37640), is granted, limited to the following issue:

"Did the Appellate Court properly reverse the trial court's judgment of contempt?"

Edward M. Kweskin, in support of the petition.

Samuel V. Schoonmaker IV, in opposition.

Decided January 3, 2018

ROGER EMERICK *v.* TOWN OF GLASTONBURY

The plaintiff's petition for certification to appeal from the Appellate Court, 177 Conn. App. 701 (AC 38646), is denied.

ROBINSON and MULLINS, Js., did not participate in the consideration of or decision on this petition.

Roger Emerick, self-represented, in support of the petition.

Kristan M. Maccini, in opposition.

Decided January 3, 2018

21ST CENTURY NORTH AMERICA INSURANCE COMPANY *v.* GLENDA PEREZ ET AL.

The petition by the defendant Gregory C. Norsiegian, administrator of the estate of Leoner Negron, for certification to appeal from the Appellate Court, 177 Conn. App. 802 (AC 39060), is denied.

John-Henry M. Steele, in support of the petition.

Yelena Akim, in opposition.

Decided January 3, 2018

STATE OF CONNECTICUT *v.* JULIO TORRES

The defendant's petition for certification to appeal from the Appellate Court, 178 Conn. App. 29 (AC 38571), is denied.

MULLINS, J., did not participate in the consideration of or the decision on this petition.

James B. Streeto, senior assistant public defender, in support of the petition.

Bruce R. Lockwood, senior assistant state's attorney, in opposition.

Decided January 3, 2018

STEPHEN J. R. *v.* COMMISSIONER OF CORRECTION

The petitioner Stephen J. R.'s petition for certification to appeal from the Appellate Court, 178 Conn. App. 1 (AC 39251), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Robert L. O'Brien, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided January 3, 2018

STEVEN LAMONT WILLIAMS *v.* COMMISSIONER OF CORRECTION

The petitioner Steven Lamont Williams' petition for certification to appeal from the Appellate Court, 178 Conn. App. 902 (AC 39589), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Kirstin B. Coffin, assigned counsel, in support of the petition.

Jennifer F. Miller, deputy assistant state's attorney, in opposition.

Decided January 3, 2018

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Writ of error; trial court's ruling precluding plaintiff in error from attending pretrial disposition conferences in criminal case in which he was alleged victim; claim that trial court's ruling barring attendance of plaintiff in error at pretrial disposition conferences violated his right as victim to attend court proceedings that accused has right to attend, as set forth in victim's rights amendment (Conn. Const., amend. XXIX [b] [5]); claim that this court lacked jurisdiction over writ of error on ground that plaintiff in error was not aggrieved by trial court's ruling and that ruling was not appealable final judgment; whether trial court's ruling was improper; whether in-chambers, off-the-record disposition conferences between prosecuting attorney, defense counsel, and presiding judge are court proceedings that accused has right to attend under victim's rights amendment.

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CONNECTICUT APPELLATE REPORTS

Vol. 179

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* HORVIL F. LEBRICK
(AC 39980)

Alvord, Prescott and Pellegrino, Js.

Syllabus

Convicted of the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, attempt to commit robbery in the first degree and assault in the first degree in connection with the shooting death of the victim, the defendant appealed. He claimed, inter alia, that the trial court improperly admitted into evidence the former testimony of a witness, P, who testified at the defendant's probable cause hearing. The defendant also claimed that the court improperly permitted the testimony of a firearm and tool mark expert, S, who testified at trial regarding the ballistic evidence collected at the crime scene. *Held*:

1. The defendant could not prevail on his claim that the former testimony of P was inadmissible hearsay because the state failed to establish that P was unavailable and, thus, P's testimony did not fall within the exception to the hearsay rule set forth in § 8-6 (1) of the Connecticut Code of Evidence: the trial court did not abuse its discretion in admitting the challenged testimony, which involved substantially similar issues to those at the defendant's trial, as the record demonstrated that the defendant had a full and fair opportunity to cross-examine P about her testimony at the probable cause hearing, and the state made a good faith effort to locate P by attempting to contact P at her last known address and phone number found in the case file and searching multiple computer databases in order to locate P, which was unsuccessful; moreover, the defendant's claim that the admission of P's former testimony

violated his constitutional right to confrontation was unavailing, as P was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine her at the probable cause hearing regarding her testimony.

2. The defendant's unpreserved claim that the trial court improperly admitted S's testimony in violation of § 4-1 of the Connecticut Code of Evidence because the state failed to establish the relevancy of S's testimony by providing a sufficient evidentiary foundation that the photographs, report, and notes relied on by S were associated with the crimes at issue in the present case was not reviewable, the defendant having failed to raise before the trial court the particular relevancy objection that he asserted on appeal; moreover, even though S's opinion was formulated in part by his review of a ballistic report prepared by a former employee of the state's forensic laboratory who was not available to testify at trial, there was no merit to the defendant's claim that his constitutional right to confrontation was implicated by the admission of S's opinion testimony because, even if the ballistic report contained testimonial hearsay, the state did not seek to introduce the ballistic report or any statement or opinion by the former employee regarding the ballistic evidence through S, who was available for cross-examination at trial regarding his own scientific conclusions and the factual basis underpinning his opinion, and, thus, the defendant was afforded a full opportunity to confront the declarant of the actual scientific conclusions admitted against him.

Argued October 12, 2017—officially released January 16, 2018

Procedural History

Substitute information charging the defendant with the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, conspiracy to commit burglary in the first degree, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree, brought to the Superior Court in the judicial district of Hartford, and tried to the jury before *Dewey*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict and judgment of guilty; subsequently, the defendant's conviction of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree was vacated, and the defendant appealed. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *John F. Fahey* and *Robert Diaz*, senior assistant state's attorneys, and *Allen M. Even*, certified legal intern, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Horvil F. Lebrick, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes (Rev. to 2009) § 53a-54c, home invasion in violation of General Statutes §§ 53a-100aa (a) (2) and 53a-8, conspiracy to commit home invasion in violation of General Statutes §§ 53a-100aa (a) (2) and 53a-48 (a), burglary in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-101 (a) (1), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-101 (a) (1), attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-49 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48 (a), and assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8.[1]

The defendant claims on appeal that the trial court improperly admitted into evidence (1) former testimony of a witness in violation of § 8-6 (1) of the Connecticut Code of Evidence and the confrontation clause of the sixth amendment to the United States constitution, and (2) testimony by the state's firearm and tool mark expert in violation of § 4-1 of the Connecticut Code of Evidence and the confrontation clause of the sixth amendment

[1] The defendant's conviction of the charges of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree was vacated.

to the United States constitution. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented at trial. On the morning of May 6, 2010, the defendant and his twin cousins, Andrew and Andraw Moses, were driven by an unidentified fourth man in a Ford Econoline van from New York to an apartment building located at 115 Nutmeg Lane in East Hartford. One of the apartments in that building was rented by Omari Barrett, a purported drug dealer, whom the defendant and the twins intended to rob. When they arrived at the apartment building, the defendant and the twins, who were dressed in workmen's clothes and hard hats, exited the van, entered the building, and knocked on the door of Barrett's third floor apartment. When no one answered after repeated knocking, the defendant kicked open the door, and he and the twins entered the apartment. All three were armed with guns.

Barrett's girlfriend, Shawna Lee Hudson, was alone in the small, two bedroom apartment at that time. She did not open the door when she heard knocking, but instead telephoned Barrett. Barrett told Hudson that he was not expecting any workers and hung up the phone. Hearing someone trying to force entry, Hudson called Barrett back, and he told her to get the .357 magnum revolver that was in the apartment. Barrett ended the call and proceeded to drive to the apartment armed with a nine millimeter revolver. Hudson called him a third time as he was driving and conveyed that the men were in the apartment and that she was hiding in the bedroom closet. As Barrett arrived, he heard on the phone someone saying, "Where's the money? Shut the fuck up," at which point the call ended.

Barrett ran into the building to the apartment, noticing as he approached that the door was open and

appeared to have been kicked in. Barrett entered the apartment and immediately encountered the twins, whom he fatally shot. Barrett then called out to Hudson, who was in the bedroom with the defendant, and asked her how many more people were in the apartment. She said that there was one more. The defendant and Barrett then engaged in a gunfight in which Barrett was shot once in the leg and once in the arm. Barrett retreated from the apartment into the hallway to an alcove by the elevators. He next heard a single gunshot and saw the defendant exit the apartment and flee in the opposite direction down the hallway. Running back into the apartment, Barrett found Hudson, who had been shot once in the chest.

Both Hudson and the twins were pronounced dead at the scene. The police collected numerous bullets and shell casings from in and around the apartment. The only firearm recovered at the scene was a .45 caliber automatic. The police also found an oil change receipt for an Econoline van. That receipt helped the police to identify the defendant as a suspect, and he subsequently was arrested and charged.

Following a jury trial, the defendant was convicted on all charges.[2] He was later sentenced by the court, which imposed a total effective sentence of ninety years of incarceration. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly admitted into evidence the former testimony of a material witness, Keisha Parks, who testified at the defendant's probable cause hearing in this matter. The defendant's arguments in support of that claim are twofold. First, he argues that Parks' former testimony was

[2] See footnote 1 of this opinion.

inadmissible hearsay because it did not fall within the exception to the hearsay rule set forth in § 8-6 (1) of the Connecticut Code of Evidence in light of the state's failure to properly establish that Parks was unavailable for trial, a necessary prerequisite to the exception's applicability. Second, he argues that the admission of the former testimony violated his rights under the confrontation clause of the sixth amendment of the United States constitution, citing *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We disagree with both arguments.

The following additional facts are relevant to our resolution of this claim. Parks was the fiancée of Andrew Moses, one of the defendant's twin cousins. She reluctantly testified at the defendant's probable cause hearing on November 10, 2010. Among other things, she testified about a conversation that she had with the defendant in the early evening of May 6, 2010, in which he implicated himself in the events that transpired that same day at the apartment in East Hartford. The defendant was represented by counsel at the probable cause hearing, and defense counsel extensively cross-examined Parks about her testimony.

On March 5, 2014, the defendant filed a motion asking the court to preclude the state from offering Parks' probable cause testimony as evidence at trial. The defendant argued that Parks' former testimony was hearsay and testimonial in nature and, thus, was admissible only if the state could show that Parks was unavailable and that the defendant had had a full and fair opportunity to cross-examine her. The defendant argued that the state had the burden of demonstrating Parks' unavailability, including that it made a good faith effort to procure her attendance for trial.

On October 16, 2014, during the trial but outside the presence of the jury, the court heard testimony from the

following two witnesses concerning the state's effort to locate Parks for trial: Henry Hightower, a police inspector with the state's criminal justice division, and Frank Garguilo, an investigator with the Brooklyn District Attorney's Office. Hightower testified that the case file contained Parks' last known address and phone number. Hightower called the telephone numbers listed in the case file for Parks but received no answers. He also ran Parks' name and birthdate through several computer database searches. Specifically, he utilized the Hartford Police Department's in-house computer; National Crime Information Center, a national database utilized by the Connecticut State Police to run criminal background checks; and CLEAR, a database that searches publicly available data within a specified state. The CLEAR search was the only one that produced any results, listing several phone numbers and addresses in New York associated with Parks as of 2013. Hightower e-mailed the Brooklyn District Attorney's Office with the most current phone numbers and addresses he could find for Parks, and asked the office to send an investigator to check those addresses and to serve Parks with an interstate summons to appear for trial.

Garguilo testified that the Brooklyn District Attorney's Office assigned him with the task of serving the summons on Parks. He checked the addresses provided by Hightower; he visited the addresses, sometimes twice in one day, but no one answered at any of the locations. Garguilo also called the telephone numbers provided to him and left messages on some answering machines, but got no return response. Garguilo was never asked to conduct an independent investigation into Parks' whereabouts, and he did not do so. Ultimately, neither Hightower nor Garguilo was able to locate Parks.

After hearing from the state's witnesses, the court heard argument from the parties. The state maintained

that the efforts described by Hightower and Garguilo demonstrated that the state exercised reasonable due diligence in locating Parks to secure her testimony for trial. The defendant, on the other hand, took the position that the state's efforts fell far short of meeting its burden of showing the necessary good faith effort to procure Parks' attendance. The defendant referenced our decision in *State* v. *Wright*, 107 Conn. App. 85, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008), both for the proposition that the state must show *substantial* due diligence and as an example of what has qualified previously as a reasonable effort to locate a witness. See id., 90–92. The defendant pointed out that the state had failed to conduct any searches of social media websites, to look for driver's license information in New York, or to access social security information to use as an additional search criterion. The defendant also argued that no effort was made to speak to a landlord or neighbors at the addresses visited by Garguilo in order to determine whether Parks currently lived at those locations or had moved. Finally, the defendant argued that although Hightower testified that he believed that information such as housing matters, civil protective orders and child support orders involving Parks should have been discovered as part of his search of the CLEAR system, he was unable to testify precisely about what information could be obtained by a search in CLEAR. The court reserved ruling on the motion at that time.

At the court's request, the state later presented additional testimony from a CLEAR product specialist employed by Thomson Reuters, Erin Tiernam, who had knowledge of how the CLEAR system operated. Tiernam testified that CLEAR was a subscription service used to search for people and that it acted as a data aggregator, pulling information from a number of public record sources. If a name and date of birth is entered,

the system is designed to return credit histories, utility records, death records, records of court and property records. After hearing from Tiernam, the court ruled that it would allow the state to read the former testimony into the record.[3]

A

We first address the defendant's evidentiary claim that, because the state failed to meet its burden regarding Parks' unavailability, the court should have deemed her former testimony inadmissible hearsay. We are not persuaded.

We begin by discussing our standard of review. In considering the propriety of a court's evidentiary rulings, "the appropriate standard of review is best determined, not as a strict bright line rule, but as one driven by the specific nature of the claim." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." Id. If, however, the court's decision to admit evidence is premised upon a correct view of the law, we review such decisions only for an abuse of discretion. Id.

It is undisputed in the present case that Parks' former testimony is properly classified as hearsay and, thus,

[3] In so ruling, the court made the following statement: "Well, the reason I had wanted to hear or put on the record information about CLEAR was because I realized after the hearing, I knew what it was, but there was no record of what it was. Now, with that on the record, I am going to allow the former testimony."

inadmissible unless it satisfies the exception in § 8-6 (1) of the Connecticut Code of Evidence. The sole challenge here is to the unavailability of Parks, or, more precisely, whether the court properly determined that the state had exercised due diligence to locate and secure Parks' attendance at trial. Because that determination involved the court exercising its discretion to make a "judgment call," the proper standard of review is the abuse of discretion standard. See id.; see also *State* v. *Lopez*, 239 Conn. 56, 79, 681 A.2d 950 (1996) ("it is within the discretion of the trial court to accept or to reject the proponent's representations regarding the unavailability of a declarant and the trial court's ruling will generally not be disturbed unless the court has abused its discretion"). "[W]hen [appellate courts] review claims for an abuse of discretion, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Cancel*, 275 Conn. 1, 18, 878 A.2d 1103 (2005).

Turning to the applicable law, the Connecticut Code of Evidence § 8-6 provides in relevant part: "The following are not excluded by the hearsay rule *if the declarant is unavailable as a witness*: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing. . . ." (Emphasis added.) In the present case, there is no dispute that Parks' testimony at the defendant's probable cause hearing involved "substantially similar" issues as those

at trial, particularly because both concerned the same substantive criminal charges. See *State* v. *Parker*, 161 Conn. 500, 503–504, 289 A.2d 894 (1971). Furthermore, the defendant had a full and fair opportunity to cross-examine the witness about her testimony at the probable cause hearing and, as reflected in the record, took advantage of that opportunity. Therefore, as we previously have indicated, the sole basis for the defendant's claim that the former testimony was inadmissible hearsay is his argument that the state failed to demonstrate Parks' unavailability for trial.

A declarant is deemed unavailable if he is "absent from the hearing [or trial] and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." (Internal quotation marks omitted.) *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980) (utilizing for state law purposes definition of unavailability contained in rule 804 of Federal Rules of Evidence). Our Supreme Court has interpreted "reasonable means" as requiring the proponent "to exercise due diligence and, at a minimum, make a good faith effort to procure the declarant's attendance." (Internal quotation marks omitted.) *State* v. *Rivera*, 221 Conn. 58, 62, 602 A.2d 571 (1992). Although our Supreme Court has stated that a good faith effort necessarily requires a showing of "substantial diligence"; *State* v. *Lopez*, supra, 239 Conn. 75; it has also explained that "[a] proponent's burden is to demonstrate a diligent and reasonable effort, *not to do everything conceivable*, to secure the witness' presence." (Emphasis added.) Id., 77–78. Therefore, an opponent's ability to point out additional yet unexplored avenues of investigation will not be dispositive of whether a proponent's efforts at locating a witness are deemed reasonable by a court.

In the present case, we agree with the defendant that the state's efforts to locate Parks were not exhaustive.

That, however, is not the standard, nor will we substitute our own judgment for that of the trial court. The standard is whether the state made a good faith effort to locate Parks. Hightower, who was tasked with locating Parks for the state, attempted to find her by using her last known address and phone number found in the case file. When that was unsuccessful, he utilized Parks' name and birthdate to search several computer databases, most notably the CLEAR system. The CLEAR system searched for available public information regarding Parks, including civil and criminal matters in New York. The CLEAR search in fact returned additional addresses and telephone numbers associated with Parks. Hightower engaged the help of the district attorney's office in New York to try to initiate personal contact with Parks or Parks' mother at the addresses obtained from CLEAR and to serve a summons. The assigned investigator from that office, Garguilo, made several attempts personally to visit the addresses provided and to make telephone calls, but was unsuccessful at making any contacts.

Although the defendant provides various additional steps or alternative avenues of investigation that the state might have utilized to locate Parks, including making some effort to speak with third parties to obtain her current whereabouts, the defendant has cited to no authority mandating that such actions are necessary in order to establish a good faith effort to locate a witness. "[T]he question of whether an effort to locate a missing witness has been sufficiently diligent to declare that person unavailable is one that is inherently fact specific and always vulnerable to criticism, due to the fact that one, in hindsight, may always think of other things." (Internal quotation marks omitted.) *State* v. *Miller*, 56 Conn. App. 191, 194, 742 A.2d 402 (1999), cert. denied, 252 Conn. 937, 747 A.2d 4 (2000). In *Miller*, the state's investigator in that case testified at trial that he had

made unsuccessful efforts to contact three witnesses at their last known addresses on file several weeks prior to trial. Id., 194–95. This court concluded that the state had made a good faith effort to locate the witnesses and that the investigator's testimony was satisfactory to prove the witnesses' unavailability. Id., 195. The investigator in the present case did no less, and also attempted to find additional leads by utilizing the CLEAR database search. On the basis of this record, we cannot conclude that the court abused its discretion in finding, albeit implicitly, that the state met its burden of demonstrating Parks' unavailability.[4]

B

In addition to his evidentiary challenge, the defendant also argues that the admission of Parks' former testimony violated his rights under the confrontation clause of the sixth amendment to the United States constitution.[5] Citing to *Crawford* v. *Washington*, supra, 541 U.S. 36, the defendant contends in his brief that "[t]estimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross-examination." Because both conditions were met in the present case, we are not persuaded that the defendant's rights under the confrontation clause are implicated.

[4] Although the court did not provide specific factual findings or legal analysis regarding the state's efforts, by deciding to admit Parks' former testimony, it necessarily determined that the state had demonstrated sufficient and reasonable efforts to secure her availability for trial. Absent some indication to the contrary, we assume that the trial court acted properly in accordance with established legal principles. See *State* v. *Marrero*, 59 Conn. App. 189, 191–92, 757 A.2d 594, cert. denied, 254 Conn. 934, 761 A.2d 756 (2000).

[5] Although the state argues that this aspect of the defendant's claim is unpreserved and raised for the first time on appeal, we conclude that the defendant adequately raised the confrontation argument in his pretrial motion to exclude Parks' former testimony, which was adjudicated at trial.

"Beyond [applicable] evidentiary principles, the state's use of hearsay evidence against an accused in a criminal trial is [also] limited by the confrontation clause of the sixth amendment. . . . The sixth amendment to the constitution of the United States guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This right is secured for defendants in state criminal proceedings. . . . [T]he primary interest secured by confrontation is the right of cross-examination." (Citation omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 712, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). "Traditionally, for purposes of the confrontation clause, all hearsay statements were admissible [under *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)] if (1) the declarant was unavailable to testify, and (2) the statement bore adequate indicia of reliability. . . . [In *Crawford* v. *Washington*, supra, 541 U.S. 68, however], the United States Supreme Court overruled *Roberts* to the extent that it applied to testimonial hearsay statements. . . . In *Crawford*, the court concluded that the reliability standard set forth in the second prong of the *Roberts* test is too amorphous to prevent adequately the improper admission of core testimonial statements that the [c]onfrontation [c]lause plainly meant to exclude." (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 379, 908 A.2d 506 (2006). Accordingly, the United States Supreme Court held that if "testimonial evidence is at issue . . . the [s]ixth [a]mendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford* v. *Washington*, supra, 68.

It is undisputed that Parks' testimony at the probable cause hearing was testimonial in nature and, thus, its admission at trial for the truth of the matters asserted implicated the test established in *Crawford*. See *State*

v. *Skakel*, supra, 276 Conn. 714 (former probable cause hearing testimony "falls squarely within *Crawford*'s core class of testimonial evidence"). To the extent, however, that the defendant's constitutional challenge relies on the same assertion made in support of his evidentiary argument, namely, that the state failed to demonstrate that Parks was unavailable for trial, we again reject it.

Although a court's ultimate determination as to whether a statement is precluded under *Crawford* raises an issue of constitutional law that is subject to plenary review; see *State* v. *Kirby*, supra, 280 Conn. 378; the factual underpinnings of such a determination are entitled to significant deference. *State* v. *Swinton*, 268 Conn. 781, 855, 847 A.2d 921 (2004). Whether a witness is unavailable is such a factual determination. See *State* v. *Schiappa*, 248 Conn. 132, 141, 728 A.2d 466 (recognizing fact-bound nature of unavailability inquiry), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). In reviewing constitutional claims, our customary deference to the trial court's factual finding is "tempered by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Swinton*, supra, 855. Having conducted a scrupulous review of the record, we are convinced that the testimony of Hightower and Garguilo, as discussed in part I A of this opinion, constitutes substantial evidence that fully supports the trial court's implicit findings that the state exercised due diligence to locate Parks, and that Parks was unavailable to testify.

Moreover, the record demonstrates that the defendant had a full and fair opportunity to cross-examine Parks regarding her testimony at the probable cause hearing, defense counsel vigorously cross-examined her at that time, and Parks' cross-examination was part of the testimony that was read back to the jury at trial.

Because Parks was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine her at the probable cause hearing regarding her testimony, his confrontation clause rights were not violated by the admission of her former testimony at trial.

II

The defendant next claims that the court improperly permitted the testimony of James Stephenson, a firearm and tool mark expert who testified at trial regarding the ballistic evidence collected at the crime scene. The defendant's arguments in support of this claim are, again, twofold. First, he argues that the testimony was not relevant and, thus, admitted in violation of § 4-1 of the Connecticut Code of Evidence, and that this error was harmful. Second, he argues that the testimony violated his rights under the confrontation clause of the sixth amendment to the United States constitution. We disagree with both arguments.

The following additional facts and procedural history are relevant to this claim. Gerard Petillo, a former employee of the state's forensic laboratory, performed various tests on the ballistic evidence collected in this case and authored a report containing his findings and analysis. Unfortunately, prior to trial, Petillo passed away and, thus, was unavailable to testify regarding his report and its contents. Stephenson also worked for the state's forensic laboratory at the time that Petillo created the ballistic report in this case and acted as that report's technical reviewer and "second signer." Although the state informed the defendant that it did not intend to offer Petillo's report into evidence, it did indicate that it would offer testimony from Stephenson, who had agreed to testify on the basis of his review of

the photographs and report prepared by Petillo regarding his own, independent conclusions.[6]

The defendant filed a motion to preclude Stephenson's testimony, arguing that Petillo's report was testimonial in nature and hearsay and, thus, that any testimony or evidence concerning that report would violate the defendant's constitutional rights as delineated in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The defendant later supplemented his motion, arguing that Stephenson lacked a proper foundation to render his own opinion in this matter because he had not personally performed any of the testing or measurement of the evidence and that "[p]ermitting Stephenson to testify about the adequacy and accuracy of tests he did not perform is nothing more than a means by which to present evidence of another witness that is not available." In support of this supplemental argument, the defendant cited to § 7-4 of the Connecticut Code of Evidence.[7]

The court held a hearing on the defendant's motion on October 27, 2014. At that time, the defendant

[6] The state indicated on the record before the trial court that it began discussing Petillo's death and the possibility of Stephenson's testimony with the defense during jury selection. The state also explained that it had sought to have the forensic lab retest the evidence, but that the lab had indicated it would not be able to comply prior to trial.

[7] Section 7-4 of the Connecticut Code of Evidence provides in relevant part: "(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

"(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence. . . ."

renewed his objection based on the confrontation clause and raised, for the first time, an objection based on relevancy. With respect to his relevancy argument, the defendant asserted that he could not evaluate the relevancy of Stephenson's testimony because nothing had been proffered regarding that testimony and it was the defendant's understanding that Stephenson had not conducted his own independent testing but would rely upon information in Petillo's report.

The state argued that Stephenson would testify about the projectiles found at the crime scene. In particular, he would opine that the projectile found in Hudson's body and a shell casing recovered in her bedroom were inconsistent with the nine millimeter projectiles found in the twins' bodies and in other areas of the crime scene, suggesting that Hudson was killed by a different nine millimeter gun, presumably one fired by the defendant. Furthermore, the state argued that Stephenson's conclusions, although not any different than those reached by Petillo, would be his own and based on his independent evaluation of the information available. Stephenson would be subject to cross-examination as to those conclusions. Whatever materials or information he reviewed in reaching his conclusions also would be fodder for cross-examination.

The court denied the motion to preclude on the record, indicating to defense counsel that it was going to permit Stephenson to testify. The court explained that the defendant certainly could raise by way of cross-examination that Stephenson had not examined the actual projectiles himself, suggesting that the court may have believed that the defendant's objections to Stephenson's testimony went more to the weight of the evidence to the jury than to its overall admissibility.[8]

[8] The court did not state the factual or legal basis of its ruling on the record.

Before the jury, Stephenson testified consistent with the state's proffer. He never referred to the contents of Petillo's report, including Petillo's conclusions. Rather, he indicated only that he had reviewed a number of reports and photographs relating to evidence submitted to the state lab in preparation for his testimony and, based on his background, training and experience, he was able from that review to formulate his own opinion.

A

We first dispose of the defendant's argument that the court improperly admitted Stephenson's testimony in violation of § 4-1 of the Connecticut Code of Evidence[9] because the state failed to establish the relevancy of Stephenson's testimony by providing a sufficient evidentiary foundation that the photographs, report, and notes relied on by Stephenson were associated with the crimes at issue in this case. The state argues, inter alia, that this evidentiary claim is unreviewable because it was never raised before the trial court. We agree with the state.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. [An appellate court] is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal

[9] Section 4-1 of the Connecticut Code of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence."

will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

The defendant never raised an issue of relevancy in his motion to preclude Stephenson's testimony but did argue relevancy in his argument before the court prior to Stephenson's testimony. That particular argument, however, was premised solely on the fact that the state had not yet made a proffer regarding Stephenson's trial testimony nor had the defense been provided with any report from Stephenson. The defendant asserted, therefore, that he could not yet evaluate the relevancy of Stephenson's testimony. After hearing from the state regarding the nature of Stephenson's testimony, however, the trial court overruled the defendant's objections and decided to allow Stephenson to testify. The defendant thereafter never raised the particular relevancy objection that he now asserts on appeal regarding whether the materials relied on by Stephenson were associated with the crimes at issue in this case. Because the defendant cannot be heard on an evidentiary claim that was never raised before or decided by the trial court, we decline to review this aspect of his claim on appeal.

B

Finally, we turn to the defendant's argument that Stephenson's testimony was admitted in violation of the defendant's rights under the confrontation clause. The defendant argues that because Stephenson's testimony was based entirely on his review of Petillo's ballistic photographs and report, Petillo was, in effect, the witness who the defendant had a right to confront. We are not persuaded that Stephenson's testimony violated the defendant's constitutional rights under the confrontation clause. We have already discussed the intersection between the confrontation clause and the

admissibility of hearsay statements in criminal cases in part I B of this opinion. In short, hearsay statements that are deemed testimonial in nature are admissible in a criminal prosecution only if the declarant is both unavailable for trial and the defendant has had a prior opportunity to cross-examine the declarant regarding those statements. See *Crawford* v. *Washington*, supra, 541 U.S. 68.

"Two cases decided by the United States Supreme Court after *Crawford* apply the confrontation clause in the specific context of scientific evidence. In *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 310–11, the court held that certificates signed and sworn to by state forensics analysts, which set forth the laboratory results of the drug tests of those analysts and which were admitted into evidence in lieu of live testimony from the analysts themselves, were testimonial within the meaning of *Crawford*. In so concluding, the court reasoned that: (1) the certificates clearly were a sworn and solemn declaration by the analysts as to the truth of the facts asserted; (2) under Massachusetts law the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance; and (3) the court could safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves. . . . In *Bullcoming* v. *New Mexico*, [supra, 564 U.S. 652], the court held that the confrontation clause also does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying to the results of a blood alcohol concentration test he performed, through the in-court testimony of another scientist who did not sign the certification or perform or observe the test reported in the certification." (Citation omitted; internal quotation marks omitted.) *State* v.

Buckland, 313 Conn. 205, 213–14, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). In short, an accused has the right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, supra, 652.

Melendez-Diaz and *Bullcoming*, however, addressed only the admission of statements in forensic reports either without any accompanying testimony by the analyst or scientist that prepared them or through a surrogate who lacked direct involvement in the preparation of the report. Neither directly addressed the situation now presented, in which a potentially testimonial forensic report is not itself offered or admitted into evidence, but rather was utilized by another expert witness to form an independent opinion. See id., 673 (*Sotomayor*, *J.*, concurring) ("[w]e would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence"). Although the United States Supreme Court had an opportunity to clarify this aspect of its confrontation clause jurisprudence in *Williams* v. *Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), that case yielded multiple opinions by the court, none of which, for the reasons we explain, is controlling here.

The issue in *Williams* was whether a defendant's confrontation clause rights were violated by the admission of testimony from a police laboratory analyst who had reviewed and compared a DNA profile prepared by an outside laboratory from vaginal swabs taken from the victim and matched it with a DNA profile in the state's DNA database that was produced from a sample of the defendant's blood in an unrelated case. Id., 56–57, 59. The United States Supreme Court upheld the trial

court's admission of the testimony. Id., 57–58. Although a majority of the court concluded that the expert's testimony did not violate the confrontation clause, they did not agree as to the rationale. A plurality of four justices, Justice Alito, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, concluded that the confrontation clause was not violated because the outside laboratory's report was not used to prove the truth of the matter asserted therein and, thus, was not hearsay. Id. Alternatively, those justices concluded that the report was not testimonial in nature because it was produced before any suspect was identified, and, thus, its primary purpose was not to obtain evidence to be used against the defendant. Id., 58. A fifth justice, Justice Thomas, agreed with the plurality's disposition of the case, and with its alternative conclusion that the report was not testimonial in nature.[10] Id., 103–104. In concluding that the report was not testimonial in nature, however, Justice Thomas focused on the report's lack of formality and solemnity, and specifically rejected the plurality's reliance on the "primary purpose test" to determine whether the report was testimonial in nature. Id., 111, 113–18. Thus, the plurality opinion and the opinion by Justice Thomas cannot be read together to provide one analytical path to employ in deciding whether a particular forensic report may be considered testimonial in nature.[11]

"When a fragmented [United States Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by

[10] Justice Thomas did not agree with the plurality's conclusion that the report was not hearsay because it was not offered for the truth of the matter asserted therein. *Williams* v. *Illinois*, supra, 567 U.S. 104.

[11] The four dissenting justices concluded that the expert testimony was "functionally identical to the surrogate testimony" in *Bullcoming* and that *Bullcoming* controlled the outcome. (Internal quotation marks omitted.) *Williams* v. *Illinois*, supra, 567 U.S. 124.

those Members who concurred in the judgments on the narrowest grounds . . . .'' (Internal quotation marks omitted.) *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). The *Marks* test has been explained by the United States Court of Appeals for the District of Columbia Circuit as follows: ''[O]ne opinion can be meaningfully regarded as narrower than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.'' (Internal quotation marks omitted.) *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), cert. denied sub nom. *King* v. *Ridley*, 505 U.S. 1229, 112 S. Ct. 3054, 120 L. Ed. 2d 920 (1992). Given that no readily applicable rationale for the court's holding in *Williams* obtained the approval of a majority of the justices, its precedential value seems, at best, to be confined to the distinct factual scenario at issue in that case.[12] In any event, our ultimate resolution of the present appeal is not inconsistent with the overall result reached in *Williams*.

[12] Courts in a number of other jurisdictions have struggled with how to apply the *Williams* holding. See, e.g., *Washington* v. *Griffin*, Docket No. 15-3831-pr, 2017 WL 5707606, *9 (2d Cir. November 28, 2017) (noting that ''neither of the plurality's rationales commanded a majority''); *State* v. *Michaels*, 219 N.J. 1, 31, 95 A.3d 648 (''[w]e find *Williams*'s force, as precedent, at best unclear''), cert. denied, U.S. , 135 S. Ct. 761, 190 L. Ed. 2d 635 (2014); *State* v. *Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) (''[t]he [United States] Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court''), cert. denied, U.S. , 135 S. Ct. 1535, 191 L. Ed. 2d 565 (2015); *State* v. *Griep*, 361 Wis. 2d 657, 680, 863 N.W.2d 567 (2015) (''[a]s no opinion overlaps with another, the *Marks* narrowest grounds rule does not apply to [*Williams*]''), cert. denied, U.S. , 136 S. Ct. 793, 193 L. Ed. 2d 709 (2016).

Turning to the present case, even assuming that Petillo's report contained testimonial hearsay,[13] there simply is no merit to the defendant's argument that his right to confrontation was implicated in the present case by the admission of Stephenson's opinion testimony, despite Stephenson's opinion having been formulated in part by his review of Petillo's ballistic report. As our Supreme Court indicated in *Buckland*, in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the court's violation of the defendant's confrontation rights occurred because it admitted certain inculpatory statements that were testimonial in nature and were made against the defendant by an individual who was absent at the trial. See *State* v. *Buckland*, supra, 313 Conn. 215–16. Those same circumstances simply are not present here. In the present case, the only inculpatory conclusion or statement regarding the ballistic evidence presented to the jury was made by Stephenson in court. At no point did the state seek to introduce Petillo's report or any statement or opinion by Petillo regarding the ballistic evidence through Stephenson. Stephenson obviously was fully available for cross-examination at trial regarding his own scientific conclusions and the factual basis underpinning his opinion. Indeed, defense counsel not only questioned Stephenson about the allegedly subjective nature of the science involved but was also able to reinforce to the jury the fact that Stephenson's opinion was not formulated on the basis of his own physical

[13] For purposes of our analysis, we will presume without deciding that the ballistic report prepared by Petillo in this matter, which was never introduced into evidence or otherwise made a part of the record in this case, contained certifications or other statements that would be deemed testimonial in accordance with *Crawford*. Although no appellate court in this state squarely has addressed the extent to which contents of a ballistic report are testimonial statements for purposes of confrontation clause analysis, courts in other jurisdiction have treated them as such. See, e.g., *Ayala* v. *Saba*, 940 F. Supp. 2d 18, 20 (D. Mass. 2013); *Conners* v. *State*, 92 So. 3d 676, 684 (Miss. 2012); *Miller* v. *Commonwealth*, Docket No. 1353-08-2, 2009 WL 2997079, *2 (Va. App. September 22, 2009).

examination of the ballistic evidence, and was instead based on his review of photographs and information in other reports. The same attack on the reliability of Stephenson's opinion was repeated by the defense during closing arguments.

There is no dispute that an accused has the right to confront the analyst who states a conclusion drawn from scientific evidence or certifies the results of scientific tests in a report prepared for trial because such statements qualify as testimonial statements subject to the confrontation clause as set forth in *Melendez-Diaz* and its progeny. To the extent, however, that, as in the present case, the defendant was afforded a full opportunity to confront the declarant of the actual scientific conclusions admitted against him, any claim of a confrontation clause violation simply is not persuasive.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL PETTIFORD *v.* STATE OF CONNECTICUT (AC 39296)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The plaintiff P sought to recover damages from the defendant for personal injuries he sustained in connection with an accident in which a vehicle owned by the defendant stuck him while he was crossing a road near an intersection. On the evening of the accident, P had parked his truck on the side of the road to deliver a package to an address on the opposite side of the road. At that time, it was dark and rainy, the road was not well lit and P was wearing dark brown clothing without any reflective

[14] Our conclusion is in accord with the decision of the Wisconsin Supreme Court, which considered a similar issue in *State* v. *Griep*, supra, 361 Wis. 2d 682–83, 691 (holding right of confrontation not violated where expert witness reviewed another analyst's forensic test results in forming independent opinion relayed at trial).

markings. There also were no distinct makings on the road indicating a place for pedestrians to cross in the area where P was struck, and the avenue that intersected the subject road did not have sidewalks at that intersection. In his complaint, P alleged that his injuries were caused by the negligence of the defendant's agent, who was driving the vehicle when it struck him. The defendant filed a special defense, asserting that P's alleged injuries were proximately caused by his own negligence. Following a trial, the court rendered judgment in favor of the defendant. In reaching its decision, the court reviewed the statutory (§ 14-297 [2]) definition of crosswalk and determined that P was not in or near an unmarked crosswalk when he was struck, because there was no prolongation of lateral lines of sidewalks at the subject intersection. The court also determined that P, by crossing a poorly lit road without wearing reflective clothing on a dark, rainy night was at least 60 percent contributorily negligent for his injuries, and, therefore, his recovery was precluded pursuant to the applicable statute (§ 52-572h [b]). On appeal to this court, P claimed that he was entitled to a new trial because the trial court's comparative negligence calculus rested on its erroneous determination that an unmarked crosswalk did not exist in the area where he was struck. *Held* that the trial court properly determined that P did not cross the road at an unmarked crosswalk at the time of the accident: contrary to P's contention that the trial court construed the statutory definition of crosswalk too narrowly under the circumstances of this case, the plain language of § 14-297 (2) applied to the undisputed facts indicated that the court properly determined that no unmarked crosswalk existed in the area where P was struck, and even if an unmarked crosswalk had existed, P failed to demonstrate how that fact would have altered the trial court's judgment, as the record was silent as to whether P was in or near the purported unmarked crosswalk when he was struck by the defendant's vehicle, and, therefore, this court lacked any basis from which to determine the degree to which the trial court's allegedly erroneous finding would have affected, if at all, its assignment of comparative negligence; furthermore, because the plaintiff did not fail to establish negligence on the part of the defendant and merely failed to establish that the defendant's negligence exceeded his own, the trial court, pursuant to § 52-572h, should have rendered a judgment on the merits against the plaintiff and in favor of the defendant, rather than dismissed the action.

Argued November 14, 2017—officially released January 16, 2018

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the

motion to intervene as a plaintiff filed by United Parcel Service; thereafter, the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment dismissing the action; subsequently, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the named plaintiff's motion to reargue, and the named plaintiff appealed to this court. *Improper form of judgment; judgment directed.*

Brenden P. Leydon, for the appellant (named plaintiff).

James E. Coyne, with whom was *Colleen D. Fries*, for the appellee (defendant).

Opinion

PRESCOTT, J. In this action arising out of a motor vehicle collision with a pedestrian, the plaintiff Michael Pettiford appeals, following a trial to the court, from the judgment rendered in favor of the defendant, the state of Connecticut.[1] The court concluded that the plaintiff was "at least" 60 percent contributorily negligent for his injuries and, thus, was barred from recovering damages on the basis of the defendant's negligence in accordance with General Statutes § 52-572h (b).[2] The plaintiff claims on appeal that he is entitled to a new trial because the court's comparative

[1] Pettiford was working for United Parcel Service (UPS) at the time of the incident, and UPS intervened as an additional plaintiff, asserting by intervening complaint that if Pettiford was successful in his action against the defendant, UPS was entitled to recover any workers' compensation benefits that it had paid or would become obligated to pay to him. See General Statutes § 31-293. UPS is not a participating party in the present appeal, however, and, thus, all references to the plaintiff in this opinion are to Pettiford only.

[2] General Statutes § 52–572h (b) provides in relevant part: "In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person . . . to recover damages resulting from personal injury . . . if the negligence was not greater than the combined negligence of the person . . . against whom recovery is sought . . . ."

negligence calculus rested on the court's erroneous determination that there was not an unmarked crosswalk at the location where the plaintiff was struck by the defendant's vehicle. The defendant disputes the existence of an unmarked crosswalk and also argues in the alternative that the existence of an unmarked crosswalk, or lack thereof, is legally insignificant because the trial court found that the plaintiff had failed to prove how and where along the roadway he crossed at the time of the accident. We agree with the defendant that the court properly determined that no unmarked crosswalk existed but conclude in the alternative that, even if an unmarked crosswalk existed, the plaintiff failed to demonstrate that he was in or very near that crosswalk at the time he was hit by the defendant's vehicle, and, therefore, we lack any basis from which to determine whether the claimed error undermined the court's judgment. Because the form of the judgment was improper, however, we reverse the judgment of the trial court and remand the case with direction to render judgment in favor of the defendant.

The following facts, as found by the court in its memorandum of decision,[3] and procedural history are relevant to our resolution of the plaintiff's claim. The accident at issue occurred at approximately 6 p.m. on January 7, 2009, in the westbound lane of Rock Spring Road in Stamford, somewhere near its intersection with Treat Avenue and the entrance to 102 Rock Spring Road. Trevor Jones, a state employee, was driving a GMC

[3] Our recitation of the facts is hampered somewhat by the manner in which the trial court set forth its factual findings in its memorandum of decision. Rather than plainly reciting the facts it found on the basis of the evidence presented, the court often refers to the testimony of fact witnesses without expressly indicating the extent to which it credited that testimony. Nevertheless, it is reasonable for us to infer that the court would not recite testimony in its factual recitation that it declined to credit. Furthermore, the parties are in agreement as to most of the salient facts.

passenger van that was owned by the defendant when he struck the plaintiff, who was crossing the roadway.

Prior to the accident, Jones had been transporting members of the Wilcox Technical High School girls basketball team home from a practice. He dropped off the last girl at the intersection of Rock Spring Road and Coolidge Avenue before proceeding westward on Rock Spring Road. It was rainy that evening, with limited visibility, and the roadway was not well lit. Although Jones had his headlights and windshield wipers on, the headlights of oncoming vehicles made it difficult at times to observe the roadway. Just prior to hitting the plaintiff with the van, Jones observed a United Parcel Service truck that was parked to his left on the eastbound side of the road with its lights on or flashing. The van traveled approximately twenty-five or thirty feet further before striking the plaintiff, who was near the double yellow line in the center of the road.[4] Jones did not see the plaintiff until a split second before the accident, having been blinded by oncoming headlights just seconds before. He tried to maneuver the van to the left to avoid the collision but was unsuccessful. The van was travelling at approximately fifteen to twenty miles per hour at the time it hit the plaintiff. The posted speed limit on Rock Springs Road was twenty-five miles per hour.

The right front corner of the van struck the plaintiff in the right hip, and he sustained serious injuries to his head and body. When emergency responders arrived, the plaintiff was lying near the beginning of the driveway leading to 102 Rock Spring Road. A package addressed to that location was found near the plaintiff, suggesting that he had been in the process of making

[4] Although the plaintiff has no recollection of the accident or other events from that day, the driver of a vehicle traveling eastbound on Rock Spring Road witnessed the accident.

a delivery to that address at the time of the accident. The plaintiff was wearing a dark brown uniform without any reflective markings or devices at the time of the accident. The responding police officer, Jeffrey Boothe, made a nonscale diagram of the accident site, which he included in his official report.

On November 12, 2010, the plaintiff commenced this action against the defendant.[5] The operative amended complaint was filed on October 21, 2015,[6] and contained a single count sounding in negligence. The plaintiff alleged various injuries he sustained as a result of the accident and that those injuries were caused by the negligence of the defendant's agent, Jones, in one or more of the following ways: he failed to keep a reasonable and proper lookout; he operated the van at a greater speed than warranted under the circumstances; he operated the van with inadequate or defective brakes or failed to apply the brakes properly; he failed to keep the van under proper control; failed to maneuver the van around the plaintiff; he operated the van at an unreasonable rate of speed in violation of General Statutes §§ 14-218a or 14-219; he failed to yield the right-of-way to a pedestrian crossing in an unmarked crosswalk in violation of General Statutes § 14-300 (c);[7] he

[5] General Statutes § 52-556 waives the sovereign immunity of the state in cases alleging the negligent operation by a state employee of a motor vehicle "owned and insured by the state against personal injuries or property damage . . . ."

[6] We note that, rather than provide this court with the relevant operative pleadings, the plaintiff included in the appendix of his brief only the original complaint and original answer and special defense. It is the responsibility of the appellant to include in part one of the appendix, inter alia, "all relevant pleadings." Practice Book § 67-8. In a civil matter, the *relevant* pleadings necessarily are the *operative* pleadings.

[7] General Statutes § 14-300 (c) provides in relevant part: "[A]t any crosswalk marked as provided in subsection (a) of this section or any unmarked crosswalk . . . each operator of a vehicle shall grant the right-of-way, and slow or stop such vehicle if necessary to so grant the right-of-way, to any pedestrian crossing the roadway within such crosswalk, provided such pedestrian steps off the curb or into the crosswalk at the entrance to a crosswalk or is within that half of the roadway upon which such operator

failed to exercise due care to avoid striking a pedestrian in violation of General Statutes § 14-300d; and he failed to sound a horn or other noise emitting device to avoid the collision in violation of § 14-300d.

The defendant filed an answer to the complaint and a special defense. The operative answer was filed on April 26, 2011. The final, operative special defense was filed on October 13, 2015. Although the defendant admitted in its answer that the plaintiff was struck by a van owned by the state and operated by a state employee acting within the scope of his employment, it denied all the various specifications of negligence. Furthermore, by way of special defense, the defendant asserted that any injuries alleged by the plaintiff were proximately caused by his own negligence. In particular, the defendant alleged that the plaintiff was negligent in that he failed to ensure that the roadway was clear of approaching vehicles before crossing and failed to be attentive of his surroundings or to keep a proper lookout. The defendant also alleged that the plaintiff abruptly left the safety of the curbside and walked into the path of a vehicle that was so close to the plaintiff that it constituted an immediate hazard to him in violation of General Statutes § 14-300c (b); he crossed the roadway outside of a crosswalk without yielding the right-of-way to the defendant's vehicle in violation of General Statutes § 14-300b (a); and he failed to walk against traffic on the roadway in violation of § 14-300c (a).[8]

of a vehicle is traveling, or such pedestrian steps off the curb or into the crosswalk at the entrance to a crosswalk or is crossing the roadway within such crosswalk from that half of the roadway upon which such operator is not traveling. . . ."

[8] General Statutes § 14-300b (a) provides in relevant part: "Each pedestrian crossing a roadway at any point other than within a crosswalk marked as provided in subsection (a) of section 14-300 or any unmarked crosswalk or at a location controlled by police officers shall yield the right of way to each vehicle upon such roadway. . . ."

General Statutes § 14-300c provides in relevant part: "(a) No pedestrian shall walk along and upon a roadway where a sidewalk adjacent to such roadway is provided and the use thereof is practicable. Where a sidewalk

Finally, the defendant alleged that the plaintiff's actions amounted to negligent use of a highway in violation of General Statutes § 53-182. The plaintiff filed a reply generally denying the allegations in the special defense.

The case was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, between November 5 and November 13, 2015. The parties submitted simultaneous posttrial briefs on January 29, 2016. On April 8, 2016, the court issued a written memorandum of decision, dismissing the action.[9]

is not provided adjacent to a roadway each pedestrian walking along and upon such roadway shall walk only on the shoulder thereof and as far as practicable from the edge of such roadway. Where neither a sidewalk nor a shoulder adjacent to a roadway is provided each pedestrian walking along and upon such roadway shall walk as near as practicable to an outside edge of such roadway and if such roadway carries motor vehicle traffic traveling in opposite directions each pedestrian walking along and upon such roadway shall walk only upon the left side of such roadway.

(b) No pedestrian shall suddenly leave a curb, sidewalk, crosswalk or any other place of safety adjacent to or upon a roadway and walk or run into the path of a vehicle which is so close to such pedestrian as to constitute an immediate hazard to such pedestrian. . . ."

[9] It appears that the court may have believed that because the plaintiff did not prevail in his negligence action brought pursuant to General Statutes § 52-556, which provides a limited waiver of sovereign immunity in cases alleging the negligent operation of a state owned and insured vehicle by a state employee, this somehow divested the court of subject matter jurisdiction and required a dismissal of the action. That belief, however, was misplaced. Once facts sufficient to support a waiver of sovereign immunity pursuant to § 52-556 have been pleaded and the case has gone to trial, the plaintiff's failure to prevail on the merits does not implicate the court's jurisdiction over the action or its authority to render judgment in favor of the prevailing party. See *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012), citing favorably to *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991) (declining to adopt "bizarre interpretation" of General Statutes § 7-465 that would require courts to conclude it lacked of subject matter jurisdiction over case tried before it solely because plaintiff failed to establish essential element of his cause of action). Moreover, in the present case, the plaintiff did not fail to establish negligence on the part of the defendant; he merely failed to establish that the defendant's negligence exceeded his own. The statutory bar against recovery in § 52-572h applies whenever a plaintiff's negligence is found to exceed 50 percent of the combined negligence of those against whom recovery is sought, and its proper application merely results in a judgment on the merits against the plaintiff and in favor

The court began its analysis by rejecting the plaintiff's argument that the defendant's agent had an enhanced duty to avoid the collision because the plaintiff had been in or very near to an "unmarked crosswalk" at the time he was struck by the defendant's van. The court reviewed the statutory definition of "crosswalk" set forth in General Statutes § 14-297 (2), which provides, in relevant part, that crosswalks emanate from "the prolongation or connection of the lateral lines *of sidewalks at intersections* . . . ." (Emphasis added.) It then agreed with the defendant that because Treat Avenue does not have sidewalks at the point where it intersects with Rock Spring Road, "there are no lateral lines of sidewalk on Treat Avenue to prolongate into Rock Spring Road to create an unmarked crosswalk."

The court then turned to a discussion of the various claims of negligence raised by the parties. Importantly, the court commented on the scant evidence pertaining to the plaintiff's actions prior to the accident, stating: "It is not known whether [the plaintiff] crossed at a ninety degree angle or took a longer diagonal crossing from his truck to the delivery address." The court made no specific findings regarding where along Rock Spring Road the plaintiff entered the roadway, the precise path he traveled from his truck before being struck, or whether he was struck in or very near to the plaintiff's proposed unmarked crosswalk.

After reviewing the facts and the applicable law, and considering the arguments of the parties, the court concluded as follows: "[B]oth the plaintiff and the defendant . . . were negligent, and their negligence caused the accident and resulting serious injuries to [the plaintiff]. Under the circumstances on Rock Spring Road on the dark evening of January 7, 2009, the [defendant's] agent Jones had a duty to drive more slowly than he

of the defendant, which was the result here. In sum, the form of the judgment in the present case is improper and should be corrected to reflect a judgment in favor of the defendant rather than a dismissal of the action.

did considering the weather conditions, the darkness and the blinding effect of the headlights of oncoming traffic, and to keep a better lookout of the road ahead. This negligence was a cause of the accident and injuries. On his part, [the plaintiff] had a duty in attempting to cross the road to be more observant of oncoming vehicles, had a statutory and common-law duty not to venture out into a well-traveled roadway where visible approaching motor vehicles had the right-of-way and constituted an immediate hazard to him and particularly not to do so in the dark and rainy conditions without the protection of available reflective clothing that might have provided motor vehicle operators such as Jones the opportunity to observe [the plaintiff] well before the collision. These were acts of negligence that also caused the accident and resulting injuries.

"The court determines [that the plaintiff] was contributorily negligent and was responsible for significantly more than half, at least [60] percent, of all the negligence that caused the accident and his injuries. Based on that finding, Connecticut law, [§ 52–572h (b)], precludes any recovery for the plaintiff."

The plaintiff filed a motion to reargue claiming that the court's finding that the plaintiff had not been wearing available reflective clothing was not supported by the evidence and that the court should reassess its assignment of percentage of liability on that basis. The plaintiff did not challenge the court's finding with respect to the existence of an unmarked crosswalk in its postjudgment motion. The court denied the motion on May 23, 2016. This appeal followed.

The plaintiff's sole claim on appeal is that the court improperly determined that the area where he was struck by the defendant's vehicle was not an unmarked crosswalk. According to the plaintiff, the court, in reaching its conclusion that an unmarked crosswalk

did not exist, too narrowly construed the statutory definition of a crosswalk as set forth in § 14-297 (2), unnecessarily fixating on the lack of sidewalks along Treat Avenue. We do not agree. Furthermore, even if we did conclude that an unmarked crosswalk existed, the record does not reflect that the plaintiff was in or very near such crosswalk at the time of impact, and thus he cannot demonstrate that the court's resolution of the crosswalk issue, even if incorrect, amounted to reversible error in this case.

Whether unmarked crosswalks extend across Rock Spring Road at its intersection with Treat Avenue is a conclusion of law that is made on the basis of applying the facts as they exist to the relevant statutory definition. Ordinarily, we review such mixed questions of law and fact under our plenary standard of review, pursuant to which we must decide whether the court's conclusions are legally and logically correct and supported by the facts in the record. See *Crews* v. *Crews*, 295 Conn. 153, 162–63, 989 A.2d 1060 (2010). Issues of statutory construction also invoke our plenary review. See *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 288, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

In construing a statute, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [In so doing, we] 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." (Internal quotation marks omitted.) *Vincent* v. *New Haven*, 285 Conn. 778, 784–85, 941 A.2d 932 (2008). "[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of

the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) Id., 792.

The issue of whether the plaintiff was in or near an unmarked crosswalk was relevant to who had the duty to yield the right-of-way and, thus, to the issue of comparative negligence. Generally, a pedestrian has the duty to yield the right-of-way to vehicles in the roadway unless "within a crosswalk marked as provided in subsection (a) of section 14-300 or *any unmarked crosswalk* or at a location controlled by police officers . . . ." (Emphasis added.) General Statutes § 14-300b. In such instances, the pedestrian has the right-of-way. Thus, if the plaintiff was in or near an unmarked crosswalk when he was struck, Jones arguably had a heightened duty to avoid hitting the plaintiff.

A crosswalk, whether actually marked upon the road's surface or unmarked, is specifically defined by § 14-297 (2) as "that portion of a highway ordinarily included *within the prolongation or connection of the lateral lines of sidewalks at intersections*, or any portion of a highway distinctly indicated, by lines or other markings on the surface, as a crossing for pedestrians, except such prolonged or connecting lines from an alley across a street . . . ." (Emphasis added.) The plaintiff does not argue that the language of the statute is ambiguous, only that it should be interpreted broadly enough to include the circumstance at issue in the present case. By the statute's plain language, however, a crosswalk is created in only two ways: (1) by connecting at the intersections of two roadways the lateral lines of any sidewalks, which resulting crosswalks could be marked or unmarked, or (2) by specifically marking the surface of the roadway, which presumably could occur anywhere along a roadway, not only at an intersection. The

statute also makes clear that an alleyway's intersection with a street does not create a crosswalk.

In the present case, is undisputed that Treat Avenue did not have sidewalks at its intersection with Rock Spring Road. The lack of sidewalks meant there were no "lateral lines of sidewalks" to connect across to the other side of Rock Spring Road. Obviously, there also were no distinct markings on the roadway indicating a place for pedestrians to cross in this area. It would appear that a straightforward application of the statute to the undisputed facts would foreclose any argument that the plaintiff could have been in an unmarked crosswalk at the time of the accident.

The plaintiff nevertheless argues that the concrete curb cutouts leading from the sidewalk along Rock Spring Road onto the road surface at the intersection with Treat Avenue were angled in such a way as to suggest extensions across Rock Spring Road from Treat Avenue. The plaintiff never called a witness at trial to explain the purpose of the concrete cutouts or whether they deviated from other cutouts, nor did he present any other evidence at trial in support of his argument other than pictures of the cutouts. In addition, the plaintiff did not cite any statutory support for his argument or provide the court with relevant case law.

The plaintiff also argues that because an alley ordinarily does not have sidewalks, the exception regarding alleys would be rendered superfluous under the trial court's reading of the statute. "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). We read the exception, however, as addressing an entirely different issue than crosswalks emanating from sidewalks. The exception clarifies that someone walking down an alley cannot, unlike on a pedestrian sidewalk, proceed

across its intersection with a roadway as if an unmarked crosswalk existed at that location.

Viewed in its best light, the plaintiff seems to be making a policy argument, invoking notions of public health and safety, asking us to expand the definition of crosswalk beyond the plain statutory meaning. We conclude that the plaintiff's arguments may be more appropriate for the legislature's consideration. Because we must construe the statute as written and cannot supply additional terms to achieve a particular result; see *Vincent* v. *New Haven*, supra, 285 Conn. 792; we agree with the trial court's conclusion that there was no unmarked crosswalk from Treat Avenue across Rock Spring Road at the time of the incident at issue. Nevertheless, even if we were to agree with the plaintiff that a crosswalk did exist, this would not result in a reversal of the court's judgment and, in particular, its conclusion that the plaintiff's negligence exceeded that of the defendant and, thus, barred recovery.

Contrary to how the plaintiff has framed his claim, the court never made any finding that identifies with any specificity the plaintiff's location on the roadway at the time he was hit or from which it reasonably can be inferred that he was struck in or very near the area of the road that the plaintiff argues constituted an unmarked crosswalk. The court certainly rejected the plaintiff's argument that unmarked crosswalks extend across Rock Spring Road from either side of Treat Avenue's terminus with Rock Spring Road, an intersection that the court found was close to the accident site. The court found that the plaintiff was struck in the middle of the roadway and made no finding that the impact zone was either in or very near to that portion of the roadway where the plaintiff's proposed unmarked crosswalk existed.

The court found that the plaintiff's truck was parked on the eastbound side of Rock Spring Road. The truck

was located some twenty-five to thirty feet eastward of the area of impact, meaning the plaintiff parked it some distance east of the Treat Avenue intersection. The court further indicated that it was "not known" whether the plaintiff "crossed at a ninety degree angle or took a longer diagonal crossing from his truck to the delivery address." We read this as an indication that there was an absence of credible evidence from which the court could determine if the plaintiff had left his truck and walked back along Rock Spring Road to its intersection with Treat Avenue, before turning and attempting to cross Rock Spring Road in the vicinity of what he alleges was an unmark crosswalk, or if he had simply attempted to cross diagonally, walking in the most direct route from his truck's location across to his delivery address at 102 Rock Spring Road. There is no finding indicating whether such a diagonal path would have placed him in or near the alleged unmarked crosswalk.

During his opening argument, the plaintiff's counsel argued that the area of impact was at the intersection of Treat Avenue and Rock Spring Road. Counsel's argument, however, does not constitute evidence. The plaintiff was unable to remember anything from the day of the accident, and testified only as to the extent of his damages, not the location where he was struck. Moreover, the only witnesses that could have testified about whether the impact occurred in the alleged unmarked crosswalk—the responding officer and the eyewitness to the incident—were never asked any questions about the precise impact area. The deposition of the van's driver, Jones, was entered into evidence but provides no further illumination on that precise issue. Finally, the plaintiff did not present the testimony of an accident reconstruction expert to aid the court in determining the precise impact area.

"In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the

burden rests with the appellant to demonstrate reversible error." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Because the record is silent as to whether the plaintiff was in or near the purported unmarked crosswalk when he was struck by the defendant's vehicle, we are left to speculate about the degree to which the court's allegedly erroneous finding regarding the existence of an unmarked crosswalk would have affected, if at all, its assignment of the percent of negligence it attributed to the plaintiff. Under the circumstance in this case, the court concluded that the plaintiff's negligent actions in crossing a poorly lit street without wearing reflective clothing on a dark, rainy night—none of which is challenged by the plaintiff on appeal—outweighed the negligence the court assigned to the defendant. Even if the plaintiff was able to demonstrate that an unmarked crosswalk existed, a claim we have rejected, he has failed to show how that fact would have significantly altered the judgment of the trial court in this case.

The form of the judgment is improper, the judgment dismissing the action is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TRAVIS MONTANA
(AC 39720)

Alvord, Prescott and Lavery, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and risk of injury to a child, the defendant appealed. *Held*:

1. The state presented sufficient evidence to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child;

the victim provided graphic testimony of the sexual assaults, which the jury was free to believe even if there were inconsistencies in that testimony, the jury reasonably could have found the defendant guilty of sexual assault on the basis of that testimony alone, which established the elements necessary to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child, and it was not for this court to assess the credibility of the victim's testimony.

2. The trial court did not abuse its discretion in refusing to admit certain third-party culpability evidence proffered by the defendant, which concerned the victim's father: the nonhearsay evidence did not directly connect the victim's father to the alleged acts of sexual abuse with which the defendant was charged, as the evidence, if believed, merely established that the victim's father may have committed some other crime during a later time frame, and the fact that the victim's father might have had a motive and an opportunity to sexually assault the victim also did not establish a direct connection between the victim's father and the crimes at issue.

Argued October 25, 2017—officially released January 16, 2018

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; thereafter, the court denied the defendant's motion to introduce certain evidence and granted the state's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Jodi Zils Gagne, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Ann P. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Travis Montana, appeals from the judgment of conviction rendered after a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury

to a child in violation of General Statutes § 53-21 (a) (2).[1] On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction and (2) the court abused its discretion in excluding third-party culpability evidence. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2012, the victim, J,[2] was living with her three biological siblings and her adoptive father in a small room at a motel in Bridgeport (motel). The room had two beds and two air mattresses. In January, 2012, when the victim was twelve years old, the defendant, who was a friend of the family, moved into the room at the motel with the victim and her family. At some point, the defendant began sharing a bed with the victim.

One night while the victim was sleeping, the defendant cut a hole in the victim's pajama pants and digitally penetrated the victim's vagina. On one other occasion, the defendant attempted to force the victim to perform fellatio. On additional occasions, the defendant forced the victim to engage in vaginal intercourse. The victim's father, who was ill and on medication, was "dead asleep" during the abuse. The last incident occurred on February 14, 2012. Shortly thereafter, the defendant moved out of the motel. After the defendant left the

[1] General Statutes § 53a-70 (a) (2) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ." General Statutes § 53-21 (a) (2) provides in relevant part: "Any person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

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

motel, the victim disclosed the abuse to her older sister and her father. The victim's father informed the victim's physician of the abuse during a physical examination. The physician contacted the Department of Children and Families (department), and the case was referred to the Bridgeport Police Department.

Following a jury trial, the jury returned a verdict finding the defendant guilty of sexual assault in the first degree and risk of injury to a child. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of fifteen years incarceration, followed by ten years special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the state presented insufficient evidence at trial to support his conviction of sexual assault in the first degree and risk of injury to a child. Specifically, the defendant asserts that the state's evidence was insufficient because of inconsistencies in the victim's testimony.[3] We disagree.

The standard of review that we apply to a claim of insufficient evidence is well established. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon

[3] The defendant also argues that the victim's father "had a propensity for committing this crime against his daughters" and the evidence was insufficient to convict the defendant because the jury was precluded from hearing third-party culpability evidence. The court ruled that the third-party culpability evidence proffered by the defendant was inadmissible. See part II of this opinion. We examine the defendant's sufficiency claim on the basis of the evidence admitted at trial and, accordingly, the court's evidentiary ruling excluding third-party culpability evidence has no bearing on our review of the sufficiency of the evidence. Our "sufficiency review does not require initial consideration of the merits of [the defendant's evidentiary claims] . . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.) *State* v. *Coyne*, 118 Conn. App. 818, 826, 985 A.2d 1091 (2010).

the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Tine*, 137 Conn. App. 483, 487–88, 48 A.3d 722, cert. denied, 307 Conn. 919, 54 A.3d 562 (2012).

The defendant asserts that the state failed to establish his guilt beyond a reasonable doubt because "[t]here were simply too many inconsistencies" in the victim's testimony and because it was "not logical to believe that [the defendant] engaged in these acts and no one heard or saw anything at the time."[4] The defendant, essentially, is asking this court to assess the credibility of the victim's testimony and conclude that the state lacked sufficient evidence as a result of the victim's lack of credibility. This we may not do. "As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . [W]e must defer to the [finder] of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor, and attitude. . . . Credibility

[4] The defendant directs our attention to the following minor inconsistencies: the victim told an interviewer that she was wearing shorts during the initial sexual assault but stated at trial she had been wearing pajama pants; the victim did not mention that the defendant cut her pants with scissors during the initial sexual assault until trial; the victim stated to an interviewer that her father did not wake during the sexual assaults because he was on pain medication following surgery, but at trial the victim stated that her father had surgery after the sexual assaults had occurred and offered a different reason for her father having remained asleep. The defendant also argues it is illogical that: (1) the victim did not mention the sexual assaults to an employee of the department when the department became involved with her family for other reasons; and (2) the defendant committed the crimes due to the short period of time in which he resided at the motel.

determinations are the exclusive province of the . . . fact finder, which we refuse to disturb. . . . It is well settled . . . that [e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . Rather, the [finder of fact] [weighs] the conflicting evidence and . . . can decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Douglas F.*, 145 Conn. App. 238, 243–44, 73 A.3d 915, cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013).

We conclude that the evidence at trial was sufficient to convict the defendant because the testimony of the victim established the elements necessary to support the defendant's conviction of sexual assault in the first degree and risk of injury to a child. The victim provided ample graphic testimony of the sexual assaults and it serves no useful purpose to recite her testimony in detail. See *State* v. *Gene C.*, 140 Conn. App. 241, 246, 57 A.3d 885, cert. denied, 308 Conn. 928, 64 A.3d 120 (2013). "The jury, as sole arbiter of credibility, was free to believe that testimony." Id. "[A] jury reasonably can find a defendant guilty of sexual assault on the basis of the victim's testimony alone." Id., 247.

II

The defendant also claims that the court abused its discretion in denying his motion in limine to present third-party culpability evidence. We disagree.

The following additional facts are relevant. On September 14, 2015, the day before the trial began, defense counsel filed a motion in limine requesting a ruling on the admissibility of evidence regarding whether the victim's father touched her in a sexually inappropriate manner and whether the victim's father sent her sexually explicit text messages. The following day, the court permitted defense counsel to make an offer of proof outside the presence of the jury.

During the offer of proof, the victim testified to the following. Her father "touched" her in 2015, but he did not touch her in a sexually inappropriate manner before 2015, or while they were living at the motel. The victim's father sent her sexually explicit text messages in 2015, but he did not send her sexually explicit text messages when she was living at the motel. When the victim told her father and sister that the defendant had abused her, her sister had a "mental relapse" due in part to being sexually abused by their father. She told the victim to be careful of their father. In 2008, the victim's father told the family that he was pursuing a relationship with the victim's sister, but the victim did not know whether the relationship was sexual in nature. The victim did not have personal knowledge of either the relationship between her father and sister, or of her father sexually abusing her sister. The state objected to the admission of the proffered evidence.

The court denied the defendant's motion in limine and sustained the state's objection to the proffered evidence. The court determined that the victim's testimony regarding statements made by her father and sister were inadmissible hearsay. The court also concluded that there was no basis for connecting the victim's nonhearsay statements that her father touched her and sent her sexually explicit text messages in 2015, to the early 2012 incidents at the motel, and, thus, that the statements were not relevant. The court noted that the victim testified in the jury's presence that her father was taking medication and was, therefore, unaware of the sexual abuse at the motel. The court further determined that the evidence was more prejudicial than probative.

On appeal, the defendant argues that the proffered evidence supported his third-party culpability defense because the victim's father had a motive and the opportunity to commit the crimes.[5] He argues that because

[5] The defendant also argues that the court erred by failing to instruct the jury in accordance with his requested third-party culpability charge. "[A]

the victim's father inappropriately touched the victim in 2015, and had a relationship with the victim's older sister, "it would not be a stretch of the imagination to believe [that the victim's father] committed these acts at an earlier time as well . . . ." We do not agree.

"It is well established that a defendant has a right to introduce evidence that another person committed the offense with which the defendant is charged. . . . The defendant must, however, present evidence that directly connects the third party to the crime. . . It is not enough . . . to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevancy is an evidentiary question, and [e]videntiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In determining relevancy, [t]he court must determine whether the proffered evidence is corroborative or coincidental, whether it is probative or tends to obfuscate, and whether it clarifies or obscures. In arriving at its conclusion, the trial court is in the best position to view the evidence in the context of the entire case, and we will not intervene unless there is a clear abuse of the

trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . . [T]he very standards governing the admissibility of third party culpability evidence also should serve as the standards governing a trial court's decision of whether to submit a requested third party culpability charge to the jury." (Citation omitted; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 810, 91 A.3d 384 (2014). We conclude that the court did not err in declining to give a third-party culpability charge because no third-party culpability evidence was admitted at trial to support the charge.

court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Baker*, 50 Conn. App. 268, 277–78, 718 A.2d 450, cert. denied, 247 Conn. 937, 722 A.2d 1216 (1998).

We conclude that the court did not abuse its discretion in refusing to admit the defendant's proffered third-party culpability evidence. The defendant failed to offer any evidence that directly connected the victim's father to the acts of sexual abuse that occurred at the motel. The nonhearsay evidence the defendant sought to introduce,[6] if believed, merely established that the victim's father engaged in factually dissimilar acts of misconduct against the victim three years after the incidents at the motel.[7] The victim testified during the offer of proof that her father did not send her sexually explicit text messages or touch her in a sexually inappropriate manner while they resided at the motel during the relevant time frame.[8] The victim also knew the defendant and clearly identified him as her assailant during her

[6] The defendant does not challenge the court's ruling that the statements by the victim's father and sister were inadmissible hearsay.

[7] "[T]he right of an accused to offer evidence of a person's character, past criminal convictions or other prior bad acts, in support of a third party culpability defense, also is compelled by the right to present a defense guaranteed by the sixth amendment, and, as a general matter, its use should be limited only by the rules relating to relevancy and balancing. . . . [T]he policies underlying "§ 4-4 (a) [character evidence] and 4-5 (a) [prior misconduct evidence] of the Connecticut Code of Evidence have extremely limited applicability when the defendant offers evidence of a character trait or other crimes, wrongs or acts to prove that someone else committed the crime charged." *State* v. *Hedge*, 297 Conn. 621, 653, 1 A.3d 1051 (2010).

[8] The defendant further argues, for the first time on appeal, that (1) the victim could have named the defendant as the perpetrator "simply to cover up for her father's actions" and that the jury should determine whether the victim was being truthful when she stated during her proffered testimony that her father had not touched her while they were residing at the motel; and (2) he was prejudiced by the court's exclusion of the evidence because the jury "had no one else to choose for this crime." We reject the defendant's arguments. As we previously concluded, the court did not abuse its discretion in refusing to admit the proffered evidence.

testimony on direct examination. She also testified on direct examination that her father was medicated while the abuse was occurring at the motel.

The proffered evidence creates a merely tenuous and speculative connection between the victim's father and the crimes at issue. It indicates that the victim's father may have committed some other crime during a later time frame, but does not establish a direct connection between the victim's father and the sexual abuse at the motel. The fact that the victim's father might have had a motive and an opportunity to sexually assault the victim at the motel does not establish a direct connection between the victim's father and the crimes at issue. "It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . . Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination." (Citations omitted; internal quotation marks omitted.) *State* v. *Arroyo*, 284 Conn. 597, 609–10, 935 A.2d 975 (2007). Accordingly, we conclude that the court did not abuse its discretion by precluding the defendant from introducing third-party culpability evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICES OF CONNECTICUT STATE AGENCIES

CONNECTICUT PORT AUTHORITY

Notice of Intent to amend Rates of Pilotage procedures

In accordance with Section 1-121 of the General Statutes of Connecticut, NOTICE IS HEREBY GIVEN that the Connecticut Port Authority (the ''Authority'') proposes to amend the Rates of Pilotage procedures of the Connecticut Port Authority (the ''Procedures'').

Summary of written procedures: The proposed amendments to the Procedures address the following:

- Establishment of increased Rates of Pilotage to be implemented over a five-year period; and
- Technical changes necessary to conform the regulations transferred from the Connecticut Department of Transportation to the Authority, including name/title and section references.

Statement of purpose: To amend the Procedures for conformity to the Authority and to establish increased Rates of Pilotage.

Copies of the proposed amended Procedures are available at the offices of the Authority between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday, by contacting Gerri Lewis, the Office Manager, at **(860) 577-5174** or via e-mail at: *glewis@ctportauthority.com*. All interested parties may submit comments in connection with the proposed Procedures, within thirty (30) days following publication of this notice, to Gerri Lewis, the Office Manager at the Connecticut Port Authority, 455 Boston Post Road, Suite 204, Old Saybrook, CT 06475 or via e-mail at: *glewis@ctportauthority.com*.

Department of Social Services

Notice of Intent to Operate Updated Policies and Procedures

Regulation 17-01 – Person-Centered Medical Home Plus (PCMH+) Program (PR 2016-087)

In accordance with and pursuant to the authority of section 17b-263c of the Connecticut General Statutes, the Department of Social Services (the ''Department'') gives notice that, effective January 1, 2018, it intends to operate under updated policies and procedures (also known as an operational policy) pending full adoption of regulations concerning the Person-Centered Medical Home Plus (PCMH+) Program. On January 17, 2017, the Department previously published notice that it intends to adopt said regulations.

The updated operational policy is posted to the Connecticut eRegulations System, http://eregulations.ct.gov, select ''Regulations in Progress'', then select Department

of Social Services – PCMH+ or search for the DSS PCMH+ regulation on the Connecticut eRegulations System and then scroll down to view the updated operational policy that is effective January 1, 2018.

In addition to accessing the updated operational policy on the Connecticut eRegulations System, anyone may also request a copy from the Department of Social Services by email: joel.norwood@ct.gov or by writing to: Department of Social Services, Office of Legal Counsel, Regulations and Administrative Hearings, 55 Farmington Avenue, Hartford, Connecticut 06105, Attention: Joel Norwood, Staff Attorney.

NOTICES

OFFICE OF CHIEF PUBLIC DEFENDER

OFFICE OF CHIEF PUBLIC DEFENDER IS ACCEPTING APPLICATIONS FOR 2018/19 ANNUAL AGREEMENTS FOR HANDLING CASE ASSIGNMENTS IN THE FOLLOWING LOCATIONS ONLY:

CRIMINAL JUDICIAL DISTRICT COURTS
Danbury Judicial District Court
Litchfield Judicial District Court
New London Judicial District Court
Tolland Judicial District Court
CRIMINAL GEOGRAPHICAL AREA PART B COURTS:
GA 04 – Waterbury
GA 09 – Middletown
GA 10 – New London
GA 11 – Danielson
GA 18 – Litchfield
CHILD PROTECTION COURTS
Bridgeport
Hartford
Middletown
New Haven
Waterbury
Waterford
STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM
Statewide

Annual agreements will cover the period of July 1, 2018 through June 30, 2019. Compensation will be as follows:

FLAT RATE COMPENSATION

JUDICIAL DISTRICT CASES	$1000 per case
CRIMINAL GEOGRAPHICAL AREA CASES	$350 per case
CHILD PROTECTION CASES	$500 per case
ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM	$500 per case

HOURLY COMPENSATION

$75 per hour for Felony cases
$50 per hour for Misdemeanor cases
$50 per hour for Child Protection
$50 per hour for AMC/GAL cases

QUALIFICATIONS FOR PRACTICE AREAS

JUDICIAL DISTRICT APPLICANTS

Attorneys approved to represent clients in JD courts must have at least 2 years of criminal litigation experience and at least 2 felony trials to verdict as lead or sole counsel.

GEOGRAPHICAL AREA APPLICANTS

Attorneys approved as Assigned Counsel for assignments in Geographical Area courts will represent criminal defendants in misdemeanor cases and felony cases (C and below). Applicants should possess a working knowledge of the criminal statutes, practice book, diversionary programs, and alternatives to incarceration.

CHILD PROTECTION APPLICANTS

Attorneys approved as Assigned Counsel for assignments in child protection matters will represent children and indigent parents in juvenile court matters dealing with abuse, neglect and termination of parental rights. Attorneys may also be appointed as guardian ad litem. The cases may also involve matters transferred from Probate Court and adoptions. Applicants will be required to participate in pre-service training and should possess general knowledge of the child protection statues, the administration and policies of the Department of Children and Families.

STATE-RATE ATTORNEY FOR MINOR CHILD / GUARDIAN AD LITEM

Attorneys approved as Assigned Counsel in state-rate attorney for minor child / guardian ad litem cases in family court will represent children from indigent families in family matters as appointed by the court.

Attorneys interested in such agreements should download the application form from the public defender web site:

http://www.ct.gov/ocpd/site/default.asp

Send the application, cover letter and resume only via email to the address below:

OCPD.AC.APPLICATIONS@JUD.CT.GOV

Do not attempt to submit applications via US mail or fax, they will not be accepted. All applications must be received no later than **Friday, February 16, 2018 by 5:00 PM.**

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on December 1, 2017, this Court reprimanded Attorney Douglas Breakstone, Juris #308613 of Waterbury, Connecticut. See UWYCV17-6034284-S, *Office of the Disciplinary Counsel* v. *Douglas Breakstone* for the full order of the Court

Mark H. Taylor, *Judge*

Notice of Reinstatement of Attorney

In accordance with § 2-54 of the Connecticut Practice Book, notice is hereby given that Attorney John Kennelly has been reinstated to the Connecticut Bar effective January 8, 2018.

Antonio C. Robaina
Presiding Judge