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Vol. 332

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JEAN JACQUES (SC 19783)

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

Syllabus

Convicted of the crime of murder, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain evidence discovered during a warrantless search of his apartment. The defendant had entered into a month-to-month lease for the apartment, paid the first month's rent, and moved in with all of his personal belongings. Five days into that lease, the defendant was arrested on unrelated drug charges and was unable to post bond. The defendant never returned to the apartment, and did not pay the second month's rent or ask the landlord for an extension of his lease. The defendant also never contacted his family or friends to ask them to pay his rent or to secure his personal belongings, even though he had the ability to do so. Although the landlord never commenced eviction proceedings, he entered into the apartment and removed all of the defendant's personal belongings prior to the search in question. The police subsequently received a tip indicating that the defendant had hidden the murder victim's cell phone inside of a bathroom wall in the apartment. Five days after the term of the defendant's lease expired, the police obtained written consent from the landlord to enter the apartment, conducted a warrantless search, and ultimately discovered the victim's cell phone in a hole in the bathroom wall. The defendant claimed in his motion to suppress that the cell phone was inadmissible under the exclusionary rule because the warrantless search of his apartment had violated his right to be free from unreasonable search and seizures under the federal constitution. At an evidentiary hearing on his motion, the defendant testified that the apartment was his home, the landlord had never contacted him, and he would have asked a friend to retrieve his belongings if he had been instructed to vacate the apartment. The defendant testified that his

intention was to stay in the apartment for a long time, and that he never gave anyone, including the landlord, permission to enter. In denying the motion to suppress, the trial court concluded that the defendant did not meet his burden of demonstrating that he had a subjective expectation of privacy in the apartment at the time of the search. In reaching its conclusion, the trial court relied on the expiration of the lease before the search, the nonpayment of rent, and the fact that the defendant had not asked his family or friends to maintain the apartment or his personal belongings contained therein while he was incarcerated. On appeal from the judgment of conviction, *held* that the trial court improperly denied the defendant's motion to suppress, and, accordingly, the judgment of conviction was reversed and the case was remanded for a new trial: this court's scrupulous review of the record led it to conclude that the trial court's determination that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search was not supported by the substantial evidence and, therefore, was clearly erroneous, as the record was devoid of any evidence that the defendant affirmatively had intended to relinquish his expectation of privacy in the apartment, and the defendant's incarceration and his failure to pay rent five days past the due date, without more, were insufficient to divest him of that expectation; moreover, the defendant's subjective expectation of privacy was objectively reasonable in light of, inter alia, a statutory (§ 47a-15a) nine day grace period for the nonpayment of rent that had not yet lapsed before the search in question, the lack of formal eviction proceedings, and the fact that the defendant's absence was due solely to his incarceration; furthermore, because the state did not advance any claim that the admission of the evidence discovered during the challenged search was harmless, this court declined to address whether the defendant's conviction could be upheld on that ground.

(*Two justices concurring separately in one opinion*)

Argued October 17, 2018—officially released July 16, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Jongbloed, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *new trial.*

S. Max Simmons, assigned counsel, for the appellant (defendant).

David J. Smith, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

MULLINS, J. After a jury trial, the trial court convicted the defendant, Jean Jacques, of murdering the victim, Casey Chadwick, in violation of General Statutes § 53a-54a. The defendant now appeals from that conviction. The subject of this appeal is the trial court's denial of his motion to suppress incriminating evidence linking him to the murder, which the police obtained from a search of his apartment without a warrant. The defendant had a month-to-month lease for the apartment and had paid only the first month's rent. Five days into that lease, the defendant was arrested for certain drug offenses and, shortly thereafter, the murder of the victim. The defendant never posted bond or made any arrangements to pay for a second month of rent.

Five days after his rent was due for a second month, the police searched his apartment without a warrant and discovered the victim's cell phone hidden in a bathroom wall. The defendant moved to suppress that evidence on the ground that the search violated his right to be free from unreasonable searches and seizures under the fourth amendment to the United States constitution.[1] In denying his motion to suppress, the trial court explained that the defendant had failed to "maintain the apartment as his own" because the lease had expired, the defendant had not made any further rent payments, and the defendant did not make arrange-

[1] The fourth amendment's protections against unreasonable searches and seizures are made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

ments to secure his belongings in the apartment. Thus, the court concluded that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search.

The question before us is whether the trial court properly denied the defendant's motion to suppress on the ground that he did not have a subjective expectation of privacy in the apartment at the time of the search. We conclude that, under the specific facts of this case, the defendant established that the apartment was his home and that neither his incarceration nor his failure to pay rent five days after it was due divested him of his subjective expectation of privacy in his apartment. Therefore, we further conclude that the trial court improperly denied the defendant's motion to suppress and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our analysis. On January 16, 2015, the defendant was released from incarceration to supervised parole.[2] Upon being released, he lived with a friend until June 10, 2015. On that date, the defendant secured his own apartment in Norwich. He entered into a month-to-month tenancy and paid the landlord $450 for the first month of rent, which ran from June 10 to July 10, 2015. After securing the apartment, the defendant moved all of his belongings into the apartment and began living there.

On June 15, 2015, the defendant was arrested on drug charges unrelated to this case. At the time of his arrest, the police noticed blood on his sneakers. That same day, police officers discovered the body of the victim stuffed into a closet in her apartment. She had been stabbed multiple times. Subsequent forensic testing

[2] The defendant had been incarcerated following a judgment of conviction in 1997 on the charges of attempted murder and carrying a pistol without a permit.

indicated that some of the blood on the defendant's shoes had come from the victim.[3]

The following day, on June 16, 2015, the police, accompanied by the defendant's parole officer, searched the defendant's apartment. Inside, they discovered blood on the walls and a mattress. Forensic testing indicated that this blood came from the defendant, who had various cuts on his hands. The defendant was subsequently arrested for the murder of the victim while he was incarcerated on the drug charges.

While the defendant was in jail on the pending drug and murder charges, the police received a tip from a confidential informant that the defendant had hidden the victim's cell phone and some drugs in a hole in the wall of the bathroom of his apartment. As a result, on July 15, 2015, police officers conducted a second search of the defendant's apartment in order to investigate whether there was a hole in the bathroom wall. This time, the officers were not accompanied by the defendant's parole officer. Instead, the officers went to the apartment alone and without a warrant. They obtained written consent from the landlord to search the apartment. After obtaining that consent, the officers entered the defendant's apartment and confirmed the presence of a hole in the bathroom wall with a bag inside of it. Inside the bag, the officers found the victim's cell phone and some drugs.[4]

Prior to trial, the defendant filed a motion to suppress the victim's cell phone and the drugs, asserting that this evidence was inadmissible under the exclusionary rule

[3] The state also presented testimonial evidence placing the defendant in the victim's apartment on the night of the murder. Additionally, forensic testing indicated that the victim's blood was on certain articles of defendant's clothing found inside of his gym bag, and that the defendant's blood was in the victim's living room and kitchen.

[4] After the officers confirmed the existence of the hole in the wall, they secured the apartment and obtained a warrant to search the inside of the bag.

as the fruit of prior police illegality. An evidentiary hearing on the motion was held during which both parties presented evidence related to the defendant's lease of the apartment and the contested search.

In its memorandum of decision on that motion, the trial court made the following explicit findings of fact. The defendant had entered into a month-to-month lease for the apartment and paid rent for the first month. Five days into his lease, on June 15, 2015, he was arrested on the drug charges. His bond was set at $100,000, which he was not able to post. While incarcerated on the drug charges, he was arrested for the murder of the victim, and his bond was increased to $1 million. He did not post that bond either. Thus, the defendant was incarcerated and never returned to the apartment following his arrest on June 15, 2015. The defendant did not make any further rent payments for any period beyond the first month. Nor did the defendant contact the landlord or attempt to have his lease extended. Despite having the ability to do so, the defendant also did not contact his friends or family to ask them to pay his rent. The trial court also found that the search at issue occurred on July 15, 2015, five days after the date of expiration of the lease term. Despite not receiving rent for a second month, the landlord did not initiate eviction proceedings. In fact, the court credited the landlord's testimony that, if the defendant had been released from jail in July and had the money to pay his rent, the landlord would have permitted him to continue to stay in the apartment.

On the basis of these findings, the court determined that the defendant did not show an interest in the apartment and, thus, did not meet his burden of demonstrating a subjective expectation of privacy in it at the time of the second search. In making that determination, the court considered that the lease had expired five days before the second search occurred, the defendant nei-

ther made any further rent payment nor any arrangements to have his rent paid, and the defendant made no effort to "maintain the apartment as his own." The trial court further explained that, even though the defendant had been incarcerated, he could have exhibited some interest in the apartment by asking his family or friends to maintain the apartment or the personal belongings within it. The court acknowledged the defendant's testimony that he would have gone back to the apartment if he had been released from jail. It determined, however, that his expressing this view many months later did not rise to the level of exhibiting an actual subjective expectation of privacy in the apartment.

The trial court denied the defendant's motion to suppress, and, following a nine day trial, the jury returned a verdict of guilty on the charge of murder. The trial court subsequently rendered judgment in accordance with that verdict and sentenced the defendant to sixty years incarceration. This appeal followed. Additional facts will be set forth below as necessary.

On appeal, the defendant asserts that the trial court improperly denied his motion to suppress the evidence obtained during the second search of his apartment, which occurred on July 15, 2015.[5] Specifically, he claims

[5] The defendant also filed a motion to suppress evidence obtained as a result of the first search that occurred on June 16, 2015, which was denied by the trial court. The court reasoned that, because the defendant was on parole at the time of that search, his parole officer, who was present during the search, had authority to conduct the search. The defendant does not challenge the trial court's decision regarding the first search on appeal.

Significantly, the state does not make the same argument on appeal regarding the second search. The state explained that it did not attempt to justify the second search on the basis of the defendant's status as a parolee because the state could not definitively determine what the defendant's parole status was at the time of the second search. Because of that uncertainty, the state represented to this court at oral argument that it was not attempting to justify the second search on the basis that the defendant had a reduced expectation of privacy as a parolee. Because the state has made no such claim, and in fact expressly disclaimed any reliance on the notion that this search could be justified on the basis of the defendant's status as a parolee,

that he had a reasonable expectation of privacy in the apartment because it was his home and he had never been evicted from it or otherwise abandoned it. We agree with the defendant.

We begin by setting forth the relevant principles of law and the standard of review governing the defendant's claim. "The fourth amendment to the United States constitution . . . provides that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." (Internal quotation marks omitted.) *State* v. *Saturno*, 322 Conn. 80, 88, 139 A.3d 629 (2016). "The capacity to claim the protection of the fourth amendment does not depend upon a property interest, permanency of residence, or payment of rent but upon whether the person who claims fourth amendment protection has a reasonable expectation of privacy in the invaded area." *State* v. *Reddick*, 207 Conn. 323, 330, 541 A.2d 1209 (1988); see id., 329 ("[a] person is entitled to fourth amendment protection anywhere he resides where he has a reasonable expectation of privacy"); see also *Rakas* v. *Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

"To receive fourth amendment protection against unreasonable searches and seizures, a defendant must have a legitimate expectation of privacy in the [subject of the search]. . . . Absent such an expectation, the subsequent police action has no constitutional ramifications." (Internal quotation marks omitted.) *State* v. *Pink*, 274 Conn. 241, 258, 875 A.2d 447 (2005). To determine whether a defendant has a reasonable expectation of privacy in an invaded place, we follow the test laid

we have no occasion to address that issue as an alternative basis upon which the second search could be justified.

out by the United States Supreme Court in *Katz* v. *United States*, supra, 389 U.S. 347. "The *Katz* test has both a subjective and an objective prong: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018).

It is well settled that "[w]hen reviewing a trial court's denial of a motion to suppress, [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights . . . and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the [trial court's] memorandum of decision . . . ." (Internal quotation marks omitted.) Id., 339–40.

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . We must defer to the trier 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." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014).

In the present case, the trial court's factual finding that the defendant had no subjective expectation of privacy in the apartment at the time of the search implicates the defendant's constitutional rights. Thus, we undertake a scrupulous review of the record to determine whether the trial court's finding is supported by substantial evidence in the record. See, e.g., id.

A review of the record reveals the following. At the suppression hearing, the defendant testified that the apartment was his "home."[6] He explained that, after verbally entering into a lease and paying his first month of rent on June 10, 2015, he moved all of his personal belongings into the apartment and began living there. He was living there when he was arrested and incarcerated five days later. When he missed his rent payment for the next month, he did not make arrangements to have his belongings removed from the apartment because he did not think that his landlord would kick him out for not paying rent.

He also expressed his uncertainty as to whether his lease had expired at the time of the search on July 15, 2015.[7] In the five days preceding the search in which

[6] The state asserts in its brief that the defendant never expressly indicated that the apartment was his home. The following exchange belies that assertion:

"[The Prosecutor]: Was [the apartment], was that your home?

"[The Defendant]: Yes."

[7] The following colloquy took place during the state's cross-examination of the defendant:

"[The Prosecutor]: In July of 2015, your lease had run, correct? Your rental agreement was over, correct?

"[The Defendant]: I don't know. I don't know . . . that."

After an objection by defense counsel on the ground that the question was a legal one, which was overruled by the court, the following exchange occurred:

"[The Prosecutor]: Had it run?

"[The Defendant]: I don't know about that."

the defendant's rent payment was overdue, the landlord neither contacted him nor gave him any reason to believe that he had to vacate the apartment. The defendant testified that, if his landlord had told him that he needed to leave the apartment, he would have contacted a friend to remove his belongings from the premises, but the landlord never did so. He stated that it was his intention to stay in the apartment for a long time. He also stated that he had a key to the apartment and did not give permission for anyone, including the landlord, to enter.

While the defendant acknowledged that he knew he might be incarcerated for a long time and made no attempt to contact his landlord when rent became due for a second month, he testified that he thought he could easily talk to the landlord and get his apartment when he got out of jail. When testifying about his expectations with regard to the apartment in the event that he was released from jail, the defendant stated that "I . . . think about when I get out, this is where I'm going . . . where I'm going [to] go."[8]

The landlord also testified at the suppression hearing, and his testimony supported the defendant's contention that he had a subjective expectation of privacy in the apartment. The landlord testified that he never communicated to the defendant in any way that he had to leave

[8] We note that, in its memorandum of decision, the trial court does not expressly discredit any portion of the defendant's testimony. It does, however, state that, "[a]lthough the defendant testified that he would have gone back to [the apartment] if he were released [from jail] in July, 2015, [t]he subjective test does not rest on the absolute subjective perception of the individual defendant. . . . Expressing a view, many months later, that he would have gone back if he could, does not rise to the level of exhibiting an actual subjective expectation of privacy in a location." (Citations omitted; internal quotation marks omitted.) Because the trial court did not expressly discredit the defendant's testimony, we consider it in our analysis. See *State* v. *Edmonds*, 323 Conn. 34, 39, 145 A.3d 861 (2016) (under a more probing review of constitutional issue, this court takes into account testimony that was not expressly discredited by trial court); see also *State* v. *DeMarco*, supra, 311 Conn. 520.

the apartment. He made no attempt to get the keys back from the defendant prior to the time of the search. Nor did he commence eviction proceedings. Although he never notified the defendant, prior to the search, the landlord took it upon himself to put all of the defendant's personal belongings in bags and remove them from the apartment.

We are aware that the first prong of *Katz* focuses on the defendant's actions and beliefs as opposed to those of the landlord. Nevertheless, we find it significant that the landlord's conduct supports the defendant's testimony that he actually believed he had a privacy right in the apartment at the time of the search. The defendant heard nothing from the landlord suggesting that he was in danger of losing the apartment or his possessions therein.[9] Cf. *United States* v. *Miller*, 387 Fed. Appx. 949, 951–52 (11th Cir. 2010) (concluding that defendant could not have subjective expectation of privacy where defendant knew property manager would give him only three weeks to remove belongings if he failed to pay rent, and search occurred after three week period elapsed).

A scrupulous examination of the record reveals that the trial court's determination that the defendant did not have a subjective expectation of privacy in his apartment at the time of the search is not supported by sub-

[9] This court recently had occasion to address the first prong of the *Katz* test and clarified that, when determining whether a defendant has a subjective expectation of privacy in property that is not his residence, it is appropriate to examine the record for conduct demonstrating an intent to preserve something as private and free from knowing exposure to the view of others. See *State* v. *Houghtaling*, supra, 326 Conn. 348. In that case, this court concluded that the owner of property who did not reside there, but instead rented it to a tenant, did not have a subjective expectation of privacy in the property because he failed to adduce evidence sufficient to establish his intent to keep the property private. Id. Because the evidence in the present case established that the apartment was the defendant's residence, we find *Houghtaling* to be distinguishable from the present case.

stantial evidence. Instead, the evidence demonstrates that the apartment was the defendant's home and that he, therefore, had an expectation of privacy in the apartment. The record shows that, the defendant entered into a month-to-month lease and paid for the first month. He was given the keys to the apartment, moved all of his possession into the place, and testified that he never gave anyone, including the landlord, permission to enter. See, e.g., *State* v. *Reddick*, supra, 207 Conn. 331–32 (holding that defendant had legitimate expectation of privacy in mother's apartment when defendant had key). He also expressly testified that the apartment was his home, and the landlord's behavior was consistent with that belief. Even though the defendant was five days late on his second rent payment in this month-to-month lease, the landlord did not initiate any eviction proceedings.

Neither the fact that the defendant was overdue on his rent nor the fact that he was incarcerated during his tenancy is sufficient, without more, for the defendant to have lost his subjective expectation of privacy in his apartment. Indeed, the failure to pay rent, on its own, does not result in the loss of one's expectation of privacy. See *United States* v. *Robinson*, 430 F.2d 1141, 1143–44 (6th Cir. 1970); *Browning* v. *State*, 176 Ga. App. 420, 422, 336 S.E.2d 41 (1985); *State* v. *Hodges*, 287 N.W.2d 413, 415 (Minn. 1979); *State* v. *Clark*, 105 N.M. 10, 13, 727 P.2d 949 (App.), cert. denied, 104 N.M. 702, 726 P.2d 856 (1986). Similarly, the defendant's incarceration and subsequent absence from the apartment did not, without more, result in the loss of his expectation of privacy. See *United States* v. *Robinson*, supra, 1143; *Browning* v. *State*, supra, 422; *State* v. *Hodges*, supra, 415; *State* v. *Clark*, supra, 952.

The trial court faulted the defendant for not exhibiting any interest in the apartment and for failing to "maintain the apartment as his own." We construe this

as an abandonment analysis. In such an analysis, however, the burden of proof is not placed on the defendant to show that he maintained his privacy interest but, rather, on the state to show "an element of conduct manifesting [an] intent to relinquish an expectation of privacy in the [item or area searched]." (Internal quotation marks omitted.) *State* v. *Jackson*, 304 Conn. 383, 396, 40 A.3d 290 (2012); see also *United States* v. *Brazel*, 102 F.3d 1120, 1147–48 (11th Cir.) (explaining that defendant bears burden of proving legitimate expectation of privacy in area searched, and government has burden of proving abandonment), cert. denied, 522 U.S. 822, 118 S. Ct. 79, 139 L. Ed. 2d 37 (1997).

Moreover, abandonment "must be established by clear and unequivocal evidence." *United States* v. *Harrison*, 689 F.3d 301, 307 (3d Cir. 2012), cert. denied, 568 U.S. 1242, 133 S. Ct. 1616, 185 L. Ed. 2d 602 (2013). To show that the defendant abandoned his expectation of privacy in his apartment, the law generally requires affirmative conduct on the part of the defendant. See, e.g., *United States* v. *Stevenson*, 396 F.3d 546, 544 (4th Cir.) (defendant showed intent to relinquish his privacy interest in apartment while he was incarcerated by writing letter to his girlfriend in which he gave her all of his personal belongings and referred to himself as "former renter"), cert. denied, 544 U.S. 1067, 125 S. Ct. 2534, 161 L. Ed. 2d 1122 (2005); see also *United States* v. *Ruiz*, 664 F.3d 833, 841 (10th Cir. 2012) (defendant sent letter to his landlord stating he would no longer be renting home and she could keep all of his furniture).

In the present case, the record is devoid of any evidence demonstrating that the defendant affirmatively intended to relinquish his expectation of privacy in his apartment. He neither expressed to his landlord that he no longer wanted the apartment nor expressed to anyone else an intention to abandon his possessions. Failure to make arrangements for the security of his

possessions a mere five days after his rent was due is not evidence that he intended to relinquish his expectation of privacy in his apartment. Rather, the defendant's conduct was consistent with his stated belief that his possessions were secure and that he was not in danger of losing his apartment five days after the rent was due.

On the basis of the foregoing, we conclude that, under the specific facts of this case, the trial court's finding that the defendant lacked a subjective expectation of privacy in the apartment at the time of the search is not supported by substantial evidence and, thus, is clearly erroneous. Instead, we conclude that the defendant met his burden of showing that he had a subjective expectation of privacy in the apartment at the time of the search.

Having concluded that the defendant satisfied his burden of proving that he had a subjective expectation of privacy in the apartment, we must now consider the second prong of the *Katz* test, namely, whether that expectation was reasonable, as measured by society's values, at the time of the search. See *Katz* v. *United States*, supra, 389 U.S. 361 (Harlan, J., concurring). This is a question of law over which our review is plenary. See, e.g., *United States* v. *Stevenson*, supra, 396 F.3d 545.

"A reasonable expectation of privacy is one that is legitimate." (Internal quotation marks omitted.) *State* v. *Zindros*, 189 Conn. 228, 239, 456 A.2d 288 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984). "The test of legitimacy is not whether the individual chooses to conceal assertedly private activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the [f]ourth [a]mendment." (Footnote omitted; internal quotation marks omitted.) *Oliver* v. *United States*, 466 U.S. 170, 182–83, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

"Legitimate expectations of privacy derive from concepts of real or personal property law or [from] understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." (Citation omitted; internal quotation marks omitted.) *State* v. *Hill*, 237 Conn. 81, 94 n.19, 675 A.2d 866 (1996); see also *Rakas* v. *Illinois*, supra, 439 U.S. 144 n.12. "Of course, one need not have an 'untrammeled power to admit and exclude' in order to claim the protection of the fourth amendment, so long as the place involved is one affording an expectation of privacy that society regards as reasonable." *State* v. *Hill*, supra, 94 n.19; see also *State* v. *Mooney*, 218 Conn. 85, 95–96, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

Moreover, it is well established that "a home is a place in which a subjective expectation of privacy virtually always will be legitimate . . . ." *California* v. *Ciraolo*, 476 U.S. 207, 220, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (Powell, J., dissenting); see also 1 W. LaFave, Search and Seizure (5th Ed. 2012) § 2.3, p. 724 ("one's dwelling has generally been viewed as the area most resolutely protected by the [f]ourth [a]mendment"). Thus, "even under the *Katz* [justified expectation of privacy] approach, it is . . . useful to view residential premises as a place especially protected against unreasonable police intrusion." 1 W. LaFave, supra, § 2.3, p. 725; see *Payton* v. *New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("[i]t is a basic principle of [f]ourth [a]mendment law that searches and seizures inside a home without a warrant are presumptively unreasonable" [internal quotation marks omitted]); see also *State* v. *Fausel*, 295 Conn. 785, 793, 993 A.2d 455 (2010).

Because the trial court determined that the defendant did not have a subjective expectation of privacy in the apartment at the time of the search, it did not reach the issue of whether the expectation was reasonable. It noted, however, that it would have concluded that the expectation was not one that society would consider reasonable. The court reasoned that the defendant's tenancy had expired prior to the search and that the defendant failed to comply with General Statutes § 47a-16a, which requires a tenant to notify his landlord of any anticipated absence from the leased premises.[10]

The defendant contends, however, that the trial court failed to consider other portions of Connecticut's landlord tenant statutes, such as those concerning summary process, that are equally relevant to the issue of reasonableness. In particular, the defendant directs our attention to several specific statutory provisions. See General Statutes § 47a-11b (a) (providing that abandonment of premises by occupant means occupant has left premises without notice to landlord as evidenced by removal of all personal belongings from premises and either nonpayment of more than two months of rent or express statements by occupant of intention to leave); General Statutes § 47a-15a (providing nine day grace period before landlord may terminate month-to-month lease for nonpayment of rent); General Statutes § 47a-23 (providing requisite steps for landlord to follow to formally initiate eviction proceedings).

We recognize that property law concepts do not necessarily control our fourth amendment inquiry. They are, however, "clearly a factor to be considered." *United States* v. *Salvucci*, 448 U.S. 83, 91, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); see also *United States* v.

[10] General Statutes § 47a-16a provides in relevant part: "[T]he tenant shall be required to notify the landlord of any anticipated extended absence from the premises . . . ."

Fields, 113 F.3d 313, 320 (2d Cir.) ("a defendant's property or possessory interest in the place searched is a factor generally considered in determining the reasonableness of a defendant's expectation of privacy"), cert. denied, 522 U.S. 976, 118 S. Ct. 434, 139 L. Ed. 2d 334 (1997); *State* v. *Houghtaling*, supra, 326 Conn. 346 n.10, 348–49 (considering defendant's property interest in fourth amendment analysis and explaining that "property rights may be the beginning and the end of a fourth amendment analysis when the police have physically intruded on a person's residence").

In the present case, the trial court made a finding that the landlord did not initiate formal eviction proceedings as required by statute. See General Statutes §§ 47a-23 through 47a-23b.[11] Moreover, the search occurred before the nine day statutory grace period for payment of rent had elapsed. See General Statutes § 47a-15a.[12] Thus, at the time of the search, the defendant had a legal right to occupy the premises and exclude others, notwithstanding his failure to pay rent.[13]

[11] General Statutes §§ 47a-23 through 47a-23b require, *inter alia*, that landlords first provide each lessee or occupant of the premises with advance written notice to quit, which then provides proper basis for a summary process action upon service.

[12] General Statutes § 47a-15a provides in relevant part: "If rent is unpaid when due and the tenant fails to pay rent within nine days thereafter . . . the landlord may terminate the rental agreement *in accordance with the* [*summary process provisions*]." (Emphasis added.)

[13] We note that the landlord could not have initiated eviction proceedings on the basis of nonpayment of rent until the statutory grace period had lapsed. See General Statutes § 47a-23 (a) ("[w]hen the owner . . . desires to obtain possession or occupancy of . . . any apartment . . . and (1) when a rental agreement or lease of such property . . . terminates [due to] . . . (D) nonpayment of rent within the grace period . . . such owner . . . shall give notice to each lessee or occupant to quit possession or occupancy of such . . . apartment"); see also *Kligerman* v. *Robinson*, 140 Conn. 219, 222, 99 A.2d 186 (1953) ("While the tenant's nonpayment of rent did not automatically terminate the lease, his failure to make a tender for the months of September and October entitled the landlord to end the tenancy by some unequivocal act. . . . That act . . . was the service of the notice to quit." [Citation omitted.]). Thus, the defendant's right of possession could not have ended until a notice to quit was served.

See, e.g., *State* v. *Johnson*, 110 Idaho 516, 523, 716 P.2d 1288 (1986) (concluding that defendant had legitimate and reasonable expectation of privacy in premises and that defendant was "entirely justified in expecting his landlord to resort to the eviction procedures required by law rather than resorting to self-help in seeking rent payment if he was in fact behind in his rent"); *State* v. *Dennis*, 182 Ohio App. 3d 674, 683–84, 914 N.E.2d 1071 (2009) (holding that defendant had reasonable expectation of privacy in apartment where defendant received multiple eviction notices, but legal procedures for eviction had not yet been completed); see also *United States* v. *Botelho*, 360 F. Supp. 620, 626 (D. Haw. 1973) (concluding that court was "not prepared to hold that a defendant with a perfectly legal right to possession or occupancy of leased premises can be found to have an 'unreasonable' expectation of privacy").

The very existence of the statutory landlord tenant scheme in Connecticut is significant in our analysis for objective standards in this context. "[S]tatutes may . . . help to define the contours of constitutional rights . . . . Because [l]egislative enactments are expressions of this state's public policy . . . they may be relevant to the resolution of whether the defendant's expectation of privacy is one that Connecticut citizens would recognize as reasonable." (Citations omitted; internal quotation marks omitted.) *State* v. *Bernier*, 246 Conn. 63, 72–73, 717 A.2d 652 (1998). Indeed, this court previously has "considered the presence of state regulation in determining whether a defendant's expectation [of privacy] was one that Connecticut citizens would consider reasonable . . . ." Id., 73; see also id., 73–74 (looking to statutory scheme regarding fire investigations in order to determine reasonableness of defendant's privacy expectations in flooring samples taken from his home); *State* v. *DeFusco*, 224 Conn. 627, 636–38, 620 A.2d 746 (1993) (considering existence of statutes

regulating garbage collection, recycling, and disposal informative to issue of reasonableness of defendant's expectation of privacy in garbage).

This state, as well as every other state in the nation, has a comprehensive statutory scheme in place detailing the process through which a landlord may retake possession of leased property from a tenant. See 2 Restatement (Second), Property, Landlord and Tenant § 14.1, note 1, p. 3 (1977). The existence of these statutes demonstrate that society expects landlords to follow the mandatory legal processes in order to lawfully retake possession of a premises, which, in turn, indicates to us that a tenant's expectation of privacy is valid, or at least reasonable, until the time that the landlord complies with the statutory procedure and regains the right of possession. In this case, the defendant's landlord did not even begin to pursue the legal statutory process. Thus, we conclude that it was reasonable for the defendant to have believed that he had the right to privacy in his apartment a mere five days after rent was due.

The state contends that the defendant's failure to pay or arrange for the payment of rent demonstrates his lack of any reasonable expectation of privacy. As we explained previously, the nonpayment of rent, by itself, does not divest a tenant of his expectation of privacy in the premises. See 79 C.J.S., Searches and Seizures § 32 (2019) ("the tenant of leased premises may maintain an expectation of privacy . . . after the termination of the tenancy, and this is so even if the tenant falls behind in [his] obligation to pay rent" [footnote omitted]); see also *United States* v. *Washington*, 573 F.3d 279, 284–85 (6th Cir. 2009) (reasoning that, "[i]f a landlord's unexercised authority over a lodging with overdue rent alone divested any occupant of a reasonable expectation of privacy, millions of tenants . . . would be deprived of [f]ourth [a]mendment protection,"

and concluding that "paying late is a common occurrence . . . and [thus, there is no merit to] the notion that the [c]onstitution ceases to apply in these circumstances"); *United States* v. *Botelho*, supra, 360 F. Supp. 625 (concluding that nonpayment of rent alone is insufficient to deem defendant's expectation of privacy in home unreasonable because "[t]o hold otherwise would abolish the protections of the [f]ourth [a]mendment for a potentially large group of persons renting homes and apartments" [internal quotation marks omitted]); *State* v. *Taggart*, 7 Or. App. 479, 482–84, 491 P.2d 1187 (1971) (concluding that defendant had reasonable expectation of privacy in premises where he failed to pay rent, search occurred before five day grace period expired, and landlord had not initiated eviction proceedings).

To be clear, a tenant may, under certain circumstances, lose an expectation of privacy in his leasehold even before he loses his legal right of possession under applicable law, and nonpayment of rent may be one factor in arriving at that determination. See *United States* v. *Stevenson*, supra, 396 F.3d 547 (any expectation defendant had in apartment was unreasonable where defendant fell behind on rent payments prior to becoming incarcerated, disposed of all of his belongings, and referred to himself as "former renter" of apartment); *United States* v. *Hoey*, 983 F.2d 890, 891–93 (8th Cir. 1993) (holding that defendant had no reasonable expectation of privacy in apartment where defendant was six weeks late on rent, defendant told landlord she was leaving and held moving sale, and neighbor saw defendant leave).

We also consider the length of time that elapsed after rent was due and before the contested search took place. The defendant's rent was due on July 10, 2015, and the search took place on July 15, 2015. Importantly, the defendant was only five days overdue on his rent at the time of the search. While we recognize that there

are limits as to how far in arrears in the payment of rent a defendant may become before his privacy expectation becomes unreasonable, we do not need to define what those limits are under the facts of the present case. Instead, we conclude that, given the record before us, the fact that the defendant's rent was five days overdue is not sufficient to render his expectation of privacy in the apartment unreasonable. See, e.g., *People* v. *Sedrel*, 184 Ill. App. 3d 1078, 1081, 540 N.E.2d 792 (acknowledging that defendant's rent was only three days overdue at time of search, which was insufficient time for landlord to believe that defendant had abandoned apartment), appeal denied, 127 Ill. 2d 636, 545 N.E.2d 126 (1989).

Indeed, in the present case, the landlord testified that, had the defendant shown up at the apartment on the day of the search and been able to pay rent, the landlord would have let him stay. Moreover, as we explained previously, § 47a-15a provides tenants with a nine day grace period in which to pay overdue rent, thus suggesting that five days is within the amount of time that society would consider reasonable for a defendant to believe that he has an expectation of privacy in his home notwithstanding the failure to pay the next month's rent. See footnote 12 of this opinion.

Aside from property law concepts, other factors aid our analysis of whether the defendant's privacy expectation was reasonable. "Absence due to arrest and incarceration while awaiting trial is not of itself a sufficient basis upon which to conclude that the accused has abandoned any reasonable expectation of privacy in his home. To hold otherwise would make permissible warrantless searches of the homes of those awaiting trial and unable to post bond." *Commonwealth* v. *Strickland*, 457 Pa. 631, 637, 326 A.2d 379 (1974); see also *United States* v. *Robinson*, supra, 430 F.2d 1143 (rejecting government's argument that defendant's

absence from apartment indicates relinquishment of privacy rights when absence was due to incarceration); *Browning* v. *State*, supra, 176 Ga. App. 422 (concluding defendant maintained reasonable expectation of privacy in apartment despite being in jail and failing to pay rent). In the present case, the defendant was living at the apartment at the time he was arrested. His absence from the apartment was solely a result of his incarceration. Further, the defendant's rent, which was only five days late at the time of the search, came due only *after* he became incarcerated. On the basis of the foregoing, we cannot conclude that, under the facts of the present case, the defendant did not have a reasonable expectation of privacy in the apartment at the time of the search.[14]

Because we conclude that the defendant had a reasonable expectation of privacy in the apartment at the

[14] Although the argument in its brief is not entirely clear, the state raises the claim that the police had consent to search the apartment. With respect to this issue, in its memorandum of decision, the trial court stated that, "[i]n this case, not only did the defendant lack any actual subjective expectation of privacy in the apartment, but also the police entered the apartment after the expiration of the month-to-month tenancy, with permission from the landlord, who signed a formal consent to search and who opened the door for them." We do not conclude—and more importantly, the state has not argued—that this determination by the trial court amounted to a finding that the warrantless search was justified because the police had obtained the consent of the landlord. Indeed, the state does not argue that any exception to the warrant requirement applies here. Rather, the state appears to argue that, because the defendant had no expectation of privacy, the landlord was the proper authority to consent to a search of the now vacant apartment. Similarly, we read the trial court's decision on consent the same way.

To be sure, because the trial court's determination that the landlord had authority to consent to the search was premised on its conclusion that, because the defendant did not have an expectation of privacy in the apartment, there was no violation of fourth amendment rights that the defendant would have had standing to assert. In light of our conclusions to the contrary, the landlord's authority to consent to the search was restricted by the general rule of law prohibiting such consent. *Chapman* v. *United States*, 365 U.S. 610, 616–17, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) (landlord does not retain right to enter rented premises for purpose of conducting search during term

time of the search, we conclude that the trial court improperly denied the defendant's motion to suppress.

On appeal, the state does not claim that, in the event this court determines that the trial court improperly denied the defendant's motion to suppress, any error was harmless. Thus, we have no occasion to address whether the error here was harmless. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 387, 908 A.2d 506 (2006) (acknowledging that state did not argue that violation of defendant's confrontation rights was harmless error and reversing judgment of trial court).

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

In this opinion the other justices concurred.

KAHN, J., with whom ROBINSON, C. J., joins, concurring. I agree with and join the judgment of the well reasoned majority opinion reversing the judgment of conviction of the defendant, Jean Jacques. That is, given the absence in the current record of any evidence or argument regarding the effect of the defendant's parole status on his expectation of privacy in his apartment, I agree that we are compelled to conclude that the trial court improperly denied the defendant's motion to suppress evidence obtained during a warrantless search of his apartment. Moreover, in light of the state's waiver of the claim that any error by the trial court was harmless, we are also compelled to reverse the judgment of conviction. I write separately to clarify two points: First, in my view, the state's case, even without the evidence obtained from the July 15, 2015 search of the defendant's apartment, was a strong one. My review

of tenancy, even when tenant may be temporarily absent, or have authority to grant consent to police to enter and to search). Therefore, the landlord's consent in the present case was not a valid justification for the warrantless search of the defendant's home.

of the record persuades me that the state would have readily been able to demonstrate that any error was harmless beyond a reasonable doubt. Second, and more importantly, I write to emphasize that a parolee's expectation of privacy in his or her dwelling does not increase upon being arrested and incarcerated for another offense during the period of parole.

I

HARMLESS ERROR

Before I proceed to the primary point I wish to make in this concurring opinion—that the defendant's expectation of privacy in his apartment did not increase as a result of his incarceration—I observe that, even without the evidence obtained from the July 15, 2015 search that is at issue in this appeal, the state had an overwhelming case against the defendant. The state's theory of the case was that the defendant went to the victim's apartment on the night of June 14, 2015, stabbed her to death, and then stole the crack cocaine and marijuana that the victim had on the premises, with the intent to sell the stolen drugs.

The state's evidence that the defendant had been in the victim's apartment and murdered her was compelling, even without the victim's cell phone and the drugs. Most significantly, the state presented evidence that the defendant's blood was on the victim's living room floor and on her kitchen wall. The state also presented the testimony of the victim's boyfriend, Jean Joseph, that, at approximately 11:20 p.m. on June 14, 2015, the victim texted him to tell him that the defendant was at her apartment. Joseph testified that, after receiving the victim's text, he unsuccessfully tried to call the defendant, but that the defendant immediately returned his call, confirmed that he was at the victim's apartment and asked whether Joseph would be coming there that night. The cell phone records of both Joseph and the

victim, produced by Verizon Wireless' Law Enforcement Resource Team, confirmed Joseph's testimony as to the substance of the victim's text, and the fact that Joseph spoke to the defendant immediately after receiving that text. The jury also viewed the redacted videotaped recording of the defendant's June 25, 2015 interview with Detective Anthony Gomes of the Norwich Police Department (department), who was the lead detective for the case. During that interview, although he denied entering her apartment, the defendant admitted that, on the night of June 14, 2015, he was outside the victim's building.

The state also produced strong evidence that the defendant stabbed the victim to death. The presence of his blood on her living room floor was certainly relevant to that question. When the defendant was arrested for selling crack cocaine on the afternoon of June 15, 2015, his clothing, including the sneakers that he was wearing, was seized. Testing revealed the victim's blood on the defendant's right sneaker. The state also produced the defendant's gym bag, which the police officers recovered from the trunk of a vehicle belonging to the defendant's friend, Indira Barros-Gomes, who had picked the defendant up at a laundromat on June 15, 2015. Inside the gym bag, the officers found a pair of the defendant's jeans, which, when tested, revealed the presence of the victim's blood.

The state produced evidence that the defendant suffered injuries during the commission of the murder. At the time of the defendant's arrest, the officers took photographs of the defendant's hands, revealing that he had bandages on both hands, covering multiple cuts. During their first search of his apartment, which the defendant does not challenge on appeal, the police found his blood in the apartment. Jeffrey Payette, a detective with the Connecticut State Police, testified that, ordinarily, they take samples of items that are

deemed to have evidentiary value, but, because "there was just so much blood around the entire apartment," they decided to simply take representative samples. Testing later confirmed that the blood in his apartment was the defendant's.

The state presented the testimony of Tywan Jenkins, who was the defendant's cellmate at the Corrigan-Radgowski Correctional Center in Uncasville. While they were incarcerated together, the defendant gave Jenkins several accounts related to the victim's murder. In his final version of the events, the defendant told Jenkins that he stabbed the victim and that he cut himself during the attack. He also told Jenkins that, after he had killed the victim, he used a mop and bucket with bleach to clean the crime scene. It is worth noting that when the victim's body was discovered, a mop in a bucket with bleach had been left out in the kitchen, consistent with Jenkins' testimony.

Finally, the state produced the following evidence to prove that, after the defendant had murdered the victim, he stole drugs from her apartment. Jenkins testified that the defendant had told him exactly that, confiding in Jenkins that he removed crack cocaine and the victim's cell phone from the apartment. Additional evidence corroborated Jenkins' account. The evidence established that, at the time of the murder, the victim had both crack and marijuana in her home. Joseph testified that he stored crack cocaine in a blue, nondairy creamer container in the victim's kitchen. He also testified that, during the afternoon of June 14, 2015, he and the victim purchased one-quarter pound of marijuana in Mystic, brought it back to the victim's apartment and smoked some of it while they watched television, including "Game of Thrones." When they had finished watching "Game of Thrones," sometime between 10 and 10:30 p.m., Joseph left, in order to go to the home of Johane Jean-Baptiste, the mother of his child.

By the next morning, both the crack and the marijuana had been removed from the victim's apartment. Joseph testified that he had a medical appointment on the morning of June 15, 2015, and that he went to the victim's home immediately thereafter. Upon entering, he immediately noticed that the victim's apartment, which ordinarily was very neat and had been so when he left the night before, was in disarray, and there was a mop and bucket left out in the kitchen. A table had been moved, the cushions on the sofa had been disturbed, kitchen cabinets were left open and items that had been removed from the cabinets were strewn over the counter. In particular, the container of nondairy creamer in which Joseph stored crack had been removed from the kitchen cabinet and left on the counter. When he eventually checked, he noticed that neither the crack nor the marijuana was in the apartment.

The state also produced evidence that the defendant, who had reported to a prospective buyer the previous week that he did not have any drugs to sell, was selling crack on the very day that the victim had been murdered. Specifically, Officer Nathaniel Tondreau of the department, testified that, on June 15, 2015, he reported to the scene of the murder when he heard the dispatch. Tondreau and his partner brought Joseph to the station to interview him. During the course of the interview, Joseph told them that the last text he received from the victim was that "Zo is here."[1] Tondreau testified that the name "Zo" caught his attention because he and his partner had attempted to use a confidential informant during the preceding week to purchase crack cocaine from a person named Zo. The confidential informant successfully contacted Zo, who was unable to sell any crack because he did not have any drugs. On the basis of their belief that Zo and the defendant were

[1] "Zo" is the defendant's nickname.

the same person, Tondreau and his partner instructed the confidential informant to attempt to set up a purchase from Zo on the afternoon of June 15, 2015. The informant contacted Zo, who agreed to sell him $40 of crack cocaine. Tondreau and a team accompanied the informant to the arranged meeting place, where they observed the defendant exchange something with the informant, who returned to them and handed Tondreau a bag of crack cocaine. The officers then arrested the defendant.

In summary, the state produced evidence that, shortly before she was murdered, the victim told Joseph that the defendant was at her apartment. The defendant's blood was at the scene of the crime. He had cuts on his hands and his blood was all over his apartment. He had the victim's blood on his sneakers and on his jeans, which were discovered in his gym bag in the trunk of a friend's vehicle. He told his cellmate that he killed the victim and that he took the crack from her apartment. The police, who had information that the defendant had no drugs to sell the week before, monitored their confidential informant's purchase of crack cocaine from the defendant on the very day that the victim's body was discovered. In light of all of this evidence, I would have concluded, had the state not waived the issue, that the error was harmless beyond a reasonable doubt. See *State* v. *Artis*, 314 Conn. 131, 154, 101 A.3d 915 (2014) (setting forth harmless error standard when error is of constitutional magnitude).

II

PAROLEE STATUS AND REASONABLE EXPECTATION OF PRIVACY

The point I emphasize is a narrow one: whatever reasonable expectation of privacy in his home that the defendant had as a parolee, it did not *increase* as a result of his June 15, 2015 arrest and incarceration. I

acknowledge that, during oral argument before this court, the state waived any claim that the July 15, 2015 warrantless search of the defendant's apartment was proper due to his status as a parolee at the time of his arrest on June 15, 2015. I also acknowledge that the state did not present any evidence in the trial court of the conditions of parole—either standard or specific—to which the defendant had agreed prior to his release to supervised parole on January 16, 2015. My starting point, however, is that, pursuant to the stipulation of the parties and as found by the trial court, when the defendant was arrested on June 15, 2015, he was "indisputably on supervised parole . . . ." Given that starting point, the *highest* reasonable expectation of privacy in his home *possibly* enjoyed by the defendant on July 15, 2015, was the same expectation that he had on June 15, 2015—not higher.

A brief factual and procedural background of the defendant's motions to suppress the two searches provides helpful context. The police and the defendant's parole officer conducted the first search of his apartment shortly after his arrest and incarceration, in the early morning hours of June 16, 2015. Gomes testified that the defendant's parole officer was "checking the residence for possible drug-related activity and contraband . . . ." The second search, on July 15, 2015, took place after Jenkins told the police that the defendant had told him that he had hidden the victim's cell phone and the crack he had stolen from her apartment in a hole in the wall in his bathroom. There is no indication in the record that the police were accompanied by a parole officer during the second search.

The defendant moved to suppress both searches, and the trial court denied both motions in an oral ruling on March 29, 2015, indicating that a memorandum of decision as to each ruling would follow. The court read its decision on its denial of the motion to suppress

the first search into the record during the defendant's sentencing hearing on June 6, 2016. On the same day, the court issued its memorandum of decision as to its denial of the motion to suppress the second search.

As to the first search, notwithstanding his stipulation that the records of the Department of Correction reflected that he was on parole at the time of his arrest, the defendant argued that the parole board lacked jurisdiction over him. Specifically, the defendant argued that, because at that time he was subject to deportation to Haiti, he properly was under the jurisdiction of federal immigration authorities, rather than the parole board. Therefore, the defendant argued, the parole officer lacked authority to search his apartment and the evidence seized from that search should be suppressed. The trial court rejected the defendant's argument, beginning with the fact that there was no dispute that the defendant was on parole at the time of his arrest. The court explained further that "an individual can be under the jurisdiction of more than one entity simultaneously and that, therefore, being subject to the jurisdiction of one entity is not mutually exclusive [of] the jurisdiction of another, or second, entity." The court therefore concluded that the parole officer had authority to search the defendant's home and denied the motion to suppress. Implicit in the court's ruling was that the police officers had the authority to accompany the parole officer and assist in searching the apartment. As I have stated earlier in this concurring opinion, the defendant does not challenge the trial court's ruling regarding the first search in this appeal.

As to the second search, the defendant relied on the federal and state constitutions to argue that the search was unreasonable and the resulting evidence should be

suppressed.[2] The defendant argued that the apartment was his home, and that his incarceration had not changed that. The defendant argued that he had established that he retained a subjective expectation of privacy in the apartment and that his expectation was one that society would deem to be reasonable. In its opposition, the state confined its arguments to rebutting the defendant's claim that he had demonstrated that he held a subjective expectation of privacy in the apartment. Neither the defendant nor the state raised any issue regarding the defendant's parole status at the time of the second search.

The trial court denied the defendant's motion to suppress on the basis of its conclusion that the defendant had failed to demonstrate that he had a subjective expectation of privacy in the premises. See *State* v. *Hill*, 237 Conn. 81, 92, 675 A.2d 866 (1996). The court pointed to the following: the defendant had failed to contact the landlord about maintaining the lease, which was a month-to-month lease; he was in custody and had no income; he had testified that he knew he was going to be incarcerated for a very long time; he did not pay rent; and, he had failed to contact anyone about securing the personal possessions he had left in the apartment. The trial court declined to credit the defendant's testimony during the suppression hearing that he would return to the apartment if he could. Because the court concluded that the defendant had not demonstrated that he had a subjective expectation of privacy in the apartment, it did not reach the question of whether any

[2] The police entered the defendant's apartment twice on July 15, 2015. The first time, they verified that Jenkins' information concerning the hole in the bathroom wall was correct by entering the bathroom and looking into the hole without removing the items within. After securing a search warrant, they returned and removed the items from the hole in the wall. The fact that the police obtained a search warrant before retrieving the items, however, is immaterial, as their admissibility stands or falls on the constitutional propriety of the initial search on July 15, 2015.

expectation he had would be deemed reasonable by society. Finally, in light of its conclusion that the defendant had failed to make the required showing, the court relied on the landlord's consent to the search to conclude that the search was reasonable. Although the trial court referenced the defendant's parole status in its factual findings, it did not rely on that status in denying the motion to suppress.

"To determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy the *Katz* test. See *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The *Katz* test has both a subjective and an objective prong: '(1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant.' " *State* v. *Houghtaling*, 326 Conn. 330, 341, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018).

It is well established that parolees have a diminished expectation of privacy. The United States Supreme Court has explained that "parolees are on the continuum of state-imposed punishments. . . . On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this [c]ourt has pointed out, parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. . . . In most cases, the [s]tate is willing

to extend parole only because it is able to condition it upon compliance with certain requirements." (Citations omitted; internal quotation marks omitted.) *Samson* v. *California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006).

"Although probationers and parolees are subject to a degree of impingement upon privacy that would not be constitutional if applied to the public at large . . . the law requires that such greater intrusions occur pursuant to a rule or regulation that itself satisfies the [f]ourth [a]mendment's reasonableness requirement . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Newton*, 369 F.3d 659, 665 (2d Cir.), cert. denied, 543 U.S. 947, 125 S. Ct. 371, 160 L. Ed. 2d 262 (2004). For this reason, the particular scope of a parolee's reasonable expectation of privacy depends on the conditions of parole. In *Samson*, the court held that a "condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the [f]ourth [a]mendment." *Samson* v. *California*, supra, 547 U.S. 847. In so holding, the court construed a California statute that required a prisoner eligible for parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal. Penal Code § 3067 (a) (West 2000); see *Samson* v. *California*, supra, 846.

Samson involved standard conditions of parole as set forth by statute, but courts also have looked to the specific conditions set forth in the order granting the defendant parole or probation. For example, in *United States* v. *Robertson*, 239 F. Supp. 3d 426, 448 (D. Conn. 2017), appeal withdrawn, United States Court of Appeals, Docket No. 17-1845 (2d Cir. August 25, 2017), the court rejected the government's contention that

the defendant's status on federal supervised release functioned as a forfeiture of "all his constitutional rights to the sanctity of his home." The court looked to the defendant's conditions of supervised release, which provided only that "[t]he defendant shall permit *a probation officer* to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view *by the probation officer*." (Emphasis in original; internal quotation marks omitted.) Id. The court reasoned that the conditions of release did not extend to the police officers who were unaccompanied by a probation officer when they searched the defendant's apartment. Id., 449.

The relevant case law makes clear that the standard and specific conditions of the defendant's release would define the scope of the defendant's reasonable expectation of privacy in his home at the time of the first search, which occurred mere hours after his arrest. The record does not reflect what those conditions were.[3] Because the second search occurred after the defendant had been incarcerated for one month, in all likelihood he was no longer on parole when that search took place.

His conditions of parole, however, remain relevant for purposes of determining whether the July 15, 2015 search violated his reasonable expectation of privacy. As the United States Supreme Court has explained, with respect to one's reasonable expectation of privacy, parole is on a " 'continuum' " with the reasonable expectation of a law-abiding citizen at one end of the continuum and that of an inmate at the opposite end. *Samson* v. *California*, supra, 547 U.S. 850. Thus, although a parolee enjoys a " 'diminished' " expectation of privacy as compared to a law-abiding citizen, he has a greater

[3] The state appears to have had access to some records pertaining to the defendant's parole, but those records do not appear to have been introduced into evidence or marked for identification.

expectation of privacy than that of an incarcerated individual. Id., 849–50. In other words, if the defendant's expectation of privacy changed when he was incarcerated, *that expectation certainly did not increase*. At the very best, the defendant's reasonable expectation of privacy in his home, following his incarceration, was the same expectation he enjoyed while on parole. Accordingly, if the July 15, 2015 search would have complied with the defendant's parole conditions at the time of his arrest—whatever those may have been—it did not constitute an invasion of his reasonable expectation of privacy. Of course, because the state did not create a record of what those conditions were, this court cannot determine whether the search comported with the conditions of parole.

For the foregoing reasons, I respectfully concur.

ROCKSTONE CAPITAL, LLC *v.* JOHN SANZO ET AL. (SC 20041)

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

Syllabus

The plaintiff brought an action seeking to foreclose judgment liens on certain real property owned by the defendants J and M. The liens had been recorded to secure a debt owed in connection with a prior judgment rendered against J and M. The parties thereafter entered into a forbearance agreement pursuant to which J and M were to make payments on the debt owed and to grant the plaintiff a mortgage on their property securing those obligations, and the plaintiff was to refrain from pursuing the foreclosure action for as long as J and M made their required payments. The mortgage included a waiver of the statutory (§ 52-352b [t]) homestead exemption for J and M's property. When J and M defaulted on their payments under the forbearance agreement, the plaintiff filed a motion to foreclose on the judgment liens. J and M objected to the motion and invoked the homestead exemption, and the plaintiff withdrew its claim as to the judgment liens and amended its complaint, seeking instead to foreclose on the mortgage. The trial court determined

that the forbearance agreement was void as against public policy and denied the plaintiff's claim to foreclose on the mortgage. The trial court also determined that the homestead exemption should apply. The court rendered judgment for the plaintiff on the judgment liens, subject to the homestead exemption, but did not determine the amount of the debt, the manner of foreclosure or set law days. The plaintiff appealed to the Appellate Court from the denial of its request to foreclose on the mortgage, and J and M cross appealed from that portion of the judgment granting foreclosure of the judgment liens. The Appellate Court concluded that it had jurisdiction over the plaintiff's appeal because the trial court's denial of the plaintiff's claim to foreclose on the mortgage constituted a final judgment and reversed the trial court's judgment on the ground that the homestead exemption did not apply to a consensual lien such as a mortgage. The Appellate Court also concluded that it had jurisdiction over the cross appeal filed by J and M because, although it was not based on a final judgment, it was inextricably intertwined with the plaintiff's appeal, which was based on a final judgment. The Appellate Court reversed the trial court's judgment on the merits of the cross appeal because the plaintiff's operative complaint did not seek foreclosure of the judgment liens. On the granting of certification, J and M appealed to this court. *Held*:

1. The Appellate Court had jurisdiction over the plaintiff's appeal from the trial court's denial of its request to foreclose on the mortgage, as the trial court's denial of that request, which was the only relief the plaintiff sought in its operative complaint, constituted a final judgment, and, contrary to the claim made by J and M that the trial court did not render a final judgment because it ruled sua sponte for the plaintiff on the judgment liens and failed to set the amount of debt, manner of foreclosure or law days, that ruling did not defeat the final judgment rendered on the mortgage, as the plaintiff did not seek foreclosure of the judgment liens in its operative complaint; moreover, this court concluded, after examining the record and considering the briefs and arguments of the parties, that certification was improvidently granted on the issue of whether the Appellate Court had jurisdiction over the cross appeal from the trial court's ruling on the judgment liens, and, therefore, the present appeal was dismissed as to that issue.
2. The plaintiff having sought, in its operative complaint, to foreclose on the mortgage that J and M voluntarily had granted to it, which was a consensual lien, rather than to foreclose on the nonconsensual judgment liens that previously had been filed, the Appellate Court correctly concluded that the homestead exemption did not apply, and, contrary to the claim of J and M, the mortgage was enforceable and was not contrary to the text of § 52-352b (t) or public policy: this court's plain reading of the text of § 52-352b (t) led it to reject the claim of J and M that a mortgage securing preexisting judgment debt could not be a consensual lien under that statute, and nothing in the statute (§ 52-350f) limiting a

judgment creditor's collection efforts to nonexempt assets prohibits parties from restructuring a judgment debt into a consensual lien, to which the homestead exemption would not apply, as the parties did in the present case; moreover, waiver of the homestead exemption through a mortgage is routinely permitted, and practical considerations supported the allowance of such a waiver inasmuch as disallowing it would severely restrict the availability of much needed credit to debtors, and as J and M appeared to deliberately choose to mortgage their home and receive forbearance from foreclosure on the judgment liens in exchange for the mortgage.

Argued January 15—officially released July 16, 2019

Procedural History

Action to foreclose judgment liens on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Richard P. Gilardi*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment in part for the plaintiff, from which the plaintiff appealed and the named defendant et al. cross appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Beach* and *Bishop*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings; thereafter, the named defendant et al., on the granting of certification, appealed to this court. *Affirmed in part*; *appeal dismissed in part.*

Matthew K. Beatman, with whom, on the brief, was *John L. Cesaroni*, for the appellants (named defendant et al.).

Houston Putnam Lowry, with whom, on the brief, was *Dale M. Clayton*, for the appellee (plaintiff).

David Lavery and *Loraine Martinez* filed a brief for the Connecticut Fair Housing Center as amicus curiae.

Opinion

D'AURIA, J. If a creditor forecloses on a debtor's home, the debtor might be entitled to keep a portion of

the home's value, whatever the amount of the debt. This debtor protection, known as the homestead exemption, is available when the creditor forecloses on a judgment lien, but not on a consensual lien. See General Statutes § 52-352b (t).[1] In this case, the plaintiff, Rockstone Capital, LLC (Rockstone), held judgment liens against the defendants John Sanzo and Maria Sanzo.[2] The parties later agreed to a consensual lien in the form of a mortgage to secure the debt. Now, the Sanzos have defaulted on the mortgage payments, and Rockstone seeks to foreclose on the mortgage. The primary issue on appeal is whether the Sanzos are entitled to the homestead exemption. We conclude they are not.

The trial court found the following facts, as stipulated by the parties and contained in exhibits submitted to the court. The Sanzos' primary residence is in Monroe and most recently was valued at $500,000. In 2000, Fleet National Bank (Fleet) secured a judgment against them for about $100,000. To secure the debt, it recorded judgment liens on the Monroe property. Fleet later assigned its interests in the judgment and judgment liens to Rockstone.

In 2008, Rockstone initiated this action to foreclose on the judgment liens because the Sanzos had defaulted. The parties, however, entered into a forbearance agreement that halted the action. Under the agreement, the Sanzos were to make regular payments on the amount outstanding on the judgment liens and additional interest, costs, and fees, and to grant Rockstone a mortgage

[1] Connecticut's homestead exemption is embodied in General Statutes § 52-352b, which provides in relevant part: "The following property of any natural person shall be exempt . . . (t) The homestead of the exemptioner to the value of seventy-five thousand dollars . . . provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . ."

[2] The Housatonic Lumber Company also was named as a defendant but was defaulted for failure to plead and is not involved in this appeal.

on the Monroe property securing these obligations. In exchange, Rockstone agreed to refrain from pursuing this foreclosure action for as long as the Sanzos made their payments. The parties stipulated that they were represented by counsel and that their agreement was a commercial agreement.

The record also reflects the following procedural history. In 2014, Rockstone resumed this action, filing a motion to foreclose on the judgment liens because the Sanzos had defaulted on their obligations under the forbearance agreement. The Sanzos objected to the motion and invoked the homestead exemption. In response, Rockstone amended its complaint to seek foreclosure on the mortgage, instead of on the judgment liens. The Sanzos filed an answer, including a special defense that claimed the mortgage was a de facto waiver of the homestead exemption, which was contrary to public policy.

The action was submitted to the trial court on stipulations and exhibits submitted by the parties. Following an initial decision that the parties agreed was improper,[3] the court issued a corrected memorandum of decision. In it, the court acknowledged that the Sanzos had "vol-

[3] In its original memorandum of decision, the trial court relied on an express waiver of the homestead exemption contained within the mortgage itself. It concluded that the express waiver was void as against public policy, but that it was severable from the rest of the mortgage. It therefore granted foreclosure of the mortgage, subject to the homestead exemption.

Neither party had relied on the express waiver, however, because they agreed that it was unnecessary. In its motion to reargue, Rockstone stated that it "was not relying upon the express waiver language contained in the [m]ortgage since the [m]ortgage, being a consensual lien, is not within the purview of the homestead exemption statute and thus no waiver argument is necessary." In their own motion to reargue, the Sanzos agreed that "the [c]ourt ruled in a manner not addressed by either party . . . ." Conceding that the express waiver in the mortgage was "actually an extraneous term," they reiterated their argument that "the [m]ortgage itself is a de facto waiver of the [h]omestead [e]xemption under the unique facts of this case."

The parties do not rely on the express waiver on appeal. See *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 782, 171 A.3d 77 (2017).

untarily enabled [Rockstone] to seek recovery without the homestead exemption's applicability" and that "the homestead exemption would ordinarily not be applicable to a mortgage created by a voluntary agreement such as the one at hand." But based on the "unique procedural history" of the case, in which "the progression of this action has been to get around the homestead exemption," the court decided that the exemption should apply nonetheless. It held that the forbearance agreement was void as against public policy and therefore denied Rockstone's claim to foreclose on the mortgage. It also rendered judgment for Rockstone on the judgment liens, subject to the homestead exemption, even though Rockstone had amended its complaint to withdraw its claim regarding the judgment liens. The court did not determine the amount of debt, manner of foreclosure or law days for the judgment lien foreclosure.

Rockstone appealed and the Sanzos cross appealed to the Appellate Court. Rockstone appealed from the denial of its request to foreclose on the mortgage, and the Sanzos cross appealed from the judgment on the judgment liens. Because the trial court had not determined the amount of debt, manner of foreclosure or law days for the judgment lien foreclosure, the Appellate Court ordered a hearing to determine whether it should dismiss the appeals for lack of a final judgment. Following that hearing, the Appellate Court ordered the trial court to articulate its ruling and, after receiving the articulation, ordered the parties to address the final judgment question in their merits briefs to that court.

The Appellate Court concluded that it had jurisdiction over Rockstone's appeal because the trial court's denial of Rockstone's claim to foreclose on the mortgage constituted a final judgment. *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 778, 171 A.3d 77 (2017). It reversed the judgment of the trial court on the merits

of Rockstone's appeal, holding that the homestead exemption did not apply to a consensual lien such as a mortgage. Id., 784. The Appellate Court also concluded that it had jurisdiction over the Sanzos' cross appeal because, although it was not based on a final judgment, it was inextricably intertwined with Rockstone's appeal, which was based on a final judgment. Id., 786. Finally, it reversed the judgment of the trial court on the merits of the cross appeal because Rockstone's operative complaint had not sought foreclosure on the judgment liens. Id., 788–89.

The Sanzos petitioned this court for certification to appeal, which we granted, limited to the following issues: "1. Did the Appellate Court properly conclude that the appeal and cross appeal were taken from a final judgment of the trial court? 2. If the answer to the first question is yes, did the Appellate Court properly conclude that the plaintiff's postjudgment mortgage encumbering the same property and the same debt as the plaintiff's judgment liens was a consensual lien, and not a de facto waiver of the homestead exemption; see General Statutes § 52-352b (t); that would be void as a matter of public policy?" *Rockstone Capital, LLC* v. *Sanzo*, 327 Conn. 968, 173 A.3d 391 (2017). We affirm the judgment of the Appellate Court with respect to its conclusions that the appeal was taken from a final judgment and that the mortgage was a consensual lien. We conclude that certification was improvidently granted with respect to whether the cross appeal was taken from a final judgment and dismiss that portion of the appeal.

I

As threshold issues, we must address whether the Appellate Court had jurisdiction over the appeal and cross appeal. "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject

matter jurisdiction is a question of law [and, therefore] our review [as to whether the Appellate Court had jurisdiction] is plenary." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 84, 191 A.3d 983 (2018). Subject to certain exceptions, an appellate court's subject matter jurisdiction "is limited to final judgments of the trial court." (Internal quotation marks omitted.) Id. A final judgment exists "[w]hen judgment has been rendered on an entire complaint . . . ." Practice Book § 61-2. In this case, Rockstone's operative complaint exclusively sought foreclosure of the mortgage, and the trial court denied the relief requested. We conclude that this constitutes a final judgment and, thus, that the Appellate Court had jurisdiction over the appeal.

Once the trial court denied Rockstone's request to foreclose on the mortgage, it then sua sponte ruled in favor of Rockstone on the judgment liens, but did not set the amount of debt, manner of foreclosure or law days. Therefore, the Sanzos argue, the trial court did not render a final judgment. See *Morici* v. *Jarvie*, 137 Conn. 97, 103, 75 A.2d 47 (1950) ("[a final] judgment [in a foreclosure action] must either find the issues for the defendant or [find the issues for the plaintiff and] determine the amount of the debt, direct a foreclosure and fix the law days"). We disagree. This argument ignores the undisputed predicate fact that Rockstone did not seek foreclosure on the judgment liens in its operative complaint. As stated previously, the complaint sets the parameters for determining a final judgment. See Practice Book § 61-2. Particularly "under the unusual circumstances of this case"; *Rockstone Capital, LLC* v. *Sanzo*, supra, 175 Conn. App. 786; in which the parties agree that there was no basis to rule on the judgment liens; id., 788; the trial court's ruling on the judgment liens, which fundamentally exceeded the scope of the complaint, does not defeat the final judgment it rendered on the mortgage.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we also conclude that certification was improvidently granted on the question of whether the Appellate Court had jurisdiction over the Sanzos' cross appeal from the trial court's ruling on the judgment liens. The parties agree that the ruling on the judgment liens was improper. Id. Moreover, the trial court stated in its articulation: "Once the court voided the forbearance agreement and underlying mortgage, the remaining matter to be resolved involved judgment on the original judgment liens. . . . It was the court's intention to preserve the [Sanzos'] right to the homestead exemption while preserving [Rockstone's] right to sue on the original judgment liens." (Citations omitted.) In other words, if the trial court had concluded, as we do, that the mortgage was enforceable, it never would have reached the judgment liens. Therefore, the appeal is dismissed as to that issue.

II

The primary issue in this case is whether the mortgage that the Sanzos granted to Rockstone is enforceable. The Sanzos argue it is not because it deprives them of the homestead exemption, which is contrary to both the text of § 52-352b (t) and public policy. We disagree. Under the plain language of the statute, a homestead exemption is not available to a mortgagor. Nor, on the facts of this case, is the granting of a mortgage a violation of public policy. Therefore, we conclude that the mortgage is enforceable.

"We exercise plenary review over questions of statutory interpretation, guided by well established principles regarding legislative intent. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent)." *State* v. *Daniel B.*, 331 Conn. 1, 12–13, 201 A.3d

989 (2019). Exemptions are construed liberally in the debtor's favor. See *In re Caraglior*, 251 B.R. 778, 782–83 (Bankr. D. Conn. 2000).

Under our statutes governing postjudgment collection, a creditor may enforce a money judgment "against any property of the judgment debtor unless the property is exempt . . . ." General Statutes § 52-350f. It may do so via "foreclosure of a real property lien . . . ." General Statutes § 52-350f. " 'Exempt' " means "unless otherwise specified, not subject to any form of process or court order for the purpose of debt collection . . . ." General Statutes § 52-352a (c). Under the homestead exemption, a judgment debtor's "homestead" is exempt "to the value of seventy-five thousand dollars . . . ." General Statutes § 52-352b (t). A " '[h]omestead' " is "owner-occupied real property . . . used as a primary residence." General Statutes § 52-352a (e). "Value" is "determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . ." General Statutes § 52-352b (t). "[T]hese statutory provisions . . . mean that a judgment lien can attach on a homestead, but that such a lien cannot be enforced up to the amount of the exemption." *KLC, Inc.* v. *Trayner*, 426 F.3d 172, 175 (2d Cir. 2005).

Plainly, though, the homestead exemption does not apply to a consensual lien. See General Statutes § 52-352b (t) ("fair market value of the real property less the amount of any . . . consensual lien which encumbers it"). A mortgage is a consensual lien. E.g., *In re Wolmer*, 494 B.R. 783, 784 (Bankr. D. Conn. 2013) ("consensual liens [here, the mortgages]"); *L. Suzio Asphalt Co.* v. *Ferreira Construction Corp.*, Superior Court, judicial district of New Haven, Docket No. 351912 (October 19, 1993) (10 Conn. L. Rptr. 264, 265) ("consensual liens, such as . . . a mortgage"); see also 4 Collier on Bankruptcy (R. Levin & H. Sommer eds., 16th Ed. 2019) ¶ 506.03 [1] [a], p. 506-11 ("[c]ommon examples of volun-

tary [or consensual] liens include real property mortgage liens").

In this case, Rockstone does not seek to foreclose on the nonconsensual judgment liens initially filed against the Sanzos. Rather, it seeks to foreclose on the consensual mortgage later voluntarily granted to it by the Sanzos. Therefore, we agree with the Appellate Court that the homestead exemption does not apply.

Although the Sanzos concede the general point that the homestead exemption does not apply to mortgages, they make two arguments as to why the particular mortgage they granted to Rockstone should not be enforced. We find neither argument persuasive.

First, the Sanzos argue that their mortgage—a mortgage securing preexisting judgment debt—is not the type of mortgage contemplated by § 52-352b (t). This argument is not supported by a plain reading of the statute's text. The statute does not define "consensual lien," but could hardly refer to the concept more broadly: "*any* . . . consensual lien" is subtracted from the property's value in calculating the homestead exemption. (Emphasis added.) General Statutes § 52-352b (t). We disagree with the Sanzos that § 52-350f,[4] which limits a judgment creditor's collection efforts to nonexempt assets, is inconsistent with this reading of the homestead exemption. Nothing in § 52-350f prohibits parties from restructuring a judgment debt into another form, such as a consensual lien, to which the

[4] General Statutes § 52-350f provides: "A money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section 52-352a, 52-352b, 52-352d or 52-361a or any other provision of the general statutes or federal law. The money judgment may be enforced, by execution or by foreclosure of a real property lien, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) interest as provided by chapter 673 on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c."

exemption would not apply. In fact, the Sanzos appear to concede that they could have properly restructured their judgment debt if they had only done so through third-party financing, rather than directly through their creditor, Rockstone. Thus, we find no textual basis for holding that a mortgage securing judgment debt is excluded from the meaning of "consensual lien."[5]

Second, the Sanzos argue that a debtor may not waive the homestead exemption and that, on the facts of this case, the mortgage agreement they entered into with Rockstone, their judgment creditor, should properly be viewed as a de facto waiver of the exemption. We are not persuaded by either point.

"Waiver is the intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *Dinan* v. *Patten*, 317 Conn. 185, 195, 116 A.3d 275 (2015). A statutory right generally may be waived. Id. However, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." (Internal quotation marks omitted.) *Pereira* v. *State Board of Education*, 304 Conn. 1, 49–50, 37 A.3d 625 (2012).

Although there is considerable variation among the states as to the contours of and legal purposes underlying homestead exemptions; see, e.g., *Chames* v. *DeMayo*, 972 So. 2d 850, 856–57 (Fla. 2007); homestead

[5] Legislative history is also, at best, unhelpful to the Sanzos, as debate did not distinguish between prejudgment and postjudgment mortgages. The homestead exemption for residential real property was enacted in No. 93-301, § 2, of the 1993 Public Acts. During debate in the House of Representatives, Representative Lee A. Samowitz did emphasize, however, that the homestead exemption was not intended to impair mortgages: "I want to clarify this. [The homestead exemption] does not affect mortgages. Mortgages are secured. They are not impaired. They won't be impaired to bankruptcy, they won't be impaired to foreclosure." 36 H.R. Proc., Pt. 30, 1993 Sess., p. 10,852; see also id., p. 10,826 ("consensual liens are not impaired by this amendment"); id., p. 10,832 ("[t]his is intended not to impair the statutory and the [consensual] lien").

exemptions are typically driven by interrelated policies that consider the welfare of both individual private citizens and the public at large. "The principal objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of stability and independence." G. Haskins, "Homestead Exemptions," 63 Harv. L. Rev. 1289, 1289 (1950). More specifically, these laws seek to achieve security for debtors and their families by protecting their ability to remain in their homes, providing a financial cushion for those who would otherwise be unable to support themselves, or both. See R. Rivera, "State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws," 39 Real Prop. Prob. & Tr. J. 71, 101–102 (2004) (noting homestead exemptions that are intended "to protect debtors' homes in bankruptcy because when debtors retain their homes, they are more likely to spend money in the local economy, which is in the state's best interest," and homestead exemptions that are intended to provide monetary relief "to prevent a debtor from becoming completely dependent on the state for financial support").

In addressing whether an individual may waive a homestead exemption, a court usually considers the form of the waiver. Waivers via mortgage are routinely permitted.[6] See 1 The Law of Debtors and Creditors (2019) § 6:70 ("perhaps the most common form of

[6] Several legislatures also have considered the form of the waiver. E.g., Alaska Stat. § 09.38.105 (2006) ("[a] waiver of exemption executed in favor of an unsecured creditor before levy on an individual's property is unenforceable, but a valid security interest may be given in exempt property"); Tenn. Code Ann. § 26-2-301 (c) (2017) ("[t]he homestead exemption shall not operate against . . . any debt secured by the homestead when the exemption has been waived by written contract"); W. Va. Code Ann. § 38-9-6 (a) (LexisNexis 2011) ("[a]ny waiver of the rights conferred by this article shall be void and unenforceable except to the extent that [1] such waiver is accompanied by a consensual security interest in the property in which the homestead exemption is asserted").

waiver involves the homestead exemption, which may typically be waived by the debtor granting a creditor a mortgage"); 40 C.J.S., Homesteads § 102 (2019) ("[a]s a general rule, homestead rights may be waived by the parties entitled thereto by an act which evidences an unequivocal intention to do so" [footnote omitted]).

Some courts permit a waiver via mortgage because granting a mortgage on specific property allows the mortgagor to consider the specific consequences of default. For example, the Sanzos repeatedly cite a Florida Supreme Court decision barring a prospective waiver of the homestead exemption in an executory contract. See *Chames* v. *DeMayo*, supra, 972 So. 2d 857 (citing constitutional provisions, statutes and case law prohibiting "a general waiver of homestead or personal property exemptions in an executory contract"). But they omit from their discussion that court's express acknowledgment that a waiver via mortgage is enforceable: "[Our cases] do not prohibit a waiver of the homestead exemption; they simply require that such waivers be accomplished . . . by mortgage, sale, or gift . . . . Those who truly wish to waive their homestead exemption . . . can do so." (Citations omitted.) Id., 861–62. A waiver via mortgage is permitted because it "is made knowingly, intelligently, and voluntarily . . . with eyes wide open . . . ." (Citation omitted.) Id., 861. "In obtaining a mortgage, a homeowner is well aware that if the payments are not made, the home may be foreclosed upon. . . . [T]he very nature of the transaction implies the exercise of discretion and the contemplation of inevitable consequences." (Internal quotation marks omitted.) Id.; cf. *Beneficial Finance Co. of Colorado* v. *Schmuhl*, 713 P.2d 1294, 1297 (Colo. 1986) ("Our holding

Connecticut's homestead exemption statute is silent on whether, or under what circumstances, a homeowner may waive the exemption. See General Statutes § 52-352b (t); see also 36 H.R. Proc., Pt. 30, 1993 Sess., p. 10,853, remarks of Representative Lee A. Samowitz ("[t]he proposed bill does not deal with the statutory right of waiver").

[that a judgment debtor may waive an exemption by granting a security interest] is supported by the expectations of the parties in secured transactions. A debtor who grants a security interest in specific property to a creditor expects foreclosure of that interest upon default."); *Lingle State Bank of Lingle* v. *Podolak*, 740 P.2d 392, 396 (Wyo. 1987) ("[t]he debtor cannot waive the privilege of claiming the exemption *in advance*" [emphasis added; internal quotation marks omitted]).

Other courts permit a debtor to waive an exemption on the theory that prohibiting such a waiver would go too far in restricting an individual's right to encumber property. For instance, the New York Court of Appeals has held that a debtor's exemptions are not meant to serve the "paternalistic function" of prohibiting a debtor from disposing of exempt property, or "the less drastic step" of encumbering it in exchange for consideration. *Matter of New York* v. *Avco Financial Service of New York, Inc.*, 50 N.Y.2d 383, 388, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (1980). It recognized that "the law has not forbidden a debtor to execute a mortgage upon the property so protected and thus create a lien which may be foreclosed despite the property's exempt status . . . ." (Citations omitted.) Id.; see also, e.g., *United Bank of Bismarck* v. *Selland*, 425 N.W.2d 921, 925 (N.D. 1988) ("although the exemption statutes are designed to protect debtors from becoming destitute as a consequence of unforeseeable indebtedness, the statutes should not be construed to deprive an individual of his rights of ownership in exempt property . . . among which is the power to encumber, to sell, or otherwise dispose of it" [internal quotation marks omitted]); cf. *Moyer* v. *International State Bank*, 404 N.W.2d 274, 277 (Minn. 1987) ("[t]he statute does not forbid a debtor to mortgage protected property and to create a lien against identified property which can be foreclosed despite the property's exempt status").

Practical considerations support the reasoning in these cases. "[A] determination that a statutory exemp-

tion cannot be waived by a security agreement would severely restrict the availability of [much needed] credit to debtors who, in many cases, have few assets to use as collateral." *Beneficial Finance Co. of Colorado* v. *Schmuhl*, supra, 713 P.2d 1297; see also *Hernandez* v. *S.I.C. Finance Co.*, 79 N.M. 673, 675, 448 P.2d 474 (1968) ("[o]ften, such property is the poor man's only source of cash in an emergency and, if the law permits him to sell his exempt property, surely it permits the less drastic step of encumbering it").

This concept applies particularly to homestead exemptions because a homestead is often a debtor's best potential source of credit. "A debtor's equity in residential real property subject to a homestead exemption is often substantial. Thus, permitting the debtor to encumber the homestead through execution of a second mortgage or similar instrument is economically justified." J. Haines, "Security Interests in Exempt Personalty: Toward Safeguarding Basic Exempt Necessities," 57 Notre Dame Law. 215, 220 n.35 (1981); see W. Vukowich, "Debtors' Exemption Rights," 62 Geo. L.J. 779, 852 (1974) ("[p]ermitting waivers of exemptions and security interests in the more substantial exempt assets . . . is sound, since it permits persons to use the more substantial assets as collateral; in fact, these are the types of assets which represent the best collateral and which are most commonly used as such"); see also *Benchmark Bank* v. *Crowder*, 919 S.W.2d 657, 661 (Tex. 1996) ("[h]omestead owners must have the ability to renew, rearrange, and readjust the encumbering obligation to prevent a loss of the homestead through foreclosure"). In some scenarios, therefore, waiver of the homestead exemption actually serves the public policies underlying it by allowing a debtor to remain in his home and providing him with a source of funds to support himself.

In support of their argument that a debtor may not waive the homestead exemption, the Sanzos ignore the form of their waiver: a mortgage. Although the Sanzos'

mortgage in this case involved an executory contract (the forbearance agreement), and therefore presents a scenario not addressed by the cases previously discussed, we are persuaded that the same principles still apply. We are not convinced that a waiver of the homestead exemption always contravenes the public policy behind it, such that it may never be waived.

The Sanzos find little support for their argument in Connecticut law. They rely primarily on *TuxisOhr's Fuel, Inc.* v. *Trio Marketers, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-04-4002067-S (October 26, 2005) (40 Conn. L. Rptr. 203), and *Haggerty* v. *Williams*, 84 Conn. App. 675, 855 A.2d 264 (2004), as examples of statutory rights that an individual may not waive in every circumstance. *Tuxis-Ohr's Fuel, Inc.*, concerned a provision in a personal guarantee contract that waived the homestead exemption. *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 204. *Haggerty* involved a provision in a mortgage that waived the relevant statute of limitations. *Haggerty* v. *Williams*, supra, 676–77. In each case, the court was concerned that allowing a debtor to waive a statutory protection "at the inception" of an agreement; id., 681; would mean a waiver was the result of "ignorance, improvidence, an unequal bargaining position or was simply unintended." (Internal quotation marks omitted.) Id., 682. These courts also feared that the public policy advanced by the granting of these statutory rights would erode by encouraging similar waivers " 'as a matter of routine.' " Id., 681; accord *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 205.

The present case does not involve a scenario, as in *Tuxis-Ohr's Fuel, Inc.*, and *Haggerty*, in which a debtor waived statutory protection "at the inception' " of an agreement; *Haggerty* v. *Williams*, supra, 84 Conn. App. 681; without a realistic chance to consider the consequences. When the Sanzos decided to grant a mortgage,

they had already defaulted on the judgment debt and were actually (not just theoretically) facing foreclosure. They had the aid of counsel. They entered into a negotiated commercial agreement. They are not relying on a provision buried within the mortgage but, rather, on the mortgage itself. It was "obvious," they concede, that the purpose of this mortgage was to contract around the homestead exemption.

Nor, unlike *Tuxis-Ohr's Fuel, Inc.*, and *Haggerty*, is this a situation in which mortgages would be granted, and thus public policy would be undercut, merely " 'as a matter of routine.' " *Haggerty* v. *Williams*, supra, 84 Conn. App. 681. Before entering into the agreement, the Sanzos could choose between invoking the homestead exemption in the face of the foreclosure action and granting a mortgage. For the reasons just stated, they appear to have made this choice deliberately. It is not self-evident that judgment debtors in similar situations would routinely make the same choice to mortgage their homes, particularly if they had few other exempt assets and a homestead exemption represented their best financial outcome. Moreover, as described previously, restructuring judgment debt might often work in a debtor's favor. Indeed, in 2009, the Sanzos received forbearance from foreclosure in exchange for the mortgage. Until 2014, they apparently complied with the terms of the forbearance agreement and remained in their home because of it.

Finally, the Sanzos and the amicus curiae, the Connecticut Fair Housing Center, urge us to look beyond the form of the mortgage to its substance, which they argue was merely a de facto general waiver. They contend that the mortgage did not secure any debt beyond the original judgment liens. They also note that it was not a novation or release of the judgment liens. Therefore, they argue, the only real effect of the mortgage was to waive the homestead exemption in the same

manner as one would through a general contractual waiver. We disagree for two reasons.

First, Rockstone's interest secured by the mortgage was not identical to the interest secured by the judgment liens. The mortgage secured the judgment lien debt, as well as additional fees and costs stemming from the forbearance. The mortgage also had the effect of subordinating Rockstone's security interest, as two superior liens had been filed and recorded after Rockstone's judgment liens, but before the mortgage.

Second, although the forbearance agreement could have more clearly distinguished between the old debt (secured by the judgment liens) and the new (secured by the mortgage) by, for instance, granting a novation, the Sanzos were well informed about the consequences of default, and the purpose of the mortgage was clear.[7]

The judgment of the Appellate Court is affirmed insofar as that court determined that Rockstone's appeal was taken from a final judgment and that the mortgage was a consensual lien to which the homestead exemption does not apply, and insofar as that court reversed the trial court's judgment with respect to the denial of Rockstone's claim to foreclose on the mortgage and remanded the case for further proceedings; that portion of the appeal concerning whether the Appellate Court correctly concluded that the Sanzos' cross appeal was taken from a final judgment of the trial court is dismissed.

In this opinion the other justices concurred.

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[7] We do not consider the other arguments advanced by the amicus because they were not raised by the parties. See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 595, 833 A.2d 908 (2003).

JANE DOE *v.* CHARLES COCHRAN
(SC 19879)

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

Syllabus

The plaintiff sought to recover damages from the defendant physician, claiming that he was negligent in failing to accurately report the positive results of a laboratory test for genital herpes to his patient, S, the plaintiff's boyfriend. The plaintiff and S had been involved in an exclusive romantic relationship. Before the relationship became sexual, the plaintiff and S agreed to seek testing for sexually transmitted diseases (STDs). Prior to this agreement, the plaintiff had tested negative for STDs. S then visited the defendant and informed him that he wanted to be tested for STDs for the protection of his new, exclusive girlfriend. The defendant arranged for S to undergo a blood test, and the results were positive for genital herpes. The defendant delegated to a member of his practice staff the task of informing S of the test results. The staff member incorrectly told S over the phone that his STD test results were negative. After the plaintiff's relationship with S became sexual, the plaintiff began to experience outbreaks consistent with and was subsequently diagnosed with genital herpes. S thereafter contacted the defendant to inquire further, and the defendant informed S that he actually had tested positive for genital herpes and apologized for the error. The defendant moved to strike the plaintiff's complaint, claiming that the plaintiff's claim sounded in medical malpractice and, therefore, must fail for lack of a physician-patient relationship between the plaintiff and the defendant. The defendant claimed alternatively that, even if the plaintiff's claim sounded in ordinary negligence, the plaintiff and the defendant were not involved in any special relationship that would justify extending a duty of care to her. The trial court granted the defendant's motion to strike, concluding that the defendant did not owe a duty to the plaintiff. On appeal from the judgment in favor of the defendant, *held*:

1. The defendant could not prevail on his claim, as an alternative ground for affirming the trial court's judgment, that, because the plaintiff's complaint sounded in medical malpractice, the lack of a physician-patient relationship rendered her claim legally insufficient and, therefore, that the trial court properly struck the plaintiff's complaint;

* This appeal originally was argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins, and Kahn. Thereafter, Justice Vertefeuille was added to the panel. Justice Vertefeuille read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

although this court assumed, for the sake of argument, that the plaintiff's complaint reasonably could be read to allege that the defendant committed medical malpractice, it concluded that the plaintiff's allegations also reasonably could be understood to sound in ordinary negligence because, even though the alleged error occurred in a medical setting and arose as a result of a medical diagnosis in the context of an ongoing physician-patient relationship, that error was not one involving professional medical judgment or skill, as the reading of the test results and the communication of those results to S were ministerial tasks that required no advanced medical training, and proof that the alleged error constituted negligence would not require expert medical testimony or the establishment of a professional standard of care.

2. A health care provider who negligently misinforms a patient, either directly or through a designated staff member, that the patient tested negative for an STD such as genital herpes owes a duty of care to an identifiable third party who is engaged in an exclusive romantic relationship with the patient at the time of the STD testing and who foreseeably contracts the STD as a result of his or her reliance on the provider's erroneous communication to the patient, and, accordingly, the trial court incorrectly concluded that, as a matter of law, the defendant owed no duty of care to the plaintiff with respect to the inaccurate reporting to S of his test results: although this court previously has demonstrated a general aversion to extending a physician's duty of care to nonpatients, it has allowed, under limited circumstances, for the imposition of liability in cases, such as the present one, involving an identifiable potential victim who will be foreseeably harmed by a physician's negligence, and construing the plaintiff's complaint in the light most favorable to sustaining its sufficiency, this court concluded that the plaintiff was an identifiable potential victim of the defendant's alleged negligence, as only one person could have fit the description of S's exclusive girlfriend, and S presumably could have identified her by name if he had been asked by the defendant to do so; moreover, a number of other jurisdictions have recognized that a duty of a medical professional to correctly advise a patient who suffers from a communicable disease, including STDs, extends not only to the patient but also to third parties who may foreseeably contract the disease from the patient, and § 311 of the Restatement (Second) of Torts, which provides that one who negligently gives false information may be held liable to a third party who predictably is injured by the recipient's reasonable reliance on that information, appeared to support the imposition of liability in this case; furthermore, public policy considerations supported the imposition of a third-party duty of care under the circumstances of the present case, as imposing a duty in this case, in which broader public health concerns are involved, would not necessarily intrude on the sanctity of the physician-patient relationship, when the duty at issue simply requires a physician to accurately relay test results to the patient himself, if the defendant could not be held liable, then the plaintiff in all likelihood would be without

remedy or compensation for her injuries and errors such as the defendant's miscommunication would go unadmonished, the defendant, rather than the plaintiff or S, was most effectively and economically situated to avoid the harm that befell the plaintiff, and such errors are not so prevalent or ineluctable that imposing third-party liability, solely with respect to identifiable victims, would meaningfully impact medical malpractice insurance rates or overall health care costs.

(*Three justices dissenting in one opinion*)

Argued November 16, 2017—officially released July 16, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the defendant's motion to strike; thereafter, the court granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

Thomas B. Noonan, for the appellant (plaintiff).

James S. Newfield, with whom, on the brief, was *Diana M. Carlino*, for the appellee (defendant).

Gregory J. Pepe filed a brief for the American Medical Association et al. as amici curiae.

Jennifer L. Cox and *Jennifer A. Osowiecki* filed a brief for the Connecticut Hospital Association as amicus curiae.

Emily B. Rock, *Cynthia C. Bott* and *Julie V. Pinette* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

PALMER, J. The principal issue in this appeal is whether a physician who mistakenly informs a patient that he does not have a sexually transmitted disease (STD) may be held liable in ordinary negligence to the patient's exclusive sexual partner for her resulting injuries when the physician knows that the patient sought

testing and treatment for the express benefit of that partner. Under the circumstances alleged, we conclude that the defendant, Charles Cochran, a physician, owed a duty of care to the plaintiff, identified by the pseudonym Jane Doe, even though she was not his patient. Accordingly, we conclude that the trial court improperly granted the defendant's motion to strike the plaintiff's one count complaint and reverse the judgment of the trial court.

The following facts, as set forth in the plaintiff's complaint and construed in the manner most favorable to sustaining its legal sufficiency; see, e.g., *Lestorti* v. *DeLeo*, 298 Conn. 466, 472, 4 A.3d 269 (2010); and procedural history are relevant to our disposition of this appeal. In early 2013, the plaintiff began dating her boyfriend, identified in this action by the pseudonym John Smith. At all relevant times, the plaintiff and Smith were involved in an exclusive romantic relationship. At some point, the couple agreed that, before their relationship became sexual, they would individually seek testing for STDs. As of July, 2013, the plaintiff had tested negative for and did not have any STDs.

At that time, pursuant to his agreement with the plaintiff, Smith visited his physician, the defendant, who is a licensed medical doctor practicing in Norwalk. During Smith's visit, the defendant asked Smith why he wanted to be tested again for STDs, as the defendant had tested him just five months earlier. Smith explained that he wanted to be tested again for the protection and benefit of his new, exclusive girlfriend, the plaintiff. The defendant then took a sample of Smith's blood, arranged for it to be tested for STDs, and subsequently reviewed the laboratory (lab) test results.

The lab report that the defendant reviewed included a guide for reading the test's results. The guide indicated that an HSV 2 IgG (herpes simplex virus type 2 specific antibody) result of less than 0.9 is negative for the

herpes simplex virus type 2 (herpes), a result between 0.9 and 1.1 is equivocal, and a result greater than 1.1 means that the sample tested positive for herpes. Smith's HSV 2 IgG test result was 4.43, significantly above the threshold for a positive herpes diagnosis.

The defendant delegated to a member of his staff the task of informing Smith of the results of his test. Even though the lab report clearly demonstrated a positive herpes diagnosis, the staff member incorrectly told Smith over the phone that his STD test results had come back negative.

The plaintiff's relationship with Smith subsequently became sexual. Thereafter, the plaintiff began to experience herpes outbreaks and was diagnosed with herpes. Upon learning of this, Smith contacted the defendant to inquire further about his test results. The defendant then informed Smith that he actually had tested positive for herpes and apologized for the error.

The plaintiff brought a one count action against the defendant, alleging that the defendant had been negligent in various respects. The defendant moved to strike the complaint on the basis that the plaintiff's claim sounded in medical malpractice and, therefore, must fail for lack of any physician-patient relationship between the plaintiff and the defendant. The defendant argued in the alternative that, even if the court construed the plaintiff's claim as sounding in ordinary negligence, the plaintiff and the defendant were not involved in any special relationship that would justify extending a duty of care to her.

The trial court granted the defendant's motion to strike. The court did not expressly resolve the issue of whether the plaintiff's claim sounds in ordinary negligence or medical malpractice, at once describing the plaintiff as "seeking to extend medical malpractice liability of a physician to the sexual partner of a patient" and referring to the defendant's "claimed negligence

. . . in reporting the test results." The analysis undertaken by the trial court, however, implies that it viewed the claim as sounding in ordinary negligence. Specifically, the court concluded that the claim was governed by our decision in *Jarmie* v. *Troncale*, 306 Conn. 578, 50 A.3d 802 (2012), and applied the framework that we set out in that case for determining whether a nonpatient may assert an ordinary negligence claim against a health care provider. See id., 591–99. Ultimately, the trial court concluded the defendant did not owe a duty of care to the plaintiff and, for that reason, granted the defendant's motion to strike. This appeal followed.[1]

I

As an initial matter, we must resolve a dispute between the parties as to the gravamen of the plaintiff's complaint. As an alternative ground for affirmance, the defendant contends on appeal, as he did before the trial court, that the plaintiff's one count complaint sounds in medical malpractice. In support of this conclusion, the defendant points to, among other things, the facts that (1) the plaintiff alleged that "[the defendant] had an obligation to perform the STD tests and [to] report the results accurately to . . . Smith according to accepted medical practice and standards," (2) the plaintiff further alleged that the defendant's "breach of accepted medical practice and standards" by failing to properly treat, test, monitor, and advise Smith, was the cause of her injuries, and (3) the plaintiff's counsel attached to the complaint a certificate, pursuant to General Statutes § 52-190a (a), averring that there were grounds for a good faith belief that the defendant had committed "medical negligence" in the "care or treatment" of Smith. Because a medical malpractice claim that fails to allege a physician-patient relationship

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

between a plaintiff and a defendant is legally insufficient; *Jarmie* v. *Troncale*, supra, 306 Conn. 588–89; and because it is undisputed that the plaintiff never was a patient of the defendant, the defendant contends that the trial court properly struck the complaint.

The plaintiff responds that, although she attached a certificate of good faith pursuant to § 52-190a (a) out of an abundance of caution, her complaint alleges ordinary, common-law negligence rather than medical malpractice. She notes that the single count complaint is titled simply "negligence," and it alleges that the plaintiff's "injuries were the result of the negligence and carelessness of the [defendant] . . . in [that he failed] to properly advise . . . Smith of his STD test results . . . ." At no point, moreover, does the complaint use the term "medical malpractice."

A

We begin our analysis by reiterating that, although the better practice may be to include a separate count of the complaint for each distinct theory of liability, there is no such requirement. Practice Book § 10-26 provides that, "[w]here separate and distinct causes of action, as distinguished from separate and distinct claims for relief founded on the same cause of action or transaction, are joined, the statement of the second shall be prefaced by the words Second Count, and so on for the others . . . ." (Emphasis omitted.) In construing an earlier version of this rule of practice, this court explained that it has "uniformly approved the use of a single count to set forth the basis of a plaintiff's claims for relief [when] they grow out of a single occurrence or transaction or closely related occurrences or transactions, and it does not matter that the claims for relief do not have the same legal basis. It is only when the causes of action, that is, the groups of facts [on] which the plaintiff bases his claims for relief, are sepa-

rate and distinct that separate counts are necessary or indeed ordinarily desirable." (Footnote omitted.) *Veits* v. *Hartford*, 134 Conn. 428, 438–39, 58 A.2d 389 (1948). That remains the rule in this state, and it has been applied with respect to a single count complaint alleging different theories of negligence. See *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 160, 129 A.3d 677 (2016) ("[e]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action" [internal quotation marks omitted]); *Beaudoin* v. *Town Oil Co.*, 207 Conn. 575, 588, 542 A.2d 1124 (1988) (restating rule as articulated in *Veits*); *Baldwin* v. *Jablecki*, 52 Conn. App. 379, 382, 726 A.2d 1164 (1999) (statutory and common-law negligence may be pleaded in single count). Indeed, in *Jarmie*, on which both parties rely, we treated the single count complaint as alleging both medical malpractice and common-law negligence when the pleadings were substantially similar to those at issue here. See *Jarmie* v. *Troncale*, supra, 306 Conn. 583–86; cf. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 463, 102 A.3d 32 (2014) (reference to violation of statutory duty did not transform count of complaint alleging common-law negligence into statutory claim).[2]

Accordingly, we may assume, for the sake of argument, that the defendant is correct that the complaint reasonably can be read to allege that he committed professional malpractice by failing to follow accepted medical standards in his advising, treatment, and ongoing testing and monitoring of Smith. The question that we must resolve is simply whether the complaint also alleges that the defendant committed ordinary com-

[2] We note that the defendant could have filed a request to revise; see Practice Book § 10-35; in order to separate out and separately address the plaintiff's medical malpractice and common-law negligence claims, but did not do so.

mon-law negligence by permitting or instructing his office staff to give Smith the wrong test results.[3]

B

The following well established principles guide our analysis. First, "[b]ecause a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016).

"In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our read-

[3] As we discuss in part II of this opinion, the plaintiff's allegations may fit most neatly under the rubric of negligent misrepresentation. Because neither party has addressed the issue, however, we need not determine whether the allegations in the complaint are legally sufficient to plead a cause of action in negligent misrepresentation under the law of this state.

ing of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Citation omitted; internal quotation marks omitted.) *ATC Partnership* v. *Windham*, 268 Conn. 463, 466 n.4, 845 A.2d 389 (2004).

Second, our courts have long recognized that a health care provider may commit ordinary negligence, as opposed to medical malpractice, in the course of treating a patient or providing medical services. See, e.g., *Multari* v. *Yale-New Haven Hospital, Inc.*, 145 Conn. App. 253, 260, 75 A.3d 733 (2013) ("The plaintiff has not alleged medical malpractice . . . but simply ordinary negligence against an entity that happens to be a medical provider. The fact that the defendant is a medical provider, does not, by itself, preclude a finding that the plaintiff's action sounds in ordinary negligence."); *Badrigian* v. *Elmcrest Psychiatric Institute, Inc.*, 6 Conn. App. 383, 385–86, 505 A.2d 741 (1986) (claim that defendant failed to supervise psychiatric patients in crossing highway sounded in ordinary negligence); see also *Jarmie* v. *Troncale*, supra, 306 Conn. 593 and n.5 (leaving open possibility of third-party negligence claims against health care providers).

To determine whether a claim against a health care provider sounds in ordinary negligence rather than (or in addition to) medical malpractice, we must "review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . .

[M]alpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 254, 811 A.2d 1266 (2002). ''[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard.'' (Internal quotation marks omitted.) Id., 254–55. Accordingly, a claim sounds in medical malpractice when ''(1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.'' (Internal quotation marks omitted.) Id., 254. In connection with an ordinary negligence claim, by contrast, the defendant's conduct is judged against the standard of ''what a reasonable person would have done under the circumstances . . . .'' *Considine* v. *Waterbury*, 279 Conn. 830, 859, 905 A.2d 70 (2006).

C

With these principles in mind, we consider the plaintiff's complaint. The relevant allegations of the complaint indicate that the defendant reviewed Smith's test results, notified a staff member of those results, and delegated to the staff member the task of informing Smith of the results. The complaint further alleges that the lab report contained a guide that made clear that Smith had tested positive for herpes. In addition, the complaint alleges that, although the test results were

positive, the staff member informed Smith that his results were negative. Finally, the plaintiff alleges that the defendant's negligence in failing to accurately advise Smith of his positive test results caused Smith to infect the plaintiff with herpes.

These allegations are consistent with two distinct theories of negligence. First, the defendant could have misread Smith's lab report and incorrectly concluded that the results were negative. Second, it is possible that the defendant interpreted the report correctly but that either the defendant misinformed his staff member that the results were negative or the staff member misinformed Smith. In other words, the alleged error could have occurred either in the initial interpretation of the report or in the inaccurate communication of the results, via the staff member, to Smith. See 2 Restatement (Second), Torts § 311 (2), p. 106 (1965) (negligence may consist of failure to exercise reasonable care in ascertaining accuracy of information or in manner in which information is communicated).

In either case, we agree with the plaintiff that her allegations reasonably can be understood to sound in ordinary negligence. It is true that the alleged error transpired in a medical setting and that it arose as a result of a medical diagnosis in the context of an ongoing physician-patient relationship. There are at least two reasons, however, why we nevertheless conclude that this aspect of the complaint need not be read to sound in medical malpractice.

First, the alleged error is not one involving professional medical judgment or skill. If the defendant misread Smith's lab result, then he failed to perform what was, in essence, a simple, ministerial task. The index to the report states that a result greater than 1.1 indicates a positive test, and the report states that Smith's result was 4.43. No advanced medical training was necessary

to determine that Smith had tested positive for herpes; elementary reading and arithmetic skills should have been sufficient. Indeed, laypeople routinely perform comparable tasks, such as reading and interpreting meat thermometers, oil dipsticks, pool and spa test strips, and insulin tests.

Of course, the same conclusion holds to an even greater extent if the genesis of the error was that the defendant simply told his staff member the wrong test result or the staff member relayed the wrong result to Smith. That sort of careless miscommunication could occur in any setting and has nothing to do with the exercise of professional medical judgment or skill. Indeed, the very fact that the defendant delegated the task to a staff member, who presumably was not a medical doctor, points to the nontechnical nature of the communication.

Second, regardless of whether the alleged error arose from a misreading or a miscommunication, proving that it constituted negligence would not require expert medical testimony or the establishment of a professional standard of care. A jury will not need expert testimony to determine whether the defendant's staff was negligent in leading Smith to believe that he was free of STDs when the defendant knew, or should have known, that Smith had tested positive for herpes, a contagious STD, and intended to engage in sexual activity. Such a determination is well within the ken of a lay person.[4]

[4] It is true that there are rare circumstances in which expert testimony may not be necessary to establish that medical malpractice has occurred, such as when a surgeon leaves a surgical implement inside a patient after completing an operation. Such gross negligence may be assessed by a jury without reference to the prevailing standard of professional care. See, e.g., *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 580, 113 A.3d 932 (2015). This is not such a case because, among other reasons, the alleged error did not involve a failure on the part of the defendant to exercise that degree of professional skill or judgment that a reasonably prudent health care provider would have exercised under the circumstances.

Accordingly, we conclude that, as in *Jarmie*, the plaintiff in this case pleaded a cause of action sounding in ordinary negligence. We therefore turn our attention to the plaintiff's claim that the defendant, in informing Smith of his test results, owed a common-law duty of care not only to Smith but also to the plaintiff, a non-patient.

II

Having concluded that the plaintiff's claim sounds in ordinary negligence, we now must determine whether, under the circumstances presented in this case, a physician owes a duty of care to an identifiable third party[5] who is not a patient. We conclude that a physician does owe such a duty.

A

We begin by setting forth the elements of a cause of action in ordinary negligence. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the [alleged tortfeasor] violated that duty in the particular situation at hand." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 589.

[5] It is not clear from the complaint whether Smith allegedly told the defendant the plaintiff's actual name or simply indicated that he had an exclusive girlfriend for whose benefit he was seeking STD testing. Our analysis would be the same regardless of whether the plaintiff was actually identified to the defendant by name or merely remained identifiable on the basis of Smith's description of her as his exclusive girlfriend.

"Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable, but the test is, would the ordinary [person] in the [alleged tortfeasor's] position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . .

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) Id., 590.

The default assumption of the common law, then, is that one owes a duty to exercise due care in one's affirmative conduct with respect to all people, insofar as one's negligent actions may foreseeably harm them. 3 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2007) § 18.6, p. 862. Under specific circumstances, however, the law, for reasons of public policy, places additional restrictions on the class of people to whom a duty of care is owed. See, e.g., id., § 18.3, p. 781. In most instances, for example, a physician's liability for

the negligent care and treatment of a patient does not extend to nonpatient third parties who have been foreseeably injured by that negligence. Id., § 18.5A, p. 852; see also *Jarmie* v. *Troncale*, supra, 306 Conn. 592–93. But see *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 568, 113 A.3d 932 (2015) (recognizing limited cause of action for bystander emotional distress resulting from medical malpractice); *Jarmie* v. *Troncale*, supra, 593 n.5 (declining to endorse per se rule barring third-party claims against health care providers). The present case requires us to further clarify the scope of this exception to the general duty rule.

B

With these principles in mind, we now turn our attention to the central question posed by the present appeal, namely, whether a health care provider who negligently misinforms a patient that he does not have an STD owes a duty of care to an identifiable third party who foreseeably[6] contracts the STD as a result of the provider's negligence. The defendant contends that various public policy considerations counsel against recognition of such a duty. Most notably, because a patient such as Smith could have been or become intimate with an unlimited number of romantic partners, there is no meaningful way to identify or restrict the number of individuals whom he might infect and, therefore, to limit the class of persons who could have standing to bring an action of this sort.

The defendant further contends that a number of public policy considerations and common-law traditions that are unique to the health care environment or, specifically, to the physician-patient relationship,

[6] The trial court determined, and we agree, that a jury reasonably could find that "it is foreseeable that a sexual partner of a patient who erroneously had been told that he did not suffer from any STDs might contract the STD with all of the health related consequences of such an illness."

counsel against recognizing a physician's duty to a nonpatient third party under the circumstances alleged in the present case. He argues that (1) the law generally does not impose on physicians a duty of care to nonpatient third parties, (2) the considerations underlying the adoption of Connecticut's medical malpractice statutes, General Statutes §§ 52-190a through 52-190c, disfavor the imposition of additional liability on physicians, (3) imposing on physicians duties to third parties risks interfering with and undermining the physician-patient relationship, and (4) considerations of confidentiality create both legal and logistical hurdles to the recognition of such duties. Finally, the defendant contends that the plaintiff could have taken various measures both to protect herself from contracting herpes—presumably sexual abstention or the use of prophylactics—and to establish proper standing to bring an action of this sort—such as accompanying Smith when he sought treatment from the defendant.

The trial court, in granting the defendant's motion to strike, was swayed by a number of these arguments. The court also discussed several additional concerns: whether physicians might become obligated to contact and warn or to educate patients' sexual partners; the fact that physicians have no control over whether and how patients share their STD test results with potential sexual partners; and whether the recognition of a duty to nonpatients should be predicated on the existence of a formal, mutual STD testing agreement between the patient and his or her prospective sexual partner. Although the defendant, certain of the amici,[7] and the trial court raise many valid concerns, for the reasons that follow, we are persuaded that they do not counsel

[7] We granted permission for the following groups to submit amicus briefs: the Connecticut Trial Lawyers Association, in support of the plaintiff; and the American Medical Association, the Connecticut Hospital Association, and the Connecticut State Medical Society, in support of the defendant.

against the recognition of a duty under the specific circumstances presented in this case.

1

Setting aside for the moment the question of what third-party duties apply within the distinct confines of the physician-patient relationship, we observe at the outset that many of the concerns that the defendant raises and that the trial court found persuasive have been addressed and resolved in other professional contexts. Although the plaintiff has not labeled it as such, her claim is, in essence, one for negligent misrepresentation. That tort specifically encompasses situations such as this, in which a tortfeasor negligently supplies misinformation knowing that the recipient of that information intends to supply it in turn for the benefit and guidance of a third party.

"This court has long recognized liability for negligent misrepresentation. We have held that even an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. . . . [When the information supplied is to be used in the furtherance of a business transaction and the alleged harm is solely pecuniary, the] governing principles are set forth in . . . § 552 of [Volume 3 of] the Restatement Second of Torts [1977]: One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance [on] the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (Citations omitted; internal quotation marks omitted.) *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 217–18, 520 A.2d 217 (1987). Recognizing the potentially limitless scope of the finan-

cial harms that may flow from the dissemination of false information, the Restatement (Second) restricts liability for negligent misrepresentation of this sort to the loss suffered "(a) by the person or one of a limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply it," and "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." 3 Restatement (Second), Torts § 552 (2) (a) and (b), p. 127 (1977); see also id., comment (a), pp. 127–28. In other words, the Restatement (Second) addresses the problem of potentially limitless third-party liability, first, by conferring standing on only those third parties to whom the defendant knew that the recipient intended to supply the information at issue and, second, by restricting liability to losses arising from transactions for the purpose of which the information was supplied.

Defined and cabined in this manner, liability for negligent misinformation has been upheld in various contexts in which a professional is hired to supply information to a client, knowing that the client is obtaining the information at least in part for the benefit and guidance of some third party or parties. Although we have not definitively resolved whether an accountant or an auditor may be liable for negligent misrepresentation to a nonclient third party; see *Stuart* v. *Freiberg*, 316 Conn. 809, 816–17, 831–32 n.17, 116 A.3d 1195 (2015) (deeming it unnecessary to determine whether liability could be imposed and leaving question open); a number of other courts have held that such professionals can be held liable under the approach set forth in § 552 of the Restatement (Second) of Torts. See, e.g., *Ellis* v. *Grant Thornton LLP*, 530 F.3d 280, 288–89 (4th Cir.) (applying West Virginia law), cert. denied, 555 U.S. 1049, 129 S. Ct. 652, 172 L. Ed. 2d 614 (2008); *North American*

Specialty Ins. Co. v. *Lapalme*, 258 F.3d 35, 38–40 (1st Cir. 2001) (applying Massachusetts law); see also *Tricontinental Industries, Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824, 836 (7th Cir. 2007) (applying similar Illinois rule).

A growing number of courts also have dispensed with the traditional privity requirement and have imposed liability on attorneys with respect to transactions in which the attorney's opinion is solicited for the benefit of an identifiable third party. See generally B. Walker, Note, "Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity," 21 Washburn L.J. 48 (1981) (noting modern trend toward imposing liability and discussing cases). Although courts following the modern approach to professional negligent misinformation claims have not been oblivious to the concerns raised by the defendant and certain of the amici—the potential for limitless third-party liability, interference with the professional-client relationship, and the undue burdening of the professional practice—they have concluded that limiting liability to circumstances in which professional services are sought for the specific benefit of *identifiable* third parties adequately addresses any concerns centering around both foreseeability and professionalism. See id., 65–66; see also *North American Specialty Ins. Co.* v. *Lapalme*, supra, 258 F.3d 40; *Pelham* v. *Griesheimer*, 92 Ill. 2d 13, 20–21, 440 N.E.2d 96 (1982).[8]

Moreover, as we discuss more fully in part II B 4 of this opinion, the Restatement (Second) of Torts recog-

[8] We emphasize that the question of negligent misrepresentation is not before us, and we express no opinion as to whether Connecticut law recognizes a third-party cause of action in negligent misrepresentation against attorneys, accountants, auditors, or medical professionals. See footnote 3 of this opinion. Our point is simply that the concerns that the defendant and the dissent raise regarding potentially limitless liability are the same concerns that have been raised, and satisfactorily addressed, in various professional contexts across many jurisdictions.

nized that there is even less need to cabin potential third-party liability for negligent misrepresentation in cases such as this, in which the misinformation was not supplied for the recipient's financial benefit and the third-party plaintiff suffered physical as well as pecuniary injuries. Under those circumstances, the Restatement (Second) advises that "[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . (b) to such third persons as the actor should expect to be put in peril by the action taken." 2 Restatement (Second), supra, § 311 (1) (b), p. 106. Similar principles underlie § 324A, which provides that "[o]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or . . . (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Id., § 324A (a) and (c), p. 142.

2

Turning to the specific question of what duties, if any, a medical professional owes to a nonpatient third party, we begin by reviewing Connecticut precedent. The parties agree that *Jarmie* v. *Troncale*, supra, 306 Conn. 578, is the seminal Connecticut case on the subject, but they disagree as to how the present case should be resolved under *Jarmie*.[9] We conclude that, although *Jarmie* helps to guide our analysis, whether a physician owes a duty of care to a patient's intimate partner to

[9] Neither party advocates that we overrule or reconsider *Jarmie*.

accurately report that patient's STD test results remains a question of first impression in Connecticut.

In *Jarmie*, the defendant physician diagnosed and treated a patient for various liver and kidney ailments, including hepatic encephalopathy but failed to warn her of the latent driving impairment associated with her condition. Id., 581. After leaving the physician's office, the patient lost consciousness while operating her motor vehicle and struck the plaintiff. Id. The trial court granted the defendant's motion to strike the plaintiff's complaint in his subsequent negligence action against the physician, concluding that physicians owe no common-law duty to protect third parties from injuries caused by patients. Id., 582.

On appeal, we began by emphasizing that there is no common-law or statutory rule against nonpatients bringing ordinary negligence claims against physicians. Id., 586. We recognized, however, that our cases display a general aversion to extending a physician's duty of care to nonpatients. See id., 592. That aversion is rooted in the principles of tort reform underlying § 52-190a, as well as the common-law rule that, in the absence of a special relationship, there is no duty to protect a third person from the conduct of another. Id. We further explained that "[t]here is no well established common-law rule that a physician owes a duty to warn or advise a patient for the benefit of another person." Id. Nevertheless, we emphasized that we have not "employed or endorsed a per se rule that [third-party] claims [against health care providers] are categorically barred because of the absence of a physician-patient relationship but, rather . . . this court has exercised restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients." (Internal quotation marks omitted.) Id., 593–94 n.5. In addition, we distinguished cases from other jurisdictions that had imposed third-party liability on a physi-

cian by remarking that those cases, unlike *Jarmie*, involved a physician who had "failed to warn the patient that he or she either had a communicable disease or had been exposed to one." Id., 616. Accordingly, we left open the possibility that, under appropriate circumstances, and in particular with respect to the diagnosis of communicable diseases, a physician's common-law duty of care may extend to nonpatients.[10]

In the parts of this opinion that follow, we will discuss and apply the various factors and considerations that we deemed to be relevant to the duty analysis in *Jarmie*. For now, we emphasize two points. First, a principal reason that we affirmed the judgment of the trial court in *Jarmie* and declined to recognize that the defendant physician owed a duty to the plaintiff motorist was because the plaintiff was not an *identifiable* victim at the time that medical services were provided. Id., 590–91, 603. Rather, "potential victims of [the physician's] alleged negligence included any random pedestrian, driver, vehicular passenger or other person who hap-

[10] The dissent, while conceding that this remains an open question under *Jarmie*, fails to note that, in *Jarmie*, we specifically distinguished cases from other jurisdictions that imposed third-party liability on physicians in the context of failing to warn about communicable diseases. Indeed, aside from one brief footnote, the dissent, which quotes heavily from *Jarmie*, barely acknowledges that the present case raises a fundamentally different question—the third-party liability of a medical professional with respect to the misreporting of a sexually transmitted disease—than that at issue in *Jarmie* or any of our previous cases.

As we explain more fully hereinafter, it is beyond cavil that both the law and the medical profession impose broader and different duties on physicians, duties that extend beyond the confines of the physician-patient relationship, with respect to the diagnosis of STDs and other infectious diseases. Of course, it is not unreasonable to take the position, as the dissent has, that, for reasons of public policy, we never should impose on physicians any duties beyond those established by the legislature. We think it would be a mistake, however, for this court to simply conclude that *Jarmie* disposes of the issue presented in this case without carefully evaluating the fundamentally distinct considerations that characterize the context of communicable diseases.

pened to come in close proximity to a motor vehicle operated by [the patient] following her diagnosis." Id., 597.

We explained that, in previous cases, we had "limited foreseeable victims of a health care provider's negligence to identifiable persons . . . ." Id., 594; see id., 596 ("the foreseeability test as applied by this court in the context of health care providers has . . . required an identifiable victim because we have deemed the effect of a physician's conduct on third parties as too attenuated"); see also *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 96–97, 735 A.2d 347 (1999) (psychiatrist owed no duty to patient's ex-spouse, who was not identifiable victim); *Fraser* v. *United States*, 236 Conn. 625, 632, 674 A.2d 811 (1996) (psychotherapist owed no duty to victim because "our decisions defining negligence do not impose a duty to those who are not identifiable victims [and] . . . in related areas of our common law, we have concluded that there is no duty except to identifiable persons").

In the present case, by contrast, the plaintiff has alleged that "Smith told [the defendant] that he was seeking STD testing not only for his benefit, but for the protection and benefit of his new, exclusive girlfriend, [the] plaintiff." Construing this pleading in the light most favorable to sustaining the sufficiency of the complaint, we must conclude that the plaintiff was an identifiable, if not identified, potential victim of the defendant's alleged negligence at the time that treatment was rendered.[11] That is to say, only one woman could have

[11] We recognize that there could be cases in which a dispute arises over whether the plaintiff is in fact the individual who was identifiable as a potential victim prior to the occurrence of negligence—if, for example, the defendant had argued that the plaintiff was not in fact the exclusive girlfriend of whom he was made aware when Smith sought STD testing. Because the defendant has not made that argument in the present case, for present purposes, the identity of the plaintiff as the identifiable victim is not in question. If it were, the question of identity would, of course, be a question of fact for the fact finder.

fit the description of Smith's exclusive girlfriend, and Smith presumably could have identified her by name if he had been asked to do so. See *Jarmie* v. *Troncale*, supra, 306 Conn. 597–98 (identifiable victim is one whom it was possible to identify before negligent act occurred).

This identifiable victim requirement strikes an equitable balance between the interests at stake. Although a health care provider's liability may expand beyond his or her patients, its increased scope would encompass only those third-party victims of whose existence and potential exposure to harm the health care provider had been made aware—or could have become aware—prior to the negligent act.[12]

Second, since we decided *Jarmie*, we have held that, under limited circumstances, a health care provider is liable to third parties for professional negligence, albeit in the context of a bystander emotional distress claim. In *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 558, we concluded that "a bystander to medical malpractice may bring a claim for the resulting emotional distress . . . when the injuries result from gross negligence such that it would be readily apparent to a lay observer." Id., 560. In so holding, we relied on "our recent statement in *Jarmie* . . . eschewing any per se rule that [third-party tort] claims are categorically barred because of the absence of a physician-patient relationship . . . ."[13] (Citation omitted; internal quotation marks omitted.) Id., 574.

[12] In *Jarmie*, we also relied on the fact that the defendant physician had not undertaken any affirmative action that placed the plaintiff at risk. *Jarmie* v. *Troncale*, supra, 306 Conn. 624. In the present case, however, the plaintiff has alleged that the defendant affirmatively informed Smith that he was free of STDs, knowing that she might become intimate with Smith in reliance on that information.

[13] We are not persuaded by the efforts of the dissent to distinguish *Squeo*. The dissent contends that *Squeo* is different because the claim in that case sounded in medical malpractice rather than ordinary negligence. See footnote 2 of the dissenting opinion. This argument proves too much.

Accordingly, we find Connecticut precedent to be unsettled with respect to the particular question presented here. Although we never have been confronted with the question of a physician's duty to a third party with respect to the reporting of STD test results, and although we consistently have expressed a general aversion to extending the duty of health care providers to third parties, we have allowed, under limited circumstances, for the imposition of liability to an identifiable potential victim who will be foreseeably harmed by a physician's negligence.

3

In *Jarmie*, after we concluded that Connecticut precedent did not bar the imposition of the duty at issue, we proceeded to look to sister state authority and also to consider whether various policy factors favored the imposition of such a duty. *Jarmie* v. *Troncale*, supra, 306 Conn. 598–624. In this part of the opinion, we review how other jurisdictions have resolved similar cases. In part II B 4, we analyze the various policies at issue.

The entire dissent is predicated on the concern that any recognition that physicians have duties to third parties will compromise the sanctity of the physician-patient relationship, jeopardize the confidentiality of patient records, promote unnecessary defensive medicine, and bring about higher insurance rates and health care costs, driving doctors out of practice and adversely affecting patient care. As we have explained, however; see part I B of this opinion; medical malpractice claims are those that go to the core of the physician-patient relationship: physicians are sued in their capacities as medical professionals, on the basis of the specialized medical care of a patient, involving the exercise of medical judgment. If nonpatient third parties can have standing to prosecute claims of *that* sort, as *Squeo* says they can, then, a fortiori, allowing them to bring claims sounding in ordinary negligence need not intrude on the sanctity of the physician-patient relationship. And, if our decision in *Squeo* has not resulted in the parade of horribles that the dissent invokes (and which are, in essence, the very same horribles that the defendants and certain of the amici in *Squeo* invoked); see *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 575–77; then we can have some reassurance that the alarmist warnings in the present case will be no more prescient.

A number of other jurisdictions have held that, under certain circumstances, the duty of a medical professional to correctly diagnose and advise a patient who suffers from a communicable disease extends not only to the patient but also to third parties who may foreseeably contract that disease from the patient. See 61 Am. Jur. 2d 382, Physicians, Surgeons and Other Healers § 226 (2012) ("[a] physician is liable for his or her negligence in permitting persons to be exposed to infectious or communicable diseases to the injury of the persons so exposed"); see also L. Gostin & J. Hodge, "Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification," 5 Duke J. Gender L. & Policy 9, 37 (1998); T. Bateman, annot., "Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient, 3 A.L.R.5th 370, 377–79, § 2 [a] (1992); G. Sarno, "Physician's Failure To Protect Third Party from Harm by Nonpsychiatric Patient," 43 Am. Jur. Proof of Facts 2d 657, 670–72, § 3 (1985). Many such courts, for example, have long held that physicians and other health care providers charged with diagnosing, treating, and controlling the spread of contagious diseases owe a duty of care to members of the immediate family of an infected patient. See, e.g., *Bolieu* v. *Sisters of Providence in Washington*, 953 P.2d 1233, 1239 (Alaska 1998); *Hofmann* v. *Blackmon*, 241 So. 2d 752, 753 (Fla. App. 1970), cert. denied, 245 So. 2d 257 (Fla. 1971); *Shepard* v. *Redford Community Hospital*, 151 Mich. App. 242, 245–46, 390 N.W.2d 239 (1986), appeal denied, 431 Mich. 872, 430 N.W.2d 458 (1988); *Skillings* v. *Allen*, 143 Minn. 323, 326, 173 N.W. 663 (1919); *Wojcik* v. *Aluminum Co. of America*, 18 Misc. 2d 740, 746–47, 183 N.Y.S.2d 351 (1959).[14] In some of these cases, the court held that the

[14] One sister state court also has recognized a third-party duty to the spouse of a hospital employee who was not informed that he had been exposed to the human immunodeficiency virus (HIV), an STD, in the line of work. See *Vallery* v. *Southern Baptist Hospital*, 630 So. 2d 861, 862,

provider had an affirmative duty to notify or educate the third party, whereas, in other cases, the court simply held that a third party had standing to enforce the provider's duty to properly diagnose, treat, and educate the infected patient.

Although appellate cases addressing a physician's duties to a patient's premarital sexual partners are few and far between, the plaintiff and certain of the amici have identified several cases that permit an action to be brought either by a victim who was identifiable at the time of treatment or by any member of the class of persons who foreseeably could contract an STD from the patient as a result of the physician's negligence. See, e.g., *Reisner* v. *Regents of the University of California*, 31 Cal. App. 4th 1195, 1200–1201, 37 Cal. Rptr. 2d 518 (1995) (physician had duty to advise patient that he tested positive for human immunodeficiency virus (HIV) for benefit of unknown and unidentifiable but foreseeable sexual partners), review denied, California Supreme Court, Docket No. S045274 (May 18, 1995); *C.W.* v. *Cooper Health System*, 388 N.J. Super. 42, 60–62, 906 A.2d 440 (App. Div. 2006) (health care provider owed duty to inform patient of positive HIV test results and that duty extended to persons "within the class of reasonably foreseeable individuals whose health [was] likely to be threatened by the patient's ignorance of his own health status," including patient's future sexual partner); *DiMarco* v. *Lynch Homes-Chester County, Inc.*, 525 Pa. 558, 563–64, 583 A.2d 422 (1990) (when boyfriend of blood technician who acquired hepatitis B from accidental exposure was member of class of persons whose health was likely to be threatened by

868–69 (La. App. 1993), cert. denied, 634 So. 2d 860 (La. 1994). But see *Doe* v. *Pharmacia & Upjohn Co.*, 388 Md. 407, 409–10, 879 A.2d 1088 (2005) (company that cultivated and harvested HIV cultures for incorporation into test for HIV antibodies owed no duty of care to spouse of employee who tested positive for HIV following workplace exposure).

exposure to such communicable disease, and her physicians gave erroneous advice to her regarding potential spread of that disease, boyfriend had cause of action against physicians); *Estate of Amos* v. *Vanderbilt University*, 62 S.W.3d 133, 138 (Tenn. 2001) (future husband and daughter of patient who was not informed that she was at risk of contracting HIV deemed members of identifiable class for purposes of hospital's third-party liability).

The defendant attempts to distinguish these cases on the ground that the plaintiff, unlike the sexual partners at issue in the cited cases, could have accompanied Smith when he sought STD testing and thus established a quasipatient relationship with the defendant sufficient to support a legal duty of care. We are not persuaded by this contention. First, the defendant provides no authority to support his theory that either the law or the medical profession confers a special status on a nonspouse sexual partner who accompanies a patient to his or her appointment with a physician and that that status is sufficient to support a legal duty of care. Second, it may well be that the defendant's suggested approach would interfere more directly with the physician-patient relationship and raise more substantial confidentiality concerns than would the imposition of the third-party duty of care for which the plaintiff advocates.

The defendant also notes that many of these cases involve potentially deadly diseases such as HIV that are more serious than herpes. We agree with the Alaska Supreme Court, however, that "the duty issue cannot turn on possible distinctions among diseases based on their severity and ubiquity. . . . Rather, the severity and ubiquity of the disease bear on what the [provider] must do to discharge the duty." *Bolieu* v. *Sisters of Providence in Washington*, supra, 953 P.2d 1240.

A Florida case, *Hawkins* v. *Pizarro*, 713 So. 2d 1036 (Fla. App.) review denied, 728 So. 2d 202 (Fla. 1998),

provides an instructive contrast. In that case, a patient tested positive for hepatitis C, but her physician's office improperly advised her that she had tested negative. Id., 1037. Several months later, the patient met the plaintiff, whom she eventually married. Id. The plaintiff contracted hepatitis C from the patient and filed an action against the physician for medical negligence. Id. In upholding the trial court's granting of summary judgment in favor of the defendant, the District Court of Appeal of Florida recognized that hepatitis C is a highly contagious sexually transmitted disease and that a physician's duty of care in treating such diseases is intended in part for the benefit of third parties. Id., 1037–38. The court held that the physician owed no duty to the plaintiff, however, because he was neither identified nor known to the physician at the time of the incorrect diagnosis. Id., 1038. By contrast, our research has not revealed any cases in which a court held that there was no third-party liability under circumstances such as those in the present case, in which STD testing was obtained expressly for the benefit of an identifiable, exclusive romantic partner. But cf. *D'Amico* v. *Delliquadri*, 114 Ohio App. 3d 579, 583, 683 N.E.2d 814 (1996) (plaintiff conceded that, under Ohio law, defendant physician owed her no direct duty to properly warn and advise his patient, plaintiff's boyfriend, as to communicability of genital warts).[15]

[15] Most of the cases on which the dissent relies address unrelated questions, such as whether a physician has a duty to third parties to properly advise a patient as to his or her fertility status or potential to infect caregivers. See, e.g., *Dehn* v. *Edgecombe*, 384 Md. 606, 616, 865 A.2d 603 (2005); *Candelario* v. *Teperman*, 15 App. Div. 3d 204, 204–205, 789 N.Y.S.2d 133 (2005). The dissent also relies on *Hawkins*, which, as we have explained, is wholly consistent with the rule that we announce today. Indeed, the court in *Hawkins* concluded that a physician's duty to accurately report the results of an STD test does run to identified third parties whose existence is known to the physician and who will foreseeably be infected as a result of the inaccurate report, precisely because the duty is intended in part for the benefit of those parties. See *Hawkins* v. *Pizarro*, supra, 713 So. 2d 1037–38.

Beyond sister state authority, we further note that the Restatement (Second) of Torts appears to support the imposition of liability in a case such as this. As we previously discussed, § 311 of the Restatement (Second) provides that one who negligently gives false information may be held liable to a third party who predictably is injured by the recipient's reasonable reliance on that information. Notably, comment (b) to that section holds up the physician-patient relationship as the primary illustration of the rule: "The rule stated in this [s]ection finds particular application where it is part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient *or others*, as it is to make a correct diagnosis or to prescribe the appropriate medicine." (Emphasis added.) 2 Restatement (Second), supra, § 311, comment (b), p. 106. Accordingly, we conclude that sister state and secondary authorities, although limited, generally support the imposition of a third-party duty under the circumstances alleged in the present case. As we discuss in part II B 5 of this opinion, sister state courts generally have not been swayed by the various practical concerns that the defendant and certain of the amici have raised and that the trial court found to be compelling.

4

Next, because the question presented is one of first impression in Connecticut, we consider various public policy factors that both this court and other authorities have deemed to be relevant to whether and under what circumstances a physician owes a duty of care to a nonpatient third party. On balance, we conclude that those factors support the imposition of a third-party

duty of care under the circumstances of the present case.

In *Jarmie*, we identified the following factors, among others, as being relevant to the question of what duty of care a physician owes to nonpatient third parties: the purposes of the tort compensation system, including efficiency, harm avoidance, and the appropriate distribution of loss; *Jarmie* v. *Troncale*, supra, 306 Conn. 599–602; the normal expectations of the participants in the activity under review and the public policy of encouraging participation in the activity, including the sanctity of the physician-patient relationship; id., 603–14; and the purposes that underlie Connecticut's medical malpractice statute, § 52-190a, including the avoidance of increased litigation and higher health care costs. Id., 592–93, 603, 614–15. When addressing third-party liability in the context of infectious diseases in particular, courts also have taken into account such considerations as "the foreseeability of third-party injury as shown by the patient's [infectious disease] carrier status, the degree of communicability of the patient's infectious disease, and the physician's actual or constructive knowledge of the ease of transmission of the patient's infectious disease; a public health statute [the] legislative intent [of which] is partly to protect third parties, such as a statute requiring physicians to report diagnosed instances of communicable or infectious diseases; breach of the physician's duty to exercise due care to protect third parties from foreseeable harm as shown by failure to report diagnosed instances of communicable or infectious diseases to public health authorities, failure to warn the patient with the infectious disease not to have contact with third parties, failure to warn the family of the patient with the infectious disease about the ease of, and precautions against, its transmission, failure to quarantine the patient with the infectious disease, failure to vaccinate the patient's

family [members] against the infectious disease, conveyance of an affirmative indication that contact with the infected patient is not risky, and failure to take other reasonable measures to prevent exposure to the patient with the communicable disease; additional indicia of negligence, including failure to use standard available tests for diagnosing a patient's infectious disease, failure to interpret diagnostic test results correctly, and failure to diagnose the patient's infectious disease; and harm to a third-party plaintiff as shown by the third party's illness from exposure to the physician's infectious patient." T. Bateman, supra, 3 A.L.R.5th 379, § 2 [b].

a

For purposes of the present appeal, two of these factors, or sets of factors, are especially pertinent to our analysis. First, although we continue to recognize the sanctity of the physician-patient relationship and the need to exercise "restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients"; *Jarmie* v. *Troncale*, supra, 306 Conn. 592; we also recognize that such concerns are at their nadir, and a physician's broader public health obligations are at their zenith, with respect to the diagnosis and treatment of infectious diseases.

Throughout history, both medical organizations and government entities have recognized not only the critical role that physicians play in combatting the spread of contagious diseases such as STDs, but also the concomitant fact that, in diagnosing and treating such diseases, a physician's duties and loyalties necessarily must be divided between the patient and other people whom the patient may infect. See generally L. Gostin & J. Hodge, supra, 5 Duke J. Gender L. & Policy 9. For example, "one of the earliest recorded public health strategies for STD prevention was to pierce the veil of

secrecy surrounding these hidden diseases by notifying sexual partners . . . of infected patients . . . .'' Id., 11. ''Often known collectively as the 'duty to warn,' these [judicially imposed, common-law] obligations subsequently have been codified by many state legislatures.'' Id., 12. For example, partner notification measures were broadly implemented during the 1930s in an effort to control and eradicate the syphilis epidemic. Id., 21. Many states continue to operate provider based partner referral programs under which health care providers are responsible for contacting, on a confidential basis, the sexual partners of patients diagnosed with various STDs. See id., 27–32.

Indeed, even the American Medical Association (AMA), one of the amici supporting the defendant's position, which argues against the imposition of a third-party duty under these circumstances, has recognized that, ''[a]lthough physicians' primary ethical obligation is to their individual patients''; American Medical Association, Code of Medical Ethics (2017) opinion 8.4, p. 128; they also have a responsibility ''to protect and promote the health of the public.'' Id., opinion 8.1, p. 125. ''[P]hysicians must balance dual responsibilities to promote the welfare and confidentiality of the individual patient and to protect public safety.'' Id., opinion 8.2, p. 126. The AMA has further observed that a physician's ''long-recognized'' professional responsibilities to nonpatients are especially pronounced in the context of infectious disease, for which professional standards of care demand that a physician not only treat his or her own patients competently, but also go so far as to ''[p]articipate in implementing scientifically and ethically sound quarantine and isolation measures in keeping with the duty to provide care in epidemics.'' Id., opinion 8.4, p. 128.

As we noted, the principle that a physician's duty to protect the broader public health and to help to deter

the spread of contagious diseases at times transcends the physician's duty to his or her individual patient has long been codified in federal and state law. See, e.g., L. Gostin & J. Hodge, supra, 5 Duke J. Gender L. & Policy 58. Connecticut is no exception in this respect. Our legislature has, for example, enacted laws that require physicians to test pregnant patients for syphilis and HIV; General Statutes § 19a-90; require health care providers to report certain communicable diseases to local and state public health officials; General Statutes § 19a-215; and permit physicians to warn, or to disclose confidential patient information for the purpose of warning, a known partner of a patient who has been diagnosed with an HIV infection or related disease. General Statutes § 19a-584 (b).

Perhaps most notably, since 2006, both the United States Centers for Disease Control and Prevention (CDC) and the AMA have approved the use of so-called expedited partner therapy programs to combat the spread of STDs.[16] Expedited partner therapy "is the delivery of medications or prescriptions by persons infected with an STD to their sex partners without clinical assessment of the partners"; in accordance with this protocol, "[c]linicians . . . provide patients with sufficient medications directly or via prescription for the patients and their partners."[17] The AMA has authorized the use of expedited partner therapy even though that approach to treating STDs "potentially abrogates the standard informed consent process, compromises continuity of care for patients' partners, encroaches [on] the privacy of patients and their partners, increases the possibility of harm by a medical or allergic reaction, leaves other diseases or complications undiagnosed,

[16] American Bar Association, Recommendation (August 11–12, 2008) p. 2, available at https://www.cdc.gov/std/ept/onehundredsixteena.authcheckdam.pdf (last visited July 5, 2019).

[17] American Bar Association, Recommendation (August 11–12, 2008) p. 2, available at https://www.cdc.gov/std/ept/onehundredsixteena.authcheckdam.pdf (last visited July 5, 2019).

and may violate state practice laws.'' American Medical Association, supra, opinion 8.9, p. 132. In other words, the medical profession has formed the judgment that the need to stem the spread of STDs is so great, and the traditional physician-patient model so inadequate therefor, that an exception to the prevailing standard of care should be drawn so that physicians can provide treatment to third parties who are not their patients. Our legislature has embraced this novel approach, allowing practitioners to dispense oral antibiotic drugs to the sexual partners of patients who have been diagnosed with chlamydia or gonorrhea, two kinds of STDs, without first physically examining the partners. See General Statutes § 20-14e (e).

We recognize that none of these laws directly applies to herpes. This presumably reflects in part the fact that that disease is not curable at present, and, thus, the sexual partners of patients infected with herpes would not be candidates for programs such as expedited partner therapy. At the same time, the fact that herpes is incurable highlights the extent to which a physician's duties in a case such as this run to third parties as well as to the patient, as it will be the patient's potential sexual partners who are the most direct beneficiaries of the diagnosis.[18]

Perhaps more than in any other field of medicine, then, the duty of care that a physician owes to his or her patient in the diagnosis and treatment of infectious and sexually transmitted diseases also, necessarily,

[18] We emphasize that our recognition of a third-party duty in the present case is grounded in the unique characteristics of STDs in general and herpes in particular. Specifically, one—if not the primary—reason that patients seek to be tested for diseases such as herpes is to be able to represent to a potential sexual partner that they are disease free. Accordingly, the dissent's fear that physicians will be liable to third parties for the improper diagnosis of conditions such as chicken pox, influenza, or the measles is unfounded. See footnote 9 of the dissenting opinion.

entails some duty to third parties who are likely to contract the disease from the patient. As the Supreme Court of Pennsylvania explained, "[c]ommunicable diseases are so named because they are readily spread from person to person. Physicians are the first line of defense against the spread of communicable diseases, because physicians know what measures must be taken to prevent the infection of others. The patient must be advised to take certain sanitary measures, or to remain quarantined for a period of time, or to practice sexual abstinence or what is commonly referred to as safe sex." (Internal quotation marks omitted.) *DiMarco* v. *Lynch Homes-Chester County, Inc.*, supra, 525 Pa. 562. The court continued: "Such precautions are taken not to protect the health of the patient, whose well-being has already been compromised, [but] rather such precautions are taken to safeguard the health of others." (Emphasis omitted.) Id.; cf. *Davis* v. *Rodman*, 147 Ark. 385, 391–92, 227 S.W. 612 (1921) ("[o]n account of his scientific knowledge and his peculiar relation, an attending physician is, in a certain sense, in custody of a patient afflicted with [an] infectious or contagious disease"); V. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials (11th Ed. 2005) p. 432 (custody of persons with contagious diseases may give rise to singular duty to control conduct of other person).

At the same time, we perceive little risk that imposing a third-party duty under these circumstances would interfere with the physician-patient relationship, breach patient confidentiality, or require the practice of costly defensive medicine. See, e.g., *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1203. Although the plaintiff contends that the defendant owed her a duty of care as an identifiable potential victim who foreseeably would rely on the accuracy of his diagnosis, her argument is that that duty would have been

fully satisfied if the defendant simply had provided the accurate test results to Smith, his patient. In other words, the defendant was under no obligation to contact the plaintiff, to otherwise ensure that she was made aware of Smith's test results, or to do anything other than fulfill his undisputed professional obligation to accurately convey his patient's test results to the patient himself.[19] The concerns of the dissent that our decision in this case will somehow result in the disclosure of confidential medical information are, therefore, wholly unfounded.

In conclusion, we think that it is beyond cavil that physicians such as the defendant owe some duty of care to third parties when diagnosing and treating a patient who suffers from an STD. We do not believe that imposing the duty for which the plaintiff advocates would intrude on the sanctity of the physician-patient relationship. Indeed, the duty at issue here—simply to accurately relay the patient's test results to the patient —is far more limited and less intrusive than the public health reporting and partner notification requirements that have been imposed on physicians in the context of diagnosing and treating infectious diseases.

b

The second set of factors that governs our analysis relates to the purposes of the tort compensation system.

[19] The dissent's position appears to be that, if the defendant's duty to the plaintiff is no more than the duty he owes to Smith to accurately report the test results, then holding the defendant liable to the plaintiff as well as Smith "would not reduce the potential for harm because health care providers would be required to do no more than they already must do to fulfill their duty to patients." (Internal quotation marks omitted.) Setting aside the fact that increasing a physician's potential liability will presumably increase his or her incentive to avoid negligent errors of the type alleged, the present case is readily distinguishable from *Jarmie*, from which the dissent draws the quoted language. In the present case, unlike in *Jarmie*, which involved an automobile accident caused by the defendant physician's patient, Smith himself is unlikely to have any cause of action against the defendant, insofar as there is no indication that he suffered legally cognizable damages. Accord-

"[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . . It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. . . . [Of course] [i]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent [on] us to consider those risks." (Citations omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 599–600. In the present case, these factors also weigh strongly in favor of imposing a duty on health care providers to identifiable and foreseeable third-party victims such as the plaintiff.

First, we observe that, if the defendant is not held liable to the plaintiff under these circumstances, then, in all likelihood, she will be without remedy or compensation for her injuries. It is doubtful, for example, that the plaintiff could recover in negligence from Smith, who acted responsibly in seeking regular STD testing and did not have sexual contact with her until he was possessed of a reasonable, good faith belief that he was free of STDs.

The trial court, while recognizing "the absence of any other source of compensation for the [plaintiff's] harm," apparently concluded that this factor was mitigated by (1) the fact that "the cost of medical treatment likely

ingly, the defendant will face potential liability only to an identifiable third-party victim such as the plaintiff.

would be covered by health insurance," and (2) the plaintiff's ability to engage in "self-protective measures . . . ." The dissent also is of the view that the plaintiff is not without recourse because she "may well be covered by public or private health insurance policies . . . ."

There is nothing in the record to support the pure speculation that the plaintiff had, or will continue to have, adequate health insurance.[20] Nor do we think it is appropriate to expect ordinary health insurance policies, or taxpayers, to bear the costs of a physician's negligence. Medical malpractice policies exist to spread such costs.

In any event, the availability of insurance will be of little consolation to the plaintiff, insofar as genital herpes is presently an incurable disease. E.g., E. Moore, Encyclopedia of Sexually Transmitted Diseases (2005) p. 135; Mosby's Medical Dictionary (8th Ed. 2009) p. 872. We must assume that, for the remainder of her life, the plaintiff will suffer periodic outbreaks of painful blisters or ulcers associated with the virus. See, e.g., E. Moore, supra, pp. 132–33. Her desirability as a potential romantic partner may be diminished. And, if she should become pregnant, she will have to contend with the risk that she may transmit the virus to her newborn child. See, e.g., id., p. 135. Some of these injuries will not be covered—or may not be adequately covered—by medical insurance, and we ought not pretend otherwise. Only the defendant can compensate the plaintiff for these losses.

With respect to "self-protective measures," we presume that the trial court was referring to the fact that,

[20] We note that "[m]any people in Connecticut are currently without health insurance, usually because they think they [cannot] afford it, are unemployed or are at higher risk due to [preexisting] conditions." Insurance for the Uninsured, available at http://www.cthealthchannel.org/individuals/group-health-insurance/insurance-for-the-uninsured/ (last visited July 5, 2019).

notwithstanding Smith's apparently negative STD test results, the plaintiff could have further reduced the risk that she would contract an STD either by using prophylactics or abstaining from intercourse with Smith altogether. Even if we were to assume, for the sake of argument, that it would be reasonable and right to expect couples, such as the plaintiff and Smith, to abstain from sexual intimacy, or to consistently practice safe sex while dating, that would only push back the problem. At some point, their relationship could have progressed to a point at which they would have married and consummated their union. At that point, a wedding band would not have been proof against the defendant's negligence. See *Hawkins* v. *Pizarro*, supra, 713 So. 2d 1037 (STD was misdiagnosed prior to courtship, and sexual partner was diagnosed after marriage).

Second, the flip side of the coin is that, if the plaintiff cannot hold the defendant responsible for his alleged negligence, then errors of this sort will go unadmonished. Patients such as Smith are unlikely to have incurred any legally cognizable damages as a result of an incorrect test report and, therefore, may be unable to recover from a defendant physician. We recognize that not every wrong is compensable in tort and that losses, even unjust losses, sometimes must be allowed to lie where fate has cast them. See *Jarmie* v. *Troncale*, supra, 306 Conn. 599. Under these circumstances, however, imposing third-party liability would play an important role in spurring physicians such as the defendant to take greater care in reporting STD lab results. As the California Court of Appeal recognized in *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1195, the law should "encourage the highest standard of care concerning communicable and infectious diseases . . . ." Id., 1201; see also id., 1204 ("we believe that a doctor who knows he is dealing with the [twentieth] [c]entury version of Typhoid Mary ought to

have a very strong incentive to tell his patient what she ought to do and not do and how she ought to comport herself in order to prevent the spread of her disease" [footnote omitted]). Holding the defendant liable to the plaintiff would create such an incentive and deter the careless misreporting of STD test results.

The trial court, while recognizing that imposing third-party liability under these circumstances could play an important deterrent function and help control the insidious spread of STDs, expressed concern over what it saw as potentially unforeseen consequences. The court speculated, for instance, that physicians themselves might feel compelled to discuss lab results with their patients, which could be more costly and less efficient than relying on nurses or office staff to relay results. We do not find this concern compelling.

A patient who seeks medical attention to be tested for a disease, any disease, has a reasonable expectation that the test results will be reported accurately, by whatever means. See, e.g., L. Casalino et al., "Frequency of Failure To Inform Patients of Clinically Significant Outpatient Test Results," 169 Archives Internal Med. 1123, 1123 (2009) ("[f]ailures to inform patients of abnormal test results . . . are common and legally indefensible factors in malpractice claims"). The risks and costs associated with misinforming a patient that he does not have a particular disease can be dramatic. Those include the direct costs to the patient and the health care system, as when, for example, treatment of a serious illness such as cancer is irremediably delayed, or, as in the present case, through the inadvertent infection of third parties by a patient who falsely believes that he is free of STDs. Holding health care providers responsible for errors of the sort alleged will help to maintain public trust in the reliability of the STD

reporting system and, therefore, encourage continued participation in this important public health regimen.[21]

Of course, it ultimately will be for the jury to determine whether a reasonable health care provider would have reported Smith's test results differently, whether through direct physician-to-patient communications or through the use of additional fail-safes and quality assurance measures. But we certainly are not prepared to say, as a matter of law, that, whatever added costs might be entailed by a quick telephone call or a letter from one's physician, or a policy requiring office staff

[21] In order to prevent the spread of genital herpes, the CDC recommends that individuals take exactly the precautions taken by the plaintiff in the present case: "The surest way to avoid transmission of STDs, including genital herpes, is to abstain from sexual contact, *or to be in a long-term mutually monogamous relationship with a partner who has been tested for STDs and is known to be uninfected.*" (Emphasis added.) Centers for Disease Control and Prevention, Genital Herpes—CDC Fact Sheet (Detailed Version), available at https://www.cdc.gov/std/herpes/stdfact-herpes-detailed.htm (last visited July 5, 2019). The Department of Public Health also has recognized that encouraging sexually active individuals to seek regular STD testing is a high public health priority. See Connecticut Department of Public Health, Press Release, Department of Public Health Urges Residents To Be Tested for Sexually Transmitted Diseases (April 28, 2010), available at https://portal.ct.gov/DPH/Press-Room/Press-Releases---2010/April-2010/Department-of-Public-Health-Urges-Residents-To-Be-Tested-for-Sexually-Transmitted-Diseases (last visited July 5, 2019).

We disagree with the dissent that the legally relevant question is whether "a person harmed in the manner that this plaintiff was harmed would expect to be compensated by the physician . . . ." Clearly, the plaintiff expected there was some reasonable possibility that the defendant would be held accountable, or she would not have brought the present action. Equally clearly, she could not have had a high degree of confidence in a favorable result, as no Connecticut court had previously recognized such a duty. When the issue is, as a question of first impression, whether a previously unrecognized common-law duty should be recognized, it makes little sense (and is circular) for the result to hinge on whether a layperson accurately would predict that an appellate court would rule in her favor. The salient question in this case, rather, is whether a person in the plaintiff's position reasonably would expect that a physician would adopt an STD test result reporting protocol with an eye toward the potentially serious harm that could befall a patient's exclusive sexual partner if a negative result should be erroneously reported.

to double check that they are reporting test results accurately, they are too onerous relative to the human, financial, and public health costs associated with a false negative report.[22] Cf. *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1200 (it is not unreasonable to expect physicians to give additional warning or warnings).

Along these same lines, we note that it would not be unreasonable for a jury to conclude that the defendant, and not the plaintiff or Smith, was most effectively and economically situated to avoid the harm that befell the plaintiff. In this era of technologized medicine, the conveyance of lab results is a regular and central component of a physician's professional duties. The physician has exclusive access to the original lab results, until such time as they are shared with or conveyed to the

[22] It may well be that the steady march of technology already has rendered purely academic the trial court's concerns, as many patients now are able to view their test results directly through online electronic portals. See Office of the National Coordinator for Health Information Technology, ONC Data Brief No. 40 (April, 2018) pp. 1, 6, available at https://www.healthit.gov/sites/default/files/page/2018-04/HINTS-2017-Consumer-Data-Brief-april-2018.pdf (last visited July 5, 2019) (stating that, as of 2017, 52 percent of individuals were offered online access to their medical records, and that lab results were most frequently accessed information).

The dissent speculates that recognizing a third-party duty under these circumstances will lead physicians such as the defendant to engage in costly defensive medicine, which could raise the cost of health care. The dissent does not contend, however, that recognizing such a duty will lead to the unnecessary use of expensive medical tests or other modalities typically associated with defensive medicine. Rather, the defensive medicine that a physician may embrace under these circumstances is the avoidance of asking a patient to identify his or her sexual partner or asking whether he or she is seeking STD testing for the purpose of informing future sexual partners of the results.

We think that there is little realistic risk that physicians will alter their standards of care when errors of the sort alleged can be so easily and economically avoided by adopting simple quality control measures and exercising reasonable diligence. In any event, we fail to understand the harm that would result if a physician did not go out of his or her way to specifically identify a patient's sexual partner.

patient. As between the defendant, on the one hand, who can avoid errors of this sort simply by double checking the results before or after speaking with the patient; see L. Casalino et al., supra, 169 Archives Internal Med. 1123 (discussing "relatively simple" best practices); and Smith and the plaintiff, on the other, who could ensure that the plaintiff remained free of STDs only by permanently abstaining from intimate contact,[23] a jury reasonably could conclude that the defendant was the party who was in the best position to avoid the harm at the lowest cost and, therefore, should bear the costs of the loss. See, e.g., *Rodi Yachts, Inc.* v. *National Marine, Inc.*, 984 F.2d 880, 883–84, 888 (7th Cir. 1993).

At the same time, physicians such as the defendant can most readily bear and spread through malpractice insurance the costs associated with errors of the sort alleged. We are not convinced that such errors are both so prevalent and so ineluctable that imposing third-party liability, solely with respect to identifiable victims, will meaningfully impact insurance rates or overall health care costs.[24] For these reasons, we conclude that

[23] We note that herpes may be transmitted by forms of intimate contact other than intercourse. See, e.g., 1 Harrison's Principles of Internal Medicine (A. Fauci et al. eds., 14th Ed. 1998) p. 1085.

[24] The dissent posits that our decision could have a significant impact on the health care system because more than 15,000 new STDs are diagnosed in Connecticut each year and, *if* we assume that each newly infected individual was involved in an exclusive sexual relationship, then their more than 15,000 partners all represent potential plaintiffs. This argument falters on many levels.

Not surprisingly, having multiple and/or anonymous sexual partners is among the primary risk factors for contracting STDs. Centers for Disease Control and Prevention, STDs and HIV—CDC Fact Sheet (Detailed Version), available at https://www.cdc.gov/std/hiv/stdfact-std-hiv-detailed.htm (last visited July 5, 2019); see also L. Finer et al., "Sexual Partnership Patterns as a Behavioral Risk Factor for Sexually Transmitted Diseases," 31 Fam. Plan. Persp. 228, 228–30 (1999). By contrast, if an individual is engaged in a truly and mutually monogamous relationship, then he or she is unlikely to contract an STD other than from his or her partner (who would not, in that scenario, be a potential plaintiff in a case such as this). Accordingly,

the relevant policy considerations weigh heavily in favor of allowing liability under these circumstances.

5

Finally, we address two concerns that the defendant and certain of the amici have raised and that the trial court found compelling. First is the slippery slope issue. The trial court observed, and we agree, that, "[i]n a sense, [the] plaintiff's complaint identifies a best case scenario . . . ." That is to say, the plaintiff and Smith were involved in an exclusive romantic relationship at the time Smith sought STD testing, Smith informed the defendant that he was seeking testing for the benefit and protection of the plaintiff, and the plaintiff subsequently agreed to engage in sexual relations with Smith in reliance on the test results as reported to Smith. This means that the defendant's potential liability for negligently misreporting Smith's test results extended to at most one nonpatient third party, a party of whose existence

the dissent's assumption that each of the more than 15,000 individuals who contracted an STD in Connecticut in 2015 was involved in an exclusive sexual relationship seems highly implausible. Nor is there any reason to believe that a significant percentage of STD test results are inaccurately reported to the patient.

Moreover, we note that, of the more than 15,000 new cases of selected STDs to which the dissent refers, the vast majority of them consist of chlamydia and, to a lesser extent, gonorrhea; see Connecticut Department of Public Health, STD Statistics in Connecticut, available at http://www.ct.gov/dph/cwp/view.asp?a=3136&q=388500 (last visited July 5, 2019); diseases that, unlike herpes, are readily treatable with antibiotics. See, e.g., E. Moore, supra, pp. 77, 107–109. Accordingly, even for the fraction of new STD cases that might involve an identifiable victim, in a newly exclusive relationship, who would become infected as a result of an erroneous test report, the vast majority would suffer minimal damages and would be unlikely to go to the trouble of bringing a legal action.

In sum, there is no reasonable basis for concluding that the present case is anything other than a singularity, let alone a harbinger of thousands of future legal actions. For example, there is no indication that other jurisdictions that have allowed such actions to proceed have experienced a spike in medical malpractice rates, and we are aware of no evidence to support the dissent's warning that such an increase is "very likely" in this state.

the defendant was aware at the time of treatment, who could foreseeably contract a contagious STD if an erroneous negative test result were reported, and to whom he owed no independent duty beyond the duty already owed to Smith to accurately report his test results.

Nevertheless, the trial court expressed concerns that imposing a duty under these limited circumstances could open the floodgates. For example, the court questioned whether, if Smith had been dating multiple women at the time, or later began to date other women, with whom Smith had not discussed STDs, the defendant would owe a duty to a large and ill-defined class of potential plaintiffs. The trial court also questioned whether, under different circumstances, a physician such as the defendant might feel compelled to question a patient regarding his sexual partners, or to contact those partners to discuss the patient's STD status, or at least to ensure that the patient accurately relayed the test results to all of his sexual partners. Finally, the court questioned whether it makes sense to make liability hinge on the sort of mutual STD testing arrangement to which the plaintiff and Smith agreed.

Beginning with the last point, we emphasize that the defendant's liability does not hinge on the fact that Smith and the plaintiff entered into a mutual testing agreement. The alleged fact that Smith sought and obtained STD testing at the time could become relevant at trial only insofar as it would support the plaintiff's theory of causation, that is, that she was free of STDs until she became intimate with Smith during or after July, 2013.

Beyond that, we emphasize that the duty that we recognize today is quite limited. It extends only to identifiable third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any

STD that a physician fails to diagnose or properly report. And the physician fully satisfies that third-party duty simply by treating *the patient* according to the prevailing standard of care and accurately informing *the patient* of the relevant test results. See, e.g., *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1203; *Pate* v. *Threlkel*, 661 So. 2d 278, 281–82 (Fla. 1995); *Estate of Amos* v. *Vanderbilt University*, supra, 62 S.W.3d 138. Whether there are other, broader circumstances under which a physician may be held to owe a duty of care to a nonpatient third party who foreseeably contracts an infectious disease as a result of the physician's negligence is a question that we need not resolve today.

Nor, as we have discussed, are we overly concerned that our recognition of a duty under the specific circumstances of this case will create a flood of litigation, increase insurance costs, or discourage physicians from offering STD testing. See, e.g., *Bolieu* v. *Sisters of Providence in Washington*, supra, 953 P.2d 1239. The amici supporting the defendant's position have given us no reason to believe that errors of the sort alleged are commonplace or that they cannot readily be avoided by cost-effective quality assurance measures. As the California Court of Appeal explained in rejecting such arguments, "[a]rguments premised on opened floodgates and broken dams are not persuasive [when] . . . we suspect that only a few drops of water may spill onto a barren desert." *Reisner* v. *Regents of the University of California*, supra, 31 Cal. App. 4th 1204. And, of course, if the legislature perceives differently the risk that conferring standing on individuals such as the plaintiff will result in a health care funding crisis, then nothing bars that body from imposing whatever restrictions it deems prudent on common-law actions of this sort.

Second, we do not share the trial court's concern that recognizing a third-party cause of action for negligent misreporting of STD test results would be impracticable. The court reasoned that, in many such instances, a patient such as Smith and an alleged victim such as the plaintiff will no longer be romantically involved by the time an action reaches the trial stage and, therefore, that key evidence—the patient's medical records—may not be available. The court noted that federal and state privacy laws could bar a plaintiff from obtaining and presenting such records without the patient's consent and that the patient might have little incentive to disclose such records to a former partner and have his or her medical and sexual history become part of the public record. The court also appeared to suggest that, in cases in which the patient does cooperate with the plaintiff, the patient might agree to selectively provide only those records that supported the plaintiff's case, leaving the physician unable to defend himself or herself.

Although we do not discount the possibility that the concerns that the trial court raises could present logistical hurdles in some other case, those hypothetical challenges do not counsel against allowing the plaintiff to hold the defendant accountable in a case such as this, in which the plaintiff apparently will have full access to the medical records necessary to put on her case.[25] As we noted in *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 86, "evidentiary constraints at trial do not, themselves, affect the sufficiency of a stated cause of action . . . ."[26] For all of the foregoing reasons, we hold that the trial court incorrectly concluded that, as a matter of law, the defendant owed no duty of care to the plain-

[25] Both parties have represented that Smith executed authorizations allowing the plaintiff to obtain and use his medical records for purposes of this action.

[26] Moreover, as in all cases, trial courts are free to take reasonable measures in mitigation of any such problems.

tiff with respect to the reporting of Smith's STD test results.[27]

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion D'AURIA, MULLINS and VERTEFEUILLE, Js., concurred.

ROBINSON, C. J., with whom McDONALD and KAHN, J., join, dissenting. I respectfully disagree with the majority's conclusion that Connecticut physicians, with respect to the diagnosis and reporting of their patients' sexually transmitted disease (STD) test results, owe a direct duty of care to "identifiable third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any STD that a physician fails to diagnose or properly report." In my view, the majority's conclusion is inconsistent with our recent decision in *Jarmie* v. *Troncale*, 306 Conn. 578, 590–91, 50 A.3d 802 (2012), in which we deemed three principal considerations to be especially pertinent in determining what, if any, duty of care is owed by a medical professional to a nonpatient third party, specifically (1) Connecticut precedent, (2) the foreseeability of the alleged harm, and (3) public policy considerations. Following *Jarmie*, I conclude instead that the defendant physician, Charles Cochran, owed no duty to the plaintiff, Jane Doe, and that the trial court properly granted the defendant's motion to strike the plaintiff's single count complaint. Because I would affirm the judg-

[27] Lest there be any confusion, we emphasize that the existence of a third-party duty with respect to the accurate reporting of STD test results does not hinge on whether a patient and a victim remain romantically involved or whether the patient agrees to cooperate in the victim's legal action. Our point is simply that, as in any legal action, the fact that a particular claim may be difficult to prove from an evidentiary standpoint does not imply that the claim itself is not legally cognizable.

ment subsequently rendered by the trial court in favor of the defendant, I respectfully dissent.

I begin by noting my agreement with the majority's recitation of the factual and procedural history of the case. I also note my substantial agreement with the majority's analysis in part I of its opinion, including the standard of review and the treatment of the plaintiff's single count complaint as having alleged both medical malpractice and common-law negligence, similar to our treatment of the action in *Jarmie*.[1] Id., 583–86. I part ways with the majority at part II of its opinion.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . .

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative

[1] I agree with the majority's observation in footnote 3 of its opinion that "the plaintiff's allegations may fit most neatly under the rubric of negligent misrepresentation. Because neither party has addressed the issue, however, we need not determine whether the allegations in the complaint are legally sufficient to plead a cause of action in negligent misrepresentation under the law of this state." I nevertheless respectfully disagree with part II B 1 of its opinion, in which the majority discusses principles of negligent misrepresentation at length in combining them with other tort law principles, in order to create a duty of care that we have not previously recognized in this state. Because I do not agree that principles of negligent misrepresentation support recognizing a direct duty of care owed by physicians to nonpatients, I respectfully disagree with this portion of part II B 1 of the majority's opinion.

to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . .

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) Id., 589–90.

In *Jarmie*, we considered whether to recognize a duty of care owed by a physician to a third party nonpatient. In that case, a patient crashed her vehicle into the plaintiff after blacking out while driving. Id., 580. The plaintiff in *Jarmie* claimed that the defendant, a physician, had breached a duty to warn the patient of

the risks of a latent driving impairment associated with a particular medical condition. Id. In concluding that the physician did not owe a duty of care to a third party nonpatient, this court considered three principal factors: (1) Connecticut precedent, (2) foreseeability, and (3) public policy considerations, including the decisions of courts in other jurisdictions. Id., 589–91.

We began in *Jarmie* by analyzing Connecticut precedent, and observed that it "is useful to view Connecticut common-law rules defining the duty of health care providers in conjunction with [General Statutes] § 52-190a, the medical malpractice statute, because all of the relevant case law followed enactment of that provision. The statute had several purposes, including: (1) to put some measure of control on what was perceived as a crisis in medical malpractice insurance rates; (2) to discourage frivolous or baseless medical malpractice actions; (3) to reduce the incentive to health care providers to practice unnecessary and costly defensive medicine because of the fear of such actions; (4) to reduce the emotional, reputational and professional toll imposed on health care providers who are made the targets of baseless medical malpractice actions; and (5) the replacement of proportional liability for the preexisting system of joint and several liability as a central part of [tort reform], so as to remove the health care provider as an unduly attractive deep pocket for the collection of all of the plaintiff's damages. . . . Thus, a principal goal of § 52-190a, and of tort reform generally, was to limit the potential liability of health care providers. . . .

"The common law, reflecting the goals of the tort reform movement and the legislature's purpose in enacting § 52-190a, likewise disfavors the imposition of liability on health care providers. The established rule is that, absent a special relationship of custody or control, there is no duty to protect a third person from the

conduct of another. . . . Thus, physicians owe an ordinary duty to their patients not to harm them through negligent conduct and an affirmative duty to help them by providing appropriate care. . . . There is no well established common-law rule that a physician owes a duty to warn or advise a patient for the benefit of another person." (Citations omitted; internal quotation marks omitted.) Id., 591–92.

"Consistent with the purpose of the medical malpractice statute and the limited duty of health care providers under the common law, this court has exercised restraint when presented with opportunities to extend the duty of health care providers to persons who are not their patients. As a consequence, we have held that a nurse and an emergency medical technician owed no duty of care to a patient's sister, who fainted while observing a medical procedure performed on the patient; *Murillo* v. *Seymour Ambulance Assn., Inc.*, [264 Conn. 474, 477–78, 823 A.2d 1202 (2003)]; a psychiatrist owed no duty to a patient's former spouse for any direct injury to the marriage caused by the allegedly negligent treatment of the patient for marital difficulties; see *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 88, 95–98, 735 A.2d 347 (1999); a psychiatrist who evaluated children for possible sexual abuse owed no duty of reasonable care to protect the children's father, the suspected abuser, from false accusations of abuse arising out of the performance of the evaluations; *Zamstein* v. *Marvasti*, 240 Conn. 549, 550–51, 559–61, 692 A.2d 781 (1997); and a physician owed no duty of care to his patient's daughter, who suffered emotional distress as a result of observing the patient's health deteriorate because of the physician's malpractice. *Maloney* v. *Conroy*, 208 Conn. 392, 393, 403, 545 A.2d 1059 (1988). The only time that we have even contemplated enlarging the duty of a health care provider to include a person who is not a patient was when we considered whether

a psychotherapist owed a duty to a third party to control an outpatient who was not known to have been dangerous. See *Fraser* v. *United States*, [236 Conn. 625, 627–30, 674 A.2d 811 (1996)]. In that case, we determined that no duty existed in the absence of a showing that the victim was either individually identifiable or, possibly, was either a member of a class of identifiable victims or within the zone of risk to an identifiable victim. Id., 634. Accordingly, although there is no directly comparable Connecticut case law on which to rely, our precedent, in general, does not support extending the duty of care . . . because, with one limited exception that does not apply . . . we repeatedly have declined, in a variety of situations, to extend the duty of health care providers to persons who are not their patients." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 592–93.

Although the precise factual circumstances of this case present an issue of first impression, I conclude that Connecticut precedent, as explained in *Jarmie*, demonstrates this court's consistent reluctance to extend the legal duties of medical professionals to nonpatient third parties. Indeed, no Connecticut case decided after *Jarmie* has disturbed the soundness of that assessment.[2] Therefore, Connecticut precedent militates against recognizing a legal duty in the present case.

[2] The majority relies on *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 113 A.3d 932 (2015), to bolster its argument that Connecticut precedent is "unsettled with respect to the particular question presented here." That case is, however, distinguishable. In *Squeo*, a case involving a bystander emotional distress claim and medical malpractice, and not ordinary negligence, we only cited to *Jarmie* to note that our rejection of a bar on a cause of action for bystander emotional distress in the context of medical malpractice was consistent with our rejection of a per se rule barring third-party tort claims in the absence of a physician-patient relationship. *Squeo* v. *Norwalk Hospital Assn.*, supra, 573–74. *Squeo* does not disturb our assessment of Connecticut precedent in *Jarmie* that this court is reluctant to extend the duties of medical professionals to nonpatient third parties. See id., 580–81 (concluding that "bystander to medical malpractice may recover for the severe emotional distress that he or she suffers as a direct result of contemporaneously

Consistent with *Jarmie*, I next consider a classic duty analysis focused on the foreseeability of the alleged harm. Id., 594–98. I agree with the majority's observation that *Jarmie* left open the possibility that a duty may exist in a case where the victim is identifiable, and I also agree with the majority that, construing the complaint in the present case in a light most favorable to sustaining its sufficiency, the plaintiff was identifiable.[3] Whereas the plaintiff in *Jarmie* was neither an identifiable victim nor a member of an identifiable class of victims as a general motorist who might come in close proximity to a vehicle operated by the patient following her diagnosis; id., 597–98; the patient in the present case explained to the defendant that he had sought STD testing for the benefit of his new, exclusive girlfriend, the plaintiff, thus making her identifiable to the defen-

observing gross professional negligence such that the bystander is aware, at the time, not only that the defendant's conduct is improper but also that it will likely result in the death of or serious injury to the primary victim").

Further, the majority's reliance on *Squeo* illustrates a problem with the majority's efforts to limit this case to the precise circumstances presented. The majority effectively uses *Squeo* as evidence that we have already stepped through the door left open in *Jarmie*, and, "if our decision in *Squeo* has not resulted in the parade of horribles that the dissent invokes . . . then we can have some reassurance that the alarmist warnings in the present case will be no more prescient." As I argue subsequently in this dissenting opinion, the public policy concerns implicated in the context of STDs apply with equal or greater force to any number of different infectious diseases, a contention the majority disputes. Just as the majority relies on *Squeo* to support an expansion of liability under the circumstances of the present case, this court may subsequently rely on today's decision as a precedent to support further expansions of liability in other contexts. Because I find the majority's efforts to distinguish STDs from other infectious diseases in the context of the present case unavailing, I see it as unlikely that, in the future, the Connecticut Bar or even the courts of this state will view the precedential value of today's decision as limited to STDs.

[3] I disagree with the majority's observation that, despite quoting "heavily" from *Jarmie*, I "barely [acknowledge]" that the present case raises a different question than the one at issue in *Jarmie*. I believe my agreement with the majority's observation that *Jarmie* left open the possibility that a duty may exist in a case where the victim is identifiable is acknowledgment enough that this case cannot be simply disposed of under *Jarmie*.

The majority further states that "it would be a mistake . . . to simply conclude that *Jarmie* disposes of the issue presented in this case without carefully evaluating the fundamentally distinct considerations that charac-

dant. Our analysis in *Jarmie* did not, however, hinge

terize the context of communicable diseases." I take no issue with that statement. In fact, the standard articulated by *Jarmie* requires evaluation of policy considerations. The majority and I have each evaluated the policy considerations, and conclude differently as to whether they militate in favor of or in opposition to recognition of a duty in this case. In essence, the majority believes certain policy concerns are so strong that this court should walk through the door left open in *Jarmie*. I, however, would stop at the threshold of that doorway.

I further emphasize that the majority misunderstands this dissent as standing for my belief "that, for reasons of public policy, we *never* should impose on physicians any duties beyond those established by the legislature." (Emphasis added.) Instead, I take the position that, when, as in the present case, our court is so deeply divided as to whether public policy concerns support recognition of a legal duty, and when the implications of such recognition of a duty may be so vast, the legislature is in a far better position to make such a determination given its institutional advantages with respect to considering and receiving evidence as to matters of public policy. See, e.g., *Cefaratti* v. *Aranow*, 321 Conn. 593, 632–33, 141 A.3d 752 (2016) (*Zarella*, *J.*, dissenting) (observing that, in deciding whether doctrine of apparent authority or apparent agency should be available to tort plaintiffs, "[i]t is not the role of this court to strike precise balances among the fluctuating interests of competing private groups . . . such as, on the one hand, people who are similarly situated to the plaintiff . . . and, on the other hand, hospitals and other health-care institutions," and noting that this "function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications [that] may arise from the assignment of liability" [citation omitted; internal quotation marks omitted]); *Campos* v. *Coleman*, 319 Conn. 36, 65–66, 123 A.3d 854 (2015) (*Zarella*, *J.*, dissenting) ("[T]his court has the authority to change the common law to conform to the times. In a society of ever increasing interdependence and complexity, however, it is an authority this court should exercise only sparingly. . . . [T]he legislature, unlike this court, is institutionally equipped to gather *all* of the necessary facts to determine whether a claim for loss of parental consortium should be permitted and, if it should, how far it should extend. The legislature can hold public hearings, collect data unconstrained by concerns of relevancy and probative value, listen to evidence from a variety of experts, and elicit input from industry and society in general. Further, elected legislators, unlike the members of this court, can be held directly accountable for their policy decisions." [Citation omitted; emphasis in original; footnote omitted.]); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 439, 119 A.3d 462 (2015) ("balancing of interests that are accommodated by statutes of limitations" is "factual [matter] within the legislative purview"); *State* v. *Lockhart*, 298 Conn. 537, 574, 4 A.3d 1176 (2010) (observing that "determining . . . parameters" of state constitutional rule requiring recording of custodial interroga-

solely on the issue of foreseeability. We noted that "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists." (Internal quotation marks omitted.) Id., 590. Considerations of foreseeability must be tempered by the reluctance in Connecticut precedent to extend the duties of health care providers to nonpatient third parties and the weight of public policy considerations, which militate against recognizing a duty in the present case.

Our final consideration in *Jarmie* was whether public policy considerations favored or disfavored recognition of a duty. In addressing public policy concerns, we considered the purposes of tort compensation and "four specific factors to be considered in determining the extent of a legal duty as a matter of public policy. . . . (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions."[4] (Internal quotation marks omitted.) Id., 603.

tions "requires weighing competing public policies and evaluating a wide variety of possible rules" and noting that "such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play").

[4] Before addressing the precedents of other jurisdictions and public policy considerations, the majority states that, "[i]n *Jarmie*, after we concluded that Connecticut precedent did not bar the imposition of the duty at issue, we proceeded to look to sister state authority and also to consider whether various policy factors favored the imposition of such a duty." Although I agree that Connecticut precedent did not per se bar the imposition of such a duty, I emphasize that this court left little doubt in *Jarmie* as to how Connecticut precedent viewed the imposition of similar duties on health care providers. As noted previously, this court explicitly concluded that, "although there is no directly comparable Connecticut case law on which to rely, our precedent, in general, does not support extending the duty of care . . . because, with one limited exception that does not apply . . . we repeatedly have declined, in a variety of situations, to extend the duty of health care providers to persons who are not their patients." *Jarmie* v. *Troncale*, supra, 306 Conn. 593.

"[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . . It is sometimes said that compensation for losses is the primary function of tort law . . . [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. . . . [I]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent upon us to consider those risks." (Citations omitted; internal quotation marks omitted.) Id., 599–600.

With regard to the compensation of innocent parties, individuals like the plaintiff in the present case may well be covered by public or private health insurance policies, so it is not necessarily the case that the plaintiff, or others in her position, will be left without compensation. Additionally, as we observed in *Jarmie*, "to the extent an injured party may not be covered by a . . . health insurance policy, the financial cost to victims . . . does not necessarily outweigh the impact of the proposed duty on thousands of physician-patient relationships across the state and the potentially high costs associated with increased litigation . . . ." Id., 601. As for the deterrence of wrongful conduct, if, as the majority concludes, the duty owed to the plaintiff is the same duty owed to the patient—namely, the accurate reporting of STD testing results—then "expanding the liability of health care providers would not reduce the potential for harm because health care providers

would be required to do no more than they already must do to fulfill their duty to patients." Id., 601–602. Finally, the same concerns we voiced in *Jarmie* concerning interference with the physician-patient relationship and an increase in litigation are present in this case, and are discussed more fully subsequently in this dissenting opinion.

I now move to the four specific factors discussed in *Jarmie*. "Starting with the expectations of the parties, long established common-law principles hold that physicians owe a duty to their patients because of their special relationship, not to third persons with whom they have no relationship. Furthermore, there is no state statute or regulation that imposes a duty on health care providers to warn a patient for the benefit of the public." Id., 603–604. It is unlikely that a person harmed in the manner that this plaintiff was harmed would expect to be compensated by the physician, with whom he or she has no special relationship, in light of the privileged status of the physician-patient relationship and the common-law protections granted to physicians. Consequently, the normal expectations of the parties weigh against recognition of a duty in the present case, as they did in *Jarmie*.

Turning to the public policy of encouraging participation in the activity under review, recognizing a duty of care under the circumstances of this case "would be inconsistent with the physician's duty of loyalty to the patient, would threaten the inherent confidentiality of the physician-patient relationship and would impermissibly intrude on the physician's professional judgment regarding treatment and care of the patient." Id., 606. Indeed, "[u]nlike most duties, the physician's duty to the patient is explicitly relational: physicians owe a duty of care to *patients*. . . . Mindful of this principle, we have recognized on more than one occasion the physician's duty of undivided loyalty to the patient . . . and

the patient's corresponding loyalty, trust and dependence on the professional opinions and advice of the physician. . . . Undivided loyalty means that the patient's well-being must be of paramount importance in the mind of the physician. Indeed, this is the foundation for the patient's reciprocal loyalty, trust and dependence on the physician's medical treatment and advice. Consistent with this view, we have stated that, [a]s a matter of public policy . . . the law should encourage medical care providers . . . to devote their efforts to their patients . . . and not be obligated to divert their attention to the possible consequences to [third parties] of medical treatment of the patient. . . . It is . . . the consequences to the patient, and not to other persons, of deviations from the appropriate standard of medical care that should be the central concern of medical practitioners. . . .

"Extending a health care provider's duty also would threaten the confidentiality inherent in the physician-patient relationship because lawsuits alleging a breach of the duty would compel the use of confidential patient records by defending physicians. The principle of confidentiality lies at the heart of the physician-patient relationship and has been recognized by our legislature. General Statutes § 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 . . . . The statute provides that a health care provider shall not disclose patient information in their files without the patient's explicit consent. See General Statutes § 52-146o (a). Thus, when a patient decides to bring a claim against a health care provider, the patient makes a purposeful decision to waive confidentiality. . . . Subsection (b) (2) of § 52-146o, however, contains an exception whereby patient consent is not required for the disclosure of communications

or records by a health care provider against whom a claim has been made. Consequently, if [an injured third party] files an action against the health care provider of [a patient], records containing the patient's medical history will very likely be disclosed in court and subjected to public scrutiny. The effect of expanding the duty of a health care provider in this fashion cannot be underestimated. 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. Accordingly, it is not in the public interest to extend the duty of health care providers to third persons in the present context because doing so would jeopardize the confidentiality of the physician-patient relationship."[5] (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 606–609.

Connecticut state law reflects additional patient confidentiality concerns that militate against the recognition of a duty in the present case. State law demonstrates the overarching primacy of patient confidentiality, even

[5] The majority contends, however, that such confidentiality concerns may be present in other cases, but do not exist in a case like this, in which a plaintiff will ostensibly have full access to the pertinent medical records via the patient, her exclusive romantic partner. But this reasoning would further limit the majority's holding to the alleged facts of this case, meaning that in a nearly identical future scenario, in which all that is different from the present case is that the patient is uncooperative with the plaintiff's action with regard to the disclosure of medical records—such as might happen if the relationship dissolved—there might be no recognition of a duty. I am aware of no Connecticut case law suggesting that our recognition of a duty of care should turn on the alleged willingness of a nonparty patient to have his or her medical records made available in a nonpatient's action sounding in ordinary negligence. Consequently, I respectfully find the majority's response to confidentiality concerns—that such concerns may be present in other cases, but do not exist in the present case—unconvincing.

in this context of infectious disease.[6] Connecticut has a communicable disease reporting system and a list of specific diseases and conditions that physicians are required to report to public health officials. See Regs., Conn. State Agencies § 19a-36-A2 (requiring Commissioner of Public Health to issue list of reportable diseases); see also Connecticut Department of Public Health, "Reportable Diseases, Emergency Illnesses and Health Conditions, and Reportable Laboratory Findings Changes for 2019," 39 Conn. Epidemiologist 1 (2019) (list of reportable diseases). The reporting is made by physicians to the public health authority, but it is government officials who may act on the information and intervene with any third parties, not the reporting physician. See General Statutes. § 19a-215 (d). Put differently, the physician has no statutory duty vis-à-vis any third party beyond merely reporting the disease or condition to the appropriate authority.

Another instructive example of the legislature's concern for confidentiality can be seen in Connecticut's HIV laws, upon which the majority relies for the proposition that physicians' public health obligations may transcend their duties to individual patients, observing that the state "permit[s] physicians to warn, or to disclose confidential patient information for the purpose of warning, a known partner of a patient who has been diagnosed with an HIV infection or related disease." The HIV statute is protective of confidentiality insofar as it does not permit a physician to directly inform a sexual partner

[6] I note that in its discussion of public policy concerns, the majority focuses a great deal of attention on public health concerns, namely, the diagnosis and treatment of infectious diseases. The majority suggests that in the context of such diseases, "a physician's duties and loyalties necessarily must be divided between the patient and other people whom the patient may infect," and "the principle that a physician's duty to protect the broader public health and to help to deter the spread of contagious diseases at times transcends the physician's duty to his or her individual patient has long been codified in federal and state law."

about a patient's HIV test results under circumstances similar to this case. See General Statutes § 19a-584 (b) (physician may only directly inform known partner if both partner and patient are under physician's care or if patient has requested it). Although the majority's opinion does not impose a duty to warn on physicians under the circumstances of this case, the overarching emphasis placed on confidentiality by the legislature, including the legislature's decision not to impose further statutory duties on physicians to warn under similar circumstances, coupled with the threat that confidential records may be disclosed in litigation without the patient's consent, suggest that imposition of a duty under the circumstances of this case is incongruous with the legislature's repeated emphasis on patient confidentiality. Put plainly, recognizing a duty under the circumstances of this case endangers participation in the activity under review because it interferes with physicians' duty of loyalty to their patients and threatens the sanctity of physician-patient confidentiality.

Moving to the avoidance of the increased risk of litigation, the Department of Public Health has published STD reporting statistics for 2015 that indicate approximately 13,269 reported cases of Chlamydia, 2,092 reported cases of Gonorrhea, and 99 reported cases of Syphilis that year. Connecticut Department of Public Health, "Chlamydia, Gonorrhea, and Primary and Secondary Syphilis Cases Reported by Town," (2015), available at https://portal.ct.gov/-/media/Departments-and-Agencies/DPH/dph/infectious_diseases/std/Table12015pdf (last visited July 11, 2019). Assuming that each of those individuals was in an exclusive sexual relationship, there would have been 15,460 additional individuals to whom physicians may have owed a duty under the majority's opinion in the present case. This increase in the risk of litigation threatens more than just the pocketbooks of physicians and their insurers;

it threatens patient care. A likely consequence of this expansion of liability is that physicians will be reticent to discuss their patients' romantic relationships or sexual behavior in an attempt to avoid identifying third parties to whom the physician could be liable, despite such an approach not necessarily being in the patient's best interests. This reaction, referred to as "defensive medicine" in medical literature, involves physicians altering treatment and advice as part of an effort to avoid liability, and it is considered to have very negative and costly effects on the provision of health care. See J. Greenberg & J. Green, "Over-testing: Why More Is Not Better," 127 Am. J. Med. 362, 362–63 (2014); M. Mello et al., "National Costs of the Medical Liability System," 29 Health Aff. 1569, 1572 (2010); see also B. Nahed et al., "Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons," (2012), p. 4, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3382203/pdf/pone.0039237.pdf (last visited July 11, 2019).

An additional concern is the effect that an expansion of the potential liability of physicians is likely to have on malpractice insurance rates. Connecticut health care professionals cannot obtain a license to practice medicine without showing that they have adequate malpractice insurance. See General Statutes § 20-11b (a). If insurance premiums for physicians increase to an unaffordable level, physicians may leave the practice of medicine or, at the least, stop offering the services that instigate such high premiums. An instructive example of this concern is the early 2000s crisis in the field of obstetrics. "Soaring malpractice insurance costs led to the closings of trauma and maternity wards across the country [and] forced many obstetricians to give up obstetrics, restrict services, deny certain high-risk patients, become consultants, relocate, retire early, or abandon their practices all together." (Footnote omit-

ted.) S. Domin, "Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis," 53 Cath. U. L. Rev. 499, 499–500 (2004). The threat of something similar happening in Connecticut requires that we exercise caution, particularly in an area where the potential consequences are such that the legislature is in a better position to address these concerns than our courts are.

Indeed, this is an issue on which the legislature has previously acted. As we observed in *Jarmie*, part of the impetus behind the enactment of our medical malpractice statute, § 52-190a, was "to put some measure of control on what was perceived as a crisis in medical malpractice insurance rates." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, supra, 306 Conn. 591. One such measure of control, the requirement that an opinion letter issued by a similar health care provider be attached to a medical negligence complaint, was suggested by the General Assembly's Legislative Program Review and Investigations Committee after it conducted hearings following a significant increase in medical malpractice insurance rates in the early 2000s. See Legislative Program Review and Investigations Committee, Connecticut General Assembly, Medical Malpractice Insurance Rates (December 2003). Because the majority's opinion recognizes a duty to potentially thousands of new plaintiffs, which is very likely to have an impact on medical malpractice rates, this court should not throw caution to the wind and take such action when the legislature is in a much better position to investigate the issue, and make findings and recommendations on the subject, as it has done in similar circumstances.

Given that the legislature has acted extensively in the areas of both STD reporting and to provide physicians relief from professional liability, I am hesitant to

usurp its "primary responsibility for formulating public policy" by recognizing a new duty to third party nonpatients. (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 780, 160 A.3d 333 (2017). Indeed, in *Sic* v. *Nunan*, 307 Conn. 399, 410, 54 A.3d 553 (2012), this court recognized that primary responsibility for public policy in declining to impose a duty on motorists stopped at an intersection to keep their wheels pointed straight, emphasizing that the legislature had "not seen fit to enact any statutes" in that respect. Thus, I disagree with the majority's decision to adopt a duty in the present case that will expand the pool of potential litigants, increase the risk of litigation, and threaten access to and the quality of patient care in this state—in contravention of legislative action on point.

Finally, turning to decisions of other jurisdictions, I note that there is no clear trend in our sister courts that supports usurping the legislature's responsibility for public policy and creating the duty that the majority recognizes in the present case. To be sure, there is case law that supports the decision of the majority. See *Reisner* v. *Regents of the University of California*, 31 Cal. App. 4th 1195, 1197–201, 37 Cal. Rptr. 2d 518 (1995) (physician owed duty to unknown and unidentifiable sexual partner of patient to warn patient or her parents of patient's HIV positive status), review denied, California Supreme Court, Docket No. S045274 (May 18, 1995); *C.W.* v. *Cooper Health System*, 388 N.J. Super. 42, 58–62, 906 A.2d 440 (App. Div. 2006) (hospital and its physicians owed direct duty to unknown and unidentifiable sexual partner of patient to warn patient of patient's HIV positive status); *DiMarco* v. *Lynch Homes-Chester County, Inc.*, 525 Pa. 558, 563–64, 583 A.2d 422 (1990) (physicians owed duty to sexual partner of patient with hepatitis not to give erroneous advice to patient because class of foreseeable victims included anyone who was

intimate with patient);[7] *Estate of Amos* v. *Vanderbilt University*, 62 S.W.3d 133, 138 (Tenn. 2001) (university medical center owed duty to future husband and future daughter of HIV positive patient to warn patient so she might take precautionary measures preventing transmission of HIV because future husband and future daughter were within class of identifiable persons within zone of danger). I find, however, that sister state cases declining to recognize a third party duty for physicians are more consistent with our state's public policy and precedent. See, e.g., *Hawkins* v. *Pizarro*, 713 So. 2d 1036, 1037–38 (Fla. App.) (physician owed no duty to future spouse of patient when physician improperly advised patient she tested negative for hepatitis C), review denied, 728 So. 2d 202 (Fla. 1998); *Dehn* v. *Edgecombe*, 384 Md. 606, 622, 865 A.2d 603 (2005) (physician owed no duty to wife of patient when physician negligently failed to provide patient with minimally acceptable medical care in connection with a vasectomy); *Herrgesell* v. *Genesee Hospital*, 45 App. Div. 3d 1488, 1490, 846 N.Y.S.2d 523 (2007) (physician owed no duty to daughter of patient when daughter contracted hepatitis B from patient because physician does not owe duty to nonpatient who contracts illness from patient, even if physician knows nonpatient cares for patient or is family member of patient); *Candelario* v. *Teperman*, 15 App. Div. 3d 204, 204–205, 789 N.Y.S.2d 133 (2005) (physician owed no duty to daughter of patient when daughter contracted hepatitis C, even though physician was aware daughter was caring for patient); *D'Amico* v. *Delliquadri*, 114 Ohio App. 3d 579, 581–83, 683 N.E.2d

[7] The dissenting justice in *DiMarco* observed that "the dangers of adopting a negligence concept of duty analyzed in terms of scope of the risk or foreseeability are considerable and are to be avoided. These dangers include . . . the prospect of inducing professionals to narrow their inquiries into the client or patient situation, to the detriment of the client or patient, so as to avoid possible liability toward third parties which might come from knowing 'too much.' " (Footnote omitted.) *DiMarco* v. *Lynch Homes-Chester County, Inc.*, supra, 525 Pa. 565–66 (Flaherty, J., dissenting).

814 (1996) (physician owed no duty to girlfriend of patient when girlfriend contracted genital warts from patient after defendant cared for and treated patient). Consequently, the decisions of our sister courts demonstrate no clear trend on the broader recognition and extent of physicians' third party duties, let alone the specific duty that the majority recognizes in the present case.[8]

Accordingly, I conclude, consistent with *Jarmie* v. *Troncale*, supra, 306 Conn. 578, that the defendant did not owe the plaintiff, who was not his patient, a duty of care in the present case. Given the potential ramifications of recognizing such an expanded duty of care, I would leave that potential expansion of liability to the legislature—which is better equipped than this court to make the public policy findings attendant to that expansion of liability.[9] See, e.g., *State* v. *Lockhart*, 298

[8] The majority attempts to distinguish these cases as not analogous enough to the precise circumstances of the present case, leaving the majority with a handful of cases it deems worthy of consideration. Even if I were to agree with the majority's winnowing of the list of cases we should consider to be relevant, I would hardly call a four to one majority in favor of the majority's position a convincing consensus among our sister courts, especially when so few courts have weighed in on the precise question presented.

[9] Finally, even if I were to agree with the majority's recognition of a direct duty of care on the facts of the present case, which I respectfully do not, the future ramifications of the majority's opinion would nevertheless give me pause. Although the majority repeatedly cautions that its holding is limited and narrow, I nevertheless find this contention troubling because its implications portend just the opposite result. First, although the majority states that its decision is limited strictly to cases involving the diagnosis of STDs, the public policy concerns discussed therein apply with equal or even greater force to any number of different infectious diseases, such as chickenpox, influenza, and measles. It is likely that in cases with identifiable nonpatient third parties, the majority's opinion in this case will be held up as a logically convincing precedent to further extend the potential liability of health care providers. Second, the majority's foreseeability analysis is inherently subjective. What if the physician has awareness of a romantic partner's existence independent of knowledge obtained from the patient, such as through a social relationship? There is little reason why this court's logic would not counsel in favor of recognizing a duty in such a case, concerns of which would be exacerbated should the majority's decision be extended beyond STDs to other infectious diseases, such as influenza. Put differently, the majority's opinion sets a precedent that will easily open the floodgates to a great expansion of potential third party liability for health care providers.

Conn. 537, 574–75, 4 A.3d 1176 (2010) (declining to require recording of custodial interrogations and deferring to legislature because "it is in a better position to evaluate the competing policy interests at play in developing a recording requirement in that it can invite comment from law enforcement agencies, prosecutors and defense attorneys regarding the relevant policy considerations and the practical challenges of implementing a recording mandate"). Accordingly, I conclude that the trial court properly granted the defendant's motion to strike.

Because I would affirm the judgment of the trial court, I respectfully dissent.

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CONNECTICUT APPELLATE REPORTS

Vol. 191

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

SCARLETT LEWIS, ADMINISTRATRIX (ESTATE OF JESSE LEWIS), ET AL. *v.* TOWN OF NEWTOWN ET AL.
(AC 41697)

Lavine, Elgo and Bishop, Js.

Syllabus

The plaintiffs, the administrators of the estates of two victims of the mass shooting at Sandy Hook Elementary School in 2012, sought to recover damages from the defendants, the town of Newtown and its board of education, pursuant to statute (§ 52-557n [a] [1]), for alleged acts of negligence that the plaintiffs claimed were substantial factors in contributing to the deaths of their decedents. The plaintiffs alleged, inter alia, that the defendants had instituted school safety policies and procedures that left no discretion to teachers and other employees, and were to be followed as mandated by the defendants. The plaintiffs claimed that a school lockdown and evacuation plan was not implemented on the day of the shooting, and that the defendants had created a ministerial duty that required their employees, agents and members to take whatever precautions were necessary and enumerated in the school safety policies and procedures to protect the plaintiffs' decedents on the day of the shooting. The plaintiffs further asserted that the defendants left the school's faculty and staff in a position in which they could not adhere to or failed to adhere to the mandatory school security guidelines. The

defendants filed a motion for summary judgment in which they claimed, inter alia, that they were entitled to governmental immunity pursuant to § 52-557n (a) (2) and that there was no genuine issue of material fact as to their alleged negligence. The trial court granted the motion for summary judgment on the ground of governmental immunity, determining that the plaintiffs' complaint made no specific allegations against any of the faculty or staff in the school at the time of the shooting, and that the school security guidelines imposed discretionary responsibilities, rather than a ministerial duty, on the defendants and faculty and staff. The court also determined that the defendants' allegedly negligent acts and omissions were discretionary. Further, the court concluded that even if the school's faculty and staff had a discretionary duty to implement the school security guidelines and that the shooter had created an imminent risk to those in the school, no reasonable fact finder could conclude that the faculty and staff caused the catastrophic consequences that befell those in the school. On appeal to this court, the plaintiffs claimed, inter alia, that the trial court improperly concluded that their complaint contained only allegations of negligence that were directed at the defendants for actions that occurred before the day of the shooting. The plaintiffs further claimed that the court improperly determined that the defendants' implementation of school security guidelines was discretionary in nature and that the identifiable person-imminent harm exception to governmental immunity did not apply to the defendants' claim of immunity. *Held*:

1. The trial court improperly determined that the complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting and contained only allegations of negligence directed at the acts and omissions of the defendants occurring before that date: the record demonstrated that the complaint contained allegations that both the defendants and the school faculty and staff had a ministerial duty to create and implement the school security guidelines, and that they failed to fulfill that duty, as the complaint set forth claims of negligence that were directed at the defendants' alleged breach of a ministerial duty prior to the shooting, and that related to an alleged breach of a ministerial duty by the school faculty and staff to implement school security guidelines that occurred on the date of the assault, and, therefore, the court improperly concluded that such allegations against the faculty and staff were raised for the first time in opposition to the defendants' motion for summary judgment; nevertheless, because the complaint did not contain any allegations that implementation of the guidelines by either the defendants or the faculty and staff was discretionary, the viability of the complaint could fairly be assessed only on the basis of the plaintiffs' claims, set forth in the complaint, that the defendants' development and implementation of school security protocols was ministerial in nature and not protected by governmental immunity, and, therefore, the plaintiffs' assertion that the identifiable person-imminent harm exception to governmental immunity applied if the acts or omissions of the faculty and staff were discretionary was not applicable, as that exception applies only to discre-

tionary act immunity under § 52-557n (a) (2) (B), which the plaintiffs failed to raise in their complaint.

2. The trial court properly concluded that no genuine issue of material fact existed as to whether the defendants' creation and implementation of school security guidelines was discretionary in nature: the adoption of the school security guidelines was an act of discretion encompassed within the defendants' general duty to manage and supervise their employees and schoolchildren and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B), the statutory scheme (§§ 10-220, 10-220f and 10-21) regarding the duty of boards of education made it plain that the defendant board of education was fulfilling a discretionary duty in developing and implementing policies, and the plaintiffs failed to identify any statutory authority or rule that imposed on the defendants a ministerial duty to create or implement school security guidelines; moreover, the school security guidelines contained no directive that would support a finding that the defendants had a ministerial duty to act in a prescribed manner when responding to the shooting, as the guidelines contained qualifying language such as may or should, which indicated that the school faculty and staff had discretion to exercise judgment, the guidelines did not indicate how school faculty and staff should act in response to a shooting, and although some language in the guidelines could be construed as mandating strict compliance, case law is clear that such language did not necessarily impose on the faculty and staff a ministerial duty.

3. The plaintiffs could not prevail on their claim that the trial court erred in determining that the identifiable person-imminent harm exception to governmental immunity was inapplicable; that court was not required to address that claim in deciding the motion for summary judgment, as the plaintiffs' complaint did not allege that the conduct of the defendants and the school's faculty and staff was discretionary, the plaintiffs alleged only violations of a ministerial duty, which were mirrored in their opposition to the defendants' motion for summary judgment, and although the plaintiffs, in opposition to the motion for summary judgment, raised an argument not contained in the complaint that even if the defendants' actions were discretionary in nature, the decedents were identifiable victims subject to imminent harm, those newly fashioned allegations asserting an alternative basis for recovery in defense of a motion for summary judgment were improper and could not substitute for a timely filed amended complaint.

Argued April 17—officially released July 16, 2019

Procedural History

Action to recover damages for the deaths of the plaintiffs' decedents resulting from the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the

action was withdrawn as against the defendant Sandy Hook Elementary School; thereafter, the court, *Wilson*, *J.*, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Devin W. Janosov, with whom was *Donald A. Papcsy*, for the appellants (plaintiffs).

Charles A. Deluca, with whom were *John W. Cannavino*, *Jr.*, *Thomas S. Lambert* and *Monte E. Frank*, for the appellees (named defendant et al.).

Opinion

BISHOP, J. This case arises from the horrific and tragic events that occurred on December 14, 2012, at the Sandy Hook Elementary School (school) in Newtown.[1] On that day, at approximately 9:35 a.m., Adam Lanza, bearing an arsenal of weaponry, shot his way into the locked school building with a Bushmaster XM15-E2S semiautomatic rifle and, with gruesome resolve, fatally shot twenty first grade children and six staff members, and wounded two other staff members before taking his own life.[2] The plaintiffs, Scarlett Lewis, administratrix of the estate of Jesse Lewis, and Leonard Pozner, administrator of the estate of Noah Pozner, appeal from the summary judgment rendered by the

[1] The school was initially named as a defendant in this case, but the plaintiffs subsequently withdrew their claims against it.

[2] The state attorney's report on the shooting indicates that, in addition to the Bushmaster semiautomatic rifle found in the same classroom as the shooter's body, police recovered from the shooter's person a Sig Sauer P226, nine millimeter semiautomatic pistol and, near his body, a Glock 20, ten millimeter semiautomatic pistol. Substantial quantities of ammunition for these weapons were found on the shooter's person or near his body. In the shooter's car in the parking lot outside the school, the police also found an Izhmash Saiga-12, twelve gauge semiautomatic shotgun. See Division of Criminal Justice, State of Connecticut, Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012.

trial court in favor of the defendants, the town of Newtown and the Board of Education of the Town of Newtown, on the ground of governmental immunity. On appeal, the plaintiffs claim that the trial court erred in rendering summary judgment by concluding that (1) the plaintiffs' third revised complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting on December 14, 2012, but, rather, contained only allegations of negligence directed at the defendants before December 14, 2012; (2) the defendants' creation and implementation of school security guidelines were discretionary acts in nature; and (3) the identifiable person-imminent harm exception did not apply to the defendants' claim of immunity. We affirm the judgment of the trial court.

The record reveals the following tragic facts and procedural history.[3] On December 14, 2012, at approximately 9:30 a.m., the doors to the school were locked as was the norm each morning once the school day began. At the same time, a meeting was taking place in room nine, a conference room adjacent to the principal's office and near an entranceway to the school. Attending this meeting were Principal Dawn Hochsprung, school psychologist Mary Joy Sherlach, a parent, and other staff. At approximately 9:35 a.m., Lanza blasted his way into the school through a plate glass window located next to the school doors. Hochsprung and Sherlach immediately ran from the conference room into the hallway, where they instantly were shot and killed by Lanza. Natalie Hammond, who had also left the conference room to investigate and was trailing Hochsprung and Sherlach, was shot and injured, but was able to crawl back into the conference room. After

[3] See Division of Criminal Justice, State of Connecticut, Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012.

shooting Hochsprung, Sherlach, and Hammond, Lanza proceeded down a hallway while firing his rifle, striking and wounding another staff member. Lanza then apparently entered and exited the main office without shooting anyone, and proceeded down another hallway to classrooms eight and ten. While in these classrooms, Lanza shot and killed four adults and twenty first-grade students. The plaintiffs' children, Jesse and Noah, were two of the students killed. Lanza then took his own life at approximately 9:40 a.m.

By summons and complaint served January 9, 2015,[4] the plaintiffs brought this action alleging acts of negligence on the part of the defendants, pursuant to General Statutes § 52-557n (a) (1),[5] which they claimed were substantial factors in contributing to the deaths of their children. In response, the defendants filed an answer and special defenses, in which they asserted that (1) the plaintiffs' claims were barred by the doctrine of governmental immunity, pursuant to § 52-557n (a) (2);[6] (2) as a matter of undisputed fact, their acts or failures to act were not the proximate cause of the children's deaths; and (3) they could not be held liable for the criminal acts of an individual who was not an agent or employee of either defendant.

On June 30, 2017, following a period of discovery, the defendants filed a motion for summary judgment

[4] The plaintiffs' third revised complaint filed September 1, 2016, which substantially contains the same allegations of negligence against the defendants, is the operative complaint in this appeal.

[5] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . [t]he negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ."

[6] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

on the grounds that (1) there was no genuine issue of material fact regarding the defendants' alleged negligence; (2) the defendants were entitled to the defense of governmental immunity pursuant to § 52-557n (a) (2); (3) Lanza's intervening criminal act destroyed any claim of proximate cause regarding any of the alleged failings of the defendants; and (4) the plaintiffs had failed to produce any expert testimony in support of their claims. In response, the plaintiffs filed a memorandum of law in opposition to the defendants' motion for summary judgment, arguing that (1) the defendants had failed to present evidence adequate to satisfy their burden on a motion for summary judgment; (2) the actions of the school faculty and staff present in the school on December 14, 2012, were not discretionary in nature but, rather, were ministerial duties prescribed by the school security guidelines, in place at that time; (3) if the duties of the faculty and staff present in the school were not ministerial but were, instead, discretionary, the conduct of Lanza in blasting his way into the school presented an imminent danger to all present in the school, and the failure of the faculty and staff in the school to follow the prescriptions set forth in the school security guidelines constituted negligence; (4) Lanza's conduct was not an intervening criminal action because the purpose of the school security guidelines was to respond to outside threats such as those posed by Lanza; and (5) the plaintiffs would address their failure to produce expert testimony by demonstrating that the expert disclosed by the defendants had no knowledge in regard to the issues presented by this case.

On May 7, 2018, after briefing and argument by counsel, the court issued a memorandum of decision granting the defendants' motion for summary judgment on the ground of governmental immunity. Finding that the complaint made no specific allegations against any of the faculty or staff present in the school building, the court nevertheless accorded the parties a substantive

analysis of this claim and determined that the school security guidelines did not impose a ministerial duty on those individuals. Rather, the court determined that the guidelines, by their own language, imposed discretionary responsibilities on the named defendants and faculty and staff. The court concluded, as well, that the acts and omissions alleged in the plaintiffs' complaint concerning the named defendants were discretionary and that no reasonable juror could find that the plaintiffs' children were subject to imminent harm at the time of the named defendants' allegedly negligent conduct in formulating, promulgating, and implementing the school security guidelines. Finally, the court concluded that even if it considered the plaintiffs' newly asserted claim in opposition to the motion for summary judgment, i.e., that the faculty and staff had a discretionary duty to implement the school security guidelines and that Lanza's initial blast into the school created an imminent risk to all present in the school building, no reasonable fact finder could find that the response of the faculty and staff to the chaotic situation that unfolded on that tragic day caused the catastrophic consequences that befell those present in the school. This appeal followed.

Before addressing the plaintiffs' claims, we first set forth our oft-recited standard of review in regard to an appeal from a trial court's rendering of summary judgment. "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 seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law,

entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 471–72, 200 A.3d 202 (2018).

"[T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact." (Internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 651, 943 A.2d 507 (2008).

We next set forth the standard of review and relevant legal principles in regard to the doctrine of governmental immunity. "[T]he determination of whether a governmental or ministerial duty exists gives rise to a question of law . . . ." *Ventura* v. *East Haven*, 330 Conn. 613, 634, 199 A.3d 1 (2019). Municipalities have traditionally been "immune from liability for [their] tortious acts at

common law . . . . Governmental immunity may, however, be abrogated by statute. The state legislature possesses the authority to abrogate any governmental immunity that the common law gives to municipalities. . . . The general rule developed in the case law is that a municipality is immune from liability unless the legislature has enacted a statute abrogating that immunity. . . . Statutes that abrogate or modify governmental immunity are to be strictly construed. . . . This rule of construction stems from the basic principle that when a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of construction." (Citations omitted; internal quotation marks omitted.) *Tryon* v. *North Branford*, 58 Conn. App. 702, 720, 755 A.2d 317 (2000).

"Section 52-557n abrogates the common-law rule of governmental immunity and sets forth the circumstances in which a municipality is liable for damages to person and property. These circumstances include the negligent acts or omissions of the political subdivision or its employees or agents . . . . The section goes on to exclude liability for acts or omissions of any employee or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct and *negligent acts that involve the exercise of judgment or discretion*." (Citation omitted; emphasis added.) Id., 721.

"Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in

their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 614–15, 903 A.2d 191 (2006). With these principles in mind, we turn to the plaintiffs' specific claims.

I

The plaintiffs first claim that the court erred in rendering summary judgment by concluding that their third revised complaint did not contain allegations of negligence directed at the acts and omissions of the school faculty and staff during the shooting on December 14, 2012, but, rather, contained only allegations of negligence directed at the acts and omissions of the defendants occurring before that date.

Viewed in the light most favorable to the plaintiffs, the operative complaint sets forth the following claims as to the defendants. The plaintiffs allege that the defendants were "under a *legal and ministerial* duty to create, enforce, and abide by" school security guidelines, "and to ensure student safety and well-being" pursuant to General Statutes §§ 10-220,[7] 10-220f,[8] and

[7] General Statutes § 10-220 (a) provides in relevant part: "Each local or regional board of education shall . . . provide an appropriate learning environment for all its students which includes (1) adequate instructional books, supplies, materials, equipment, staffing, facilities and technology, (2) equitable allocation of resources among its schools, (3) proper maintenance of facilities, and (4) a safe school setting . . . and shall perform all acts required of it by the town or necessary to carry into effect the powers and duties imposed by law."

[8] General Statutes § 10-220f provides: "Each local and regional board of education may establish a school district safety committee to increase staff

10-221,[9] and that their failure to do so subjected them to liability pursuant to § 52-557n. (Emphasis added.) In particular, the plaintiffs allege in paragraph 30 of counts one and three, and in paragraph 31 in counts two and four, that, inter alia, the defendants were negligent

and student awareness of safety and health issues and to review the adequacy of emergency response procedures at each school. Parents and high school students shall be included in the membership of such committees."

[9] General Statutes § 10-221 provides in relevant part: "(a) Boards of education shall prescribe rules for the management, studies, classification and discipline of the public schools and, subject to the control of the State Board of Education, the textbooks to be used; shall make rules for the control, within their respective jurisdictions, of school library media centers, including Internet access and content, and approve the selection of books and other educational media therefor, and shall approve plans for public school buildings and superintend any high or graded school in the manner specified in this title.

"(b) . . . [E]ach local and regional board of education shall develop, adopt and implement written policies concerning homework, attendance, promotion and retention. The Department of Education shall make available model policies and guidelines to assist local and regional boards of education in meeting the responsibilities enumerated in this subsection.

"(c) Boards of education may prescribe rules to impose sanctions against pupils who damage or fail to return textbooks, library materials or other educational materials. Said boards may charge pupils for such damaged or lost textbooks, library materials or other educational materials and may withhold grades, transcripts or report cards until the pupil pays for or returns the textbook, library book or other educational material.

"(d) . . . [E]ach local and regional board of education shall develop, adopt and implement policies and procedures . . . for (1) dealing with the use, sale or possession of alcohol or controlled drugs . . . by public school students on school property, including a process for coordination with, and referral of such students to, appropriate agencies, and (2) cooperating with law enforcement officials.

"(e) . . . [E]ach local and regional board of education shall adopt a written policy and procedures for dealing with youth suicide prevention and youth suicide attempts. Each such board of education may establish a student assistance program to identify risk factors for youth suicide, procedures to intervene with such youths, referral services and training for teachers and other school professionals and students who provide assistance in the program.

"(f) . . . [E]ach local and regional board of education shall develop, adopt and implement written policies and procedures to encourage parent-teacher communication. These policies and procedures may include monthly newsletters, required regular contact with all parents, flexible parent-teacher conferences, drop-in hours for parents, home visits and the use of technology such as homework hot lines to allow parents to check on their children's assignments and students to get assistance if needed. . . ."

because they either left school faculty and staff in a position where they either could not adhere or failed to adhere to the *mandatory* school security guidelines by failing (1) to provide school faculty and staff with necessary information, equipment, and training to properly implement the school security guidelines, including training regarding the school lockdown and evacuation plan that faculty and staff were to follow should an intruder enter the school; (2) to provide school faculty and staff with doors that could be locked from the inside; (3) to provide the teachers of classrooms eight and ten with keys to lock the doors to those classrooms; (4) to provide a security guard or other type of law enforcement personnel to assist in the implementation of the school security guidelines; (5) to provide a secure front entrance; and (6) to follow their own school security guidelines.

In addition, the plaintiffs allege in paragraph 7 of all counts that the defendants, "under the requirements of § 10-220, instituted school safety policies and procedures *which left no area for discretion by its staff and/or agents*, concerning the safety of the schools in the Newtown Public School District, including the lockdown and evacuation plan previously practiced, *but never implemented on December 14, 2012, by the Sandy Hook Elementary staff*," and that this failure to implement resulted in the deaths of twenty students, including the plaintiffs' children. (Emphasis added.) The plaintiffs allege, as well, in paragraph 13 in counts one and three, and in paragraph 14 in counts two and three, that the "details and proscriptions of this plan *left no discretion* to the teachers and other employees, and *were to be followed* as outlined for the safety of the children at Sandy Hook Elementary School, *by mandate of*" the [defendants]. (Emphasis added.) The plaintiffs also allege in paragraph 14 of counts one and three, and in paragraph 15 in counts two and four, that the

defendants "*had created a ministerial duty for all employees, agents and members* to take whatever precautions necessary and enumerated in the safety procedures" to protect the plaintiffs' children on December 14, 2012, "due to the creation of their own internal policies . . . and due to their acute knowledge of the imminent and apparent harm the intruder . . . presented to the identifiable victims of the Sandy Hook Elementary School . . . on December 14, 2012; at which time the fact [that] an intruder was present on the school premises, and the fact that the identifiable victims were in an imminent harm became apparent to the staff, agents, employees and members of the Sandy Hook Elementary School." (Emphasis added.)

In its memorandum of decision on the defendants' motion for summary judgment, the court noted that the plaintiffs had attempted to argue for the first time, in their opposition to the defendants' motion, that the defendants were liable not just for their own conduct, but also for the allegedly negligent conduct of the school faculty and staff present in the school building during the shooting on December 14, 2012. In particular, the court referred to the plaintiffs' arguments that school security guidelines imposed a ministerial duty on the faculty and staff as a "new theory of liability" not previously raised in the operative complaint.

"[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e have long eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleadings with reference to the

general theory upon which it proceeded, and to substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . ." (Citation omitted; internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, 173 Conn. App. 463, 479, 164 A.3d 682 (2017).

"The pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial. . . . The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in the] complaint. . . . A complaint must fairly put the defendant on notice of the claims . . . against him. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . Only those issues raised by the [plaintiff] in the latest complaint can be tried before the jury." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014).

In *White*, the plaintiff sought to establish a malfunction theory as part of his product liability claims against the defendant. Id. The court concluded that the plaintiff failed to allege facts in his amended complaint establishing a claim regarding the malfunction theory and, thus, that the amended complaint was deficient. See id., 626–28; id., 626 ("[a] plaintiff must allege facts to put the trial court and the defendant on notice that the plaintiff intends to pursue his claim under this alternative burden of proof"). The court concluded, as well,

that "the plaintiff could not properly raise an entirely new, alternative theory of liability for the first time in his opposition to the defendants' summary judgment motion when he failed to plead this theory in his complaint or put the defendants on notice that he intended to rely on it by further amending his complaint." Id., 629.

With the foregoing in mind, we turn to the plaintiffs' arguments on appeal. The plaintiffs assert that their third amended complaint did, indeed, include specific allegations of negligence against the school faculty and staff present in the building during the shooting. In particular, the plaintiffs point to the allegations contained in paragraphs 7, 13, 14, 30h and 30j of counts one and three, and in paragraphs 7, 14, 15, 31h and 31j of counts two and four, which, they assert, fairly set forth claims that the defendants had created mandatory policies and procedures for implementation by faculty and staff in the school building, and that adherence to these policies and procedures imposed a ministerial duty, which they allege the faculty and staff had breached during the course of the shooting.

On the basis of our careful review of the pleadings, we conclude that the complaint did contain allegations that both the defendants and the school faculty and staff had a ministerial duty to create and implement the school security guidelines, and that they failed to fulfill that duty. In this regard, we disagree with the trial court that such allegations against the faculty and staff were raised for the first time in opposition to the defendants' motion for summary judgment. We note, however, that nowhere does the complaint contain any allegations that implementation of the guidelines by either the defendants or the faculty and staff was *discretionary*. The plaintiffs, rather, asserted for the first time in their opposition to the motion for summary judgment that the identifiable person-imminent harm exception applied *if the acts or omissions of the faculty and staff*

were discretionary. This assertion is not applicable to the plaintiffs' argument because the identifiable person-imminent harm exception applies only to discretionary act immunity under § 52-557n (a) (2) (B), which the plaintiffs failed to raise in their complaint. See *Doe* v. *Petersen*, supra, 279 Conn. 615–16 (identifiable person-imminent harm exception recognized as one of three exceptions to *discretionary act immunity*). In sum, the viability of the plaintiffs' complaint can fairly be assessed only on the basis of the plaintiffs' claims, set forth in the complaint, that the defendants' development and implementation of school security protocols were ministerial in nature and, therefore, not protected by governmental immunity, and that the faculty and staff present in the school breached ministerial duties regarding implementation of the school security protocols.

Accordingly, we conclude that the plaintiffs' operative complaint only sets forth claims of negligence directed at the defendants' alleged breach of a ministerial duty prior to the December 14, 2012 shooting, and relating to an alleged breach of a ministerial duty by the school faculty and staff occurring on the date of the assault. We, thus, turn next to a consideration of the court's conclusion in regard to whether the duties of the defendants and faculty and staff implicated by the allegations in the operative complaint were ministerial or discretionary.[10]

[10] We agree, also, with the trial court's comment that even if the plaintiffs' operative complaint could be construed as setting forth a claim of negligence against individual members of the school faculty or staff on the day of the shooting, no reasonable juror could find negligence in the instinctive and heroically protective reactions of Hochsprung, Sherlach and Hammond in immediately running to the hallway to investigate the cause of a thunderous crash by the entrance door only to be cut down by a fusillade of bullets, i.e., that it was foreseeable that their conduct could have led to the harm suffered by the plaintiffs. See *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191–92, 74 A.3d 1278 (2013) ("Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. . . . Although it has been said that no universal test for

II

The plaintiffs claim that the court erred in determining that the defendants' creation and implementation of the school security guidelines was discretionary in nature instead of allowing jurors the opportunity to make that decision.

In its memorandum of decision, the trial court concluded that the alleged conduct of the defendants in creating and implementing the school security guidelines was discretionary in nature because no statute, policy, or rule imposed clear ministerial duties on the defendants. In particular, after determining that the supervision of school employees and students is generally considered discretionary, the court looked to §§ 10-220, 10-220f and 10-221, and concluded that "none of these sections limited the defendants' exercise of discretion in their supervision and management of the school or imposed clear, ministerial duties on the defendants with regards to the type of security measures or protocols they were to implement." We agree with the court's conclusion.

[duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . [T]he test for the existence of a legal duty entails [1] a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and [2] a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." [Internal quotation marks omitted.]).

The faculty and staff present at the school during the shooting were confronted with a chaotic and violent situation, made evident by later descriptions of the noise variously as "banging sounds like someone kicking a door"; "gunfire from the lobby area adjacent to the conference room"; "a noise coming from the front of the school sounding like a metal pipe hitting the floor"; and, from Hammond who was in the conference room, "a loud banging noise." Under such unimaginable circumstances, no reasonable juror could have found that the acts or omissions of the individual members of the faculty and staff amounted to negligence.

As previously noted, our determination of whether governmental immunity applies to the allegations of a complaint is generally a question of law subject to plenary review. See *Ventura* v. *East Haven*, supra, 330 Conn. 634–37. In addressing the question of whether the general supervision of public school employees is a discretionary or ministerial function, our Supreme Court has concluded that the administrators' "duty to ensure that school staff members adequately discharged their assignments [is] discretionary because it [is] encompassed within their general responsibility to manage and supervise school employees." *Strycharz* v. *Cady*, 323 Conn. 548, 569, 148 A.3d 1011 (2016), overruled in part on other grounds by *Ventura* v. *East Haven*, 330 Conn. 613, 637 and n.12, 199 A.3d 1 (2019). In addition, our case law has implicitly determined that the supervision of public school children is generally considered a discretionary act. See, e.g., *Martinez* v. *New Haven*, 328 Conn. 1, 8–9, 176 A.3d 531 (2018) (framing general supervision of student at public school as discretionary act subject to identifiable person-imminent harm exception); *McCarroll* v. *East Haven*, 180 Conn. App. 515, 522–23, 183 A.3d 662 (2018) (same). Our case law also has made clear that a plaintiff bringing a cause of action against a municipality or government officials must allege and, thus, demonstrate the existence of a genuine issue of material fact, that the acts or omissions complained of are ministerial, rather than discretionary, in nature. See *Violano* v. *Fernandez*, 280 Conn. 310, 323–24, 907 A.2d 1188 (2006); id., 324 ("plaintiffs . . . failed to allege that there was any rule, policy, or directive that prescribed the manner in which [one of the defendants] was to secure the property" that was under his care); *Colon* v. *New Haven*, 60 Conn. App. 178, 182–83, 758 A.2d 900 (summary judgment properly rendered on ground of governmental immunity where defendant's "poor exercise of judgment" formed basis

of complaint, rather than directive specifically describing manner in which defendant was to act), cert. denied, 255 Conn. 908, 763 A.2d 1034 (2000).

On the basis of the foregoing, it is clear that the adoption of the school security guidelines by the defendants was an act of discretion encompassed within their general duty to manage and supervise their employees and the schoolchildren, and, therefore, was protected by governmental immunity pursuant to § 52-557n (a) (2) (B). As discussed in part I of this opinion, the plaintiffs' complaint alleged that the defendants were "under a legal and ministerial duty to create, enforce, and abide by" school security guidelines, "and to ensure student safety and well-being" pursuant to §§ 10-220, 10-220f and 10-221, and that their failure to do so subjected them to liability pursuant to § 52-557n. The language of the pertinent statutes and, indeed, the statutory scheme regarding the duty of boards of education, make it plain that in developing and implementing policies, the board is fulfilling a discretionary duty. See *Washburne* v. *Madison*, 175 Conn. App. 613, 623, 167 A.3d 1029 (2017) ("[i]n order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner" [internal quotation marks omitted]), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). Section 10-220 (a) states, generally, that boards of education "shall provide . . . (4) a safe school setting," and § 10-220f states that boards of education may, but are not required to, establish a school safety committee. Furthermore, § 10-221 does not specifically address school safety, but, rather, states that boards of education shall implement policies to regulate several other unrelated areas as part of their general duty to manage and supervise school activity. Accordingly, we agree with the trial court and conclude that, because the plaintiffs failed to identify any statutory authority or rule that imposed upon the defendants

a ministerial duty to create or implement the school security guidelines that the defendants allegedly failed to abide by, no genuine issue of material fact existed as to whether the defendants' acts were discretionary in nature.

The plaintiffs also claim that the trial court erred in rendering summary judgment because the school security guidelines adopted by the defendants imposed upon the school faculty and staff a ministerial duty to act in a prescribed manner during the shooting. The language in the guidelines referenced by the plaintiffs contradicts this claim.

In conjunction with the defendants' motion for summary judgment, the parties submitted several school security guidelines. The plaintiffs first referenced the "Newtown Public Schools Emergency Lockdown Guidelines for Faculty and Staff," which states that "[u]pon notification of personal observation that an emergency situation exists, it *may* become necessary for school administration to commence a lockdown," and in such event "teachers and support staff *should* promptly gather their students and those in the immediate vicinity, and escort them into a classroom or securable room . . . that can be locked and secured from the inside." (Emphasis added; internal quotation marks omitted.) This guideline additionally states that "[u]pon notification or personal observation that an imminent emergency situation exists, it *may* become necessary for school administration to commence a Lockdown—Code Blue." (Emphasis added; internal quotation marks omitted.) In the event of this type of lockdown, the guideline states that "staff *should* immediately gather students, and if not already, escort them inside a classroom or securable room that can be locked and secured from the inside." (Emphasis added.) Language at the bottom of the first page of this guideline states that "[f]ailure to comply with these rules can ultimately jeop-

ardize the safety of all persons inside the classroom or neighboring classrooms in the immediate proximity." Supplementing this guideline is the "Newtown Public Schools Faculty-Staff Emergency Response Guide," which sets forth emergency terms and command actions that faculty and staff can use in the event of a lockdown.

The plaintiffs next referenced an "Incident Command System Overview," which states that it "is a field management system that has a number of basic system features. Because of these features, [it] has the flexibility and adaptability to be applied to a wide variety of incidents and events both small and large." This guideline provides a structured plan that school faculty and staff can use to manage and respond to a particular incident. Finally, the plaintiffs referenced the "Newtown, Connecticut Emergency Operations Plan Annex L—School Emergency," which provides, inter alia, that "[i]n the event of an emergency, the primary function of all school personnel is to provide maximum protection for students and to reunite students with their parents as soon as it is feasible." This guideline sets forth certain tasks for school faculty and staff in the event of an emergency. In particular, it provides that "[p]rincipals are responsible for . . . [a]ctivating the evacuation or take shelter message or signal to instruct teachers to take protective action(s) for themselves and their students," and "[s]upervising plan implementation." It states, as well, that "[t]eachers are responsible for . . . [e]xercising control and discipline in their supervision of students in the evacuation and take shelter modes," and "[t]aking all necessary precautions to protect the school facility." The guideline also lists how school faculty and staff may respond to various types of emergencies and implement evacuation measures, but does not specifically discuss actions to take in the event of a school shooting.

After a thorough review of the school security guidelines referenced by the plaintiffs, we conclude that they contain "no directive of the type required to support a finding that the [defendants] had a [ministerial] duty" to act in a prescribed manner when responding to the events that unfolded on December 14, 2012. *Ugrin* v. *Cheshire*, 307 Conn. 364, 391, 54 A.3d 532 (2012). In *Ugrin*, our Supreme Court determined that language in a letter by town counsel that described the danger posed by mines that were operated in the vicinity of the plaintiffs' properties and contained legal advice to the town regarding such mines did not constitute "a directive to the town giving rise to a ministerial duty because [the letter] . . . contain[ed] the qualifying words *should* or *could*, which indicate[d] that the town had discretion to exercise its judgment in deciding whether to follow [the town counsel's] advice." (Emphasis added; internal quotation marks omitted.) Id., 392. The court determined, as well, that "the plaintiffs fail[ed] to identify any other comment that could be construed as an actual directive to the town that it had no discretion to ignore." Id.; see also *Colon* v. *New Haven*, supra, 60 Conn. App. 183.

In the present case, the school security guidelines contained qualifying language such as *may* or *should*, which indicated that the school faculty and staff had discretion to exercise judgment in following them, and they set forth broad structures that did not indicate how school faculty and staff should act in response to a shooting. Additionally, they did not contain any language placing upon the school faculty and staff a ministerial duty to act in a specific manner in the event of an emergency such as the one that occurred on December 14, 2012. Although some language, such as the indication of the consequences of a failure to comply with the guidelines during a school lockdown, may be construed as mandating strict compliance, our case law

is clear that such language does not necessarily impose upon the faculty and staff a ministerial duty. See *Coley* v. *Hartford*, 312 Conn. 150, 169, 95 A.3d 480 (2014) ("[c]ontrary to the plaintiff's contention, the word *shall* does not necessarily give rise to a ministerial duty to remain at the scene when the policy language, read in its entirety, clearly relies upon the police officer's discretion" [emphasis added; internal quotation marks omitted]), overruled in part on other grounds by *Ventura* v. *East Haven*, 330 Conn. 613, 637 and n.12, 199 A.3d 1 (2019); *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 51, 50 A.3d 381 ("[a]lthough the word *shall* can connote a mandatory command, the language of the statute, read as a whole, involves discretionary acts" [emphasis added; internal quotation marks omitted]), cert. denied, 307 Conn. 928, 55 A.3d 570 (2012). Accordingly, we agree with the trial court and conclude that no reasonable juror could have found that the school security guidelines imposed a ministerial duty upon the faculty and staff.

III

Finally, the plaintiffs claim that the court erred in determining that if the complaint can fairly be read as asserting that the defendants and school faculty and staff breached a discretionary duty in the creation, promulgation, and implementation of the school security guidelines, the identifiable person-imminent harm exception was inapplicable.[11]

We need not address this claim because, as previously discussed in part I of this opinion, nowhere in the operative complaint do the plaintiffs allege that the conduct

[11] Although our jurisprudence recognizes three exceptions to discretionary act immunity, the plaintiffs claim only that the identifiable person-imminent harm exception applies. See, e.g., *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434, 165 A.3d 148 (2017) (noting that three exceptions to discretionary act immunity are recognized, but only identifiable person-imminent harm exception was relevant).

of the defendants and faculty and staff was discretionary in nature. Paragraphs 7, 13, 14, 30h and 30j of counts one and three, and paragraphs 7, 14, 15, 31h and 31j of counts two and four of the complaint all make clear that the plaintiffs only allege violations of a ministerial duty. This is further supported by assertions in the plaintiffs' opposition to the defendants' motion for summary judgment, which first mirrors the complaint by stating that "the actions of the defendants . . . were not of a discretionary nature," but then raises the argument not contained in the complaint that, "even if they were discretionary in nature, the deceased plaintiffs were identifiable victims . . . and . . . clearly an imminent harm was before them . . . ."

In adjudicating a motion for summary judgment, a court is not required to address allegations that are not made in the complaint. See *DeCorso* v. *Calderaro*, 118 Conn. App. 617, 627–28, 985 A.2d 349 (2009) ("[i]n adjudicating the motions for summary judgment, the [trial] court was not required to address trespass because the operative complaint did not contain counts alleging trespass"), cert. denied, 295 Conn. 919, 991 A.2d 564 (2010). Because the plaintiffs failed to allege the applicability of the identifiable person-imminent harm exception to the discretionary acts of the defendants in the operative complaint, we conclude that the court was not required to address this claim at summary judgment.[12] In sum, newly fashioned allegations asserting an alternative basis for recovery in defense of a motion for summary judgment are improper and may not substitute for a timely filed amended complaint.

In reaching our conclusion in this case, we concur with the trial court and find apt our Supreme Court's

[12] We recognize that the trial court provided substantial analysis in regard to whether the identifiable person-imminent harm exception was applicable to the plaintiffs' claims. Although we believe that such analysis was unnecessary because it involved a claim outside the contours of the complaint, we have no disagreement with the conclusions reached by the trial court.

closing language in *Coley* v. *Hartford*, supra, 312 Conn. 172: "The facts in the present case are undeniably tragic, and, understandably, the parties are left questioning whether anything more could have been done to prevent the realities that unfolded. It is, however, precisely because it can always be alleged, in hindsight, that a public official's actions were deficient that we afford limited governmental liability for acts that necessarily entailed the exercise of discretion."

For the reasons set forth in this opinion, we conclude that the trial court properly rendered summary judgment in the defendants' favor on the ground of governmental immunity pursuant to § 52-557n (a) (2) (B).[13]

The judgment is affirmed.

In this opinion the other judges concurred.

TROY HARRIS *v.* COMMISSIONER OF CORRECTION
(AC 41036)

Lavine, Elgo and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder and assault in the first degree in connection with a shooting incident, filed a third petition for a writ of habeas corpus, claiming that he had received ineffective assistance of counsel from V, who had represented him with respect to his second petition for a writ of habeas corpus. Specifically, the petitioner alleged that V was ineffective for failing to show that his first habeas counsel was ineffective for failing to show that his trial attorney rendered ineffective assistance of counsel for failing to obtain psychiatric records of one of the state's witnesses, J. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal,

[13] Because we agree with the trial court's analysis regarding governmental immunity, we need not reach the defendants' alternative claim for affirmance regarding proximate cause and the superseding criminal conduct of Lanza.

the petitioner having failed to demonstrate that his prior habeas and trial counsel were ineffective; the petitioner produced no evidence that J would have, at the time of trial, consented to a review of her records, especially given that J testified at the habeas trial that she would not sign a release for her records because she was afraid that evidence of her mental health would be used against her in custody disputes, and, therefore, the petitioner had failed to demonstrate that his claim of ineffective assistance of habeas and trial counsel was adequate to deserve encouragement to proceed further.

Argued April 17—officially released July 16, 2019

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, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Sferrazza*, *J.*, denied the petitioner's motion for articulation; thereafter, this court granted the petitioner's motion for review but denied the relief requested therein. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Troy Harris, appeals from the habeas court's denial of his petition for certification to appeal from its judgment denying his third petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly concluded that the petitioner's prior habeas and trial counsel were not ineffective for failing to

obtain the psychiatric records of one of the state's witnesses, Tammy Jamison. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

This is the fourth time that the petitioner has been before this court. The following facts, as this court summarized on direct appeal, and procedural history, as articulated by this court on the petitioner's second habeas appeal, are relevant to our resolution of the issues in the present appeal. "On May 16, 2000, John Simpson drove Howard Dozier and Hector Quinones to Washington Street in Waterbury to pick up Ray Ramos. At that time, the [petitioner] was residing at 39 Washington Street with . . . Jamison, the mother of his child. Simpson stopped the vehicle he was driving on Washington Street in a driveway between the [petitioner's] house and the house where they were picking up Ramos, and all three men exited the car. Dozier walked up the street and encountered the [petitioner] standing on his porch . . . . Dozier and the [petitioner] had a brief conversation. As Dozier turned his back to the [petitioner] in an attempt to return to the vehicle in which he had arrived, the [petitioner] began firing an Uzi machine gun at Dozier. Dozier ran back to the vehicle and he and Simpson drove off. The [petitioner] continued to fire at the vehicle, and Simpson, who was driving, was shot in his neck.

"The [petitioner] was tried to a jury, which found him guilty of attempting to murder Simpson and Dozier, as well as the first degree assault on Simpson. The [petitioner] received a total effective sentence of forty years imprisonment." (Footnotes omitted.) *State* v. *Harris*, 85 Conn. App. 637, 639–40, 858 A.2d 284, cert. denied, 272 Conn. 901, 863 A.2d 695 (2004).

Jamison, Simpson, and Dozier testified at the petitioner's underlying criminal trial. "Jamison testified that she and the [petitioner] lived together at the address

where the shooting took place, and that, on the night of the shooting, she saw the [petitioner] leave their apartment with a machine gun that she had seen in his possession approximately one month earlier. . . . [S]he looked down from the second floor window and saw the tip of the gun, a person across the street and shots fire out of the gun. . . . [A]fter the shooting, the [petitioner] came back upstairs carrying the gun and . . . [Jamison] and the [petitioner] wrapped it in a shirt and placed it inside a book bag. . . . [S]he then left the apartment with the gun and went to her aunt's house, where she hid the gun inside a grill. . . . [A]t the [petitioner's] request, she gave the gun to Dontae Stallings, a friend of the [petitioner] who lived in their building. Jamison also revealed that she was incarcerated after pleading guilty to charges of hindering prosecution for hiding the [gun]. [Moreover], Jamison testified that the [petitioner] told her that he fired the gun from the porch and that there was no question in her mind that . . . [he] fired the gun from her porch." (Footnotes omitted.) Id., 653–54.

"Dozier testified that he knew the [petitioner] from previous encounters . . . . [H]e and the [petitioner] previously had engaged in face-to-face disagreements. . . . [O]n the night of the shooting, he was having a conversation with the [petitioner] when the [petitioner] pulled out a gun from behind his leg. . . . [W]hen he saw the [petitioner] raise the gun, he turned and ran toward the vehicle Simpson was driving, and then shots were fired. . . . [H]e did not see anyone else with a gun besides the [petitioner]. . . .

"Simpson testified that he had a conversation with the [petitioner] immediately before the shots were fired. . . . [H]e saw the [petitioner] on his porch, holding a gun, and was assured by the [petitioner] that he was 'straight' when he asked the [petitioner] if he was going to shoot him. Simpson further testified that he saw the [petitioner] fire the gun at Dozier as he ran down the street." Id., 652–53.

On direct appeal, this court determined that "the state's case was overwhelmingly strong. This was not merely a credibility contest between one defendant and one victim—this was a credibility contest, supported by physical evidence, among the [petitioner] and Simpson, his assault victim and attempted murder victim; Dozier, an eyewitness to the assault and an attempted murder victim; and Jamison, the mother of his child, with whom he was residing at the time of the shooting. The evidence showed no connection between Jamison and the victims, and therefore no reason to suspect that she offered false testimony to corroborate the stories of Simpson and Dozier. The evidence also showed that Simpson and Dozier had no personal animus toward the [petitioner], and therefore no motivation to fabricate a story. The physical evidence showed conclusively that the gun from which the bullets were fired was the same gun that was recovered after Jamison told the police where she disposed of it after it was fired by the [petitioner]. The testimony of the witnesses in this case, who had very different connections and relationships with the [petitioner], and which was supported by the physical evidence, strongly supported the [petitioner's] conviction." Id., 647.

After the petitioner's conviction was affirmed on direct appeal, he filed his first petition for a writ of habeas corpus. "In that petition, the petitioner challenged his underlying conviction on the ground of ineffective assistance of counsel . . . [and alleged] that his trial counsel, [Robert] Berke, had been ineffective in failing properly to investigate all possible exculpatory and/or alibi witnesses who might have supported his defense at trial. . . . The habeas court [*Schuman*, *J.*] rejected that claim . . . conclud[ing] that Berke did not render ineffective assistance of counsel and that his failure to call several individuals as alibi witnesses at the criminal trial was a valid strategic decision. The

[habeas] court credited Berke's testimony that he tried to discourage the petitioner from testifying at the criminal trial but that the petitioner wanted to testify regardless of whether the alibi witnesses did so. The petitioner's testimony differed from that which would have been offered by the putative alibi witnesses. The [habeas] court noted that as conflicting as the petitioner's own versions of his alibi were, the addition of alibi witnesses would likely have made matters worse for the petitioner. The [habeas] court thereafter denied his petition for certification." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 146 Conn. App. 877, 880–81, 81 A.3d 259 (2013), cert. denied, 322 Conn. 905, 139 A.3d 708 (2016). The petitioner appealed from the denial of his petition for certification and made three arguments to this court.

"First, he claimed that, when deciding his claim of ineffective assistance of counsel, the habeas court improperly had applied the presumption of attorney competence set forth in *Strickland* v. *Washington*, [466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d (1984)]. Second, he claimed that the habeas court improperly had defined the concept of exculpatory evidence, thereby, assertedly, making it futile for him to present evidence regarding the psychiatric history of Jamison, which Berke had failed to elicit during trial. Third, he claimed that the [habeas] court improperly avoided certain ethical issues when determining that Berke's decision not to present alibi witnesses at the trial had been a strategic decision. . . . This court was not persuaded by the petitioner's arguments, and thus ordered that his appeal from the denial of his first habeas petition be dismissed." (Citation omitted.) *Harris* v. *Commissioner of Correction*, supra, 146 Conn. App. 881.

The petitioner filed a second petition for a writ of habeas corpus, and claimed that his first habeas counsel, Justine Miller, had been ineffective because: "(1)

[she] failed to call . . . Jamison who would recant her trial testimony and say that [the petitioner] did not shoot the victims; (2) [she] did not subpoena Jamison's medical records which document[ed] her mental disorder; and (3) [she] did not subpoena alibi witnesses to testify at the habeas trial. . . . [T]he court, *T. Santos*, *J.* . . . dismissed the petition upon finding that the petitioner had failed to meet his burden of proving, under the first prong of *Strickland*, that Miller's performance was ineffective. . . . [T]he petitioner filed a petition for certification to appeal from the dismissal of his amended second petition for a writ of habeas corpus, which [the second habeas court] . . . granted . . . ." (Internal quotation marks omitted.) Id., 882. This court affirmed the judgment of the second habeas court, agreeing that the petitioner had failed to demonstrate that Miller's performance was deficient. Id., 889.

In his third habeas petition, the petitioner alleged, in relevant part, that his second habeas counsel, Joseph Visone, "was ineffective for failing to show that [Miller] was ineffective for failing to show that [Berke] rendered ineffective assistance of counsel . . . for failing to subpoena [Jamison's psychiatric] records . . . ." The habeas court, *Sferrazza*, *J.*, denied the petition, concluding that the petitioner failed to establish that Visone was ineffective or that the petitioner was prejudiced.

The petitioner filed a petition for certification to appeal from the denial of his amended third petition for a writ of habeas corpus on October 19, 2017. The habeas court denied the petition for certification to appeal on October 20, 2017, and the petitioner appealed to this court.

The petitioner claims on appeal that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his third petition for a writ of habeas corpus that alleges ineffective assistance of habeas and trial counsel for failing to obtain

Jamison's psychiatric records. Because the petitioner failed to establish that Jamison would have consented to a review of her records, we conclude that the habeas court did not abuse its discretion when it denied the petition for certification to appeal and agree with the habeas court that the petitioner failed to demonstrate that his prior habeas and trial counsel were ineffective.

A petitioner can only obtain appellate review of the denial of his petition for certification to appeal by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). "First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must prove that the decision of the habeas court should be reversed on the merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Mejia* v. *Commissioner of Correction*, 112 Conn. App. 137, 144, 962 A.2d 148, cert. denied, 291 Conn. 910, 969 A.2d 171 (2009).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 561, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018). We, therefore,

address the petitioner's claim that the habeas court improperly concluded that the petitioner's prior habeas and trial counsel were not ineffective by failing to obtain Jamison's psychiatric records.

We begin by noting our well settled standard of review in a habeas corpus proceeding contesting the effective assistance of habeas counsel. "Although a habeas court's findings of fact are reviewed under the clearly erroneous standard of review . . . [w]hether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 80 Conn. App. 792, 797, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective." (Citation omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

As to each claim of ineffectiveness, the petitioner must satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. "First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." (Citation omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, supra, 169 Conn. App. 464.

The performance inquiry centers on "whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." (Citation omitted; internal quotation marks

omitted.) Id., 464–65. "Simply put, a petitioner cannot succeed as a matter of law . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 320, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

The petitioner alleges that Berke was ineffective because he "failed to pursue Jamison's psychiatric history or subpoena [Department of Correction] records for use as impeachment," and that he "could have satisfied the preliminary showing required by *State* v. *Esposito*, 192 Conn. 166, [471 A.2d 949] (1984), such that Jamison's testimony would have been stricken had she not consented to an in camera inspection of the psychiatric records . . . that an in camera inspection of the records would have revealed information relevant to Jamison's testimonial capacity such that her testimony would have been stricken had she not consented to disclosure of the records . . . for use as impeachment [and] that Jamison's testimony would have been severely undercut by the information contained in [her psychiatric] records."[1] Because the petitioner failed to

[1] The petitioner further argues that Miller was ineffective for failing to subpoena the records, to examine Jamison, and to elicit testimony from Berke to support this claim of ineffectiveness against Berke, and that Visone was ineffective for failing to subpoena the records and to elicit testimony to support a claim of ineffectiveness against Miller. Because we conclude that Berke was not ineffective, we need not address these arguments.

Even if we were to reach the petitioner's arguments regarding the performance of his prior habeas counsel, this court already has rejected the petitioner's claim that Miller was ineffective for failing to subpoena Jamison's records and concluded that Miller made a reasonable strategic decision. *Harris* v. *Commissioner of Correction*, supra, 146 Conn. App. 889. Miller indicated that psychiatric records, if disclosed, might undermine the reliability of the retraction she believed Jamison might make of her trial testimony. Id., 885. Miller also stated that she did not believe the psychiatric records

produce evidence that Jamison would have consented to a review of her records at the time of trial, we disagree.[2]

"The psychiatrist-patient privilege, which is codified at [General Statutes] § 52-146e (a), prohibits the disclosure of any communications and records that identify a person who has communicated with a psychiatrist for the purpose of diagnosis or treatment without the express prior consent of the patient or his authorized representative. The privilege applies to all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist . . . . In general, [our Supreme Court has] interpreted the privilege

were pertinent to Jamison's mental state as of the time of the crime and the petitioner's criminal trial. Id., 885–86.

[2] The petitioner additionally argues that Berke could have satisfied the preliminary showing required by *State* v. *Esposito*, supra, 192 Conn. 166, such that Jamison's testimony would have been stricken had she not consented to an in camera inspection of the psychiatric records. The substance of the petitioner's argument, however, fails to meet the standard set forth in *Esposito*.

As our Supreme Court observed in *Esposito*, the mere existence of a psychiatric disorder does not automatically impugn a witness' ability to testify truthfully or to relay events accurately, nor does it automatically subject that witness' psychiatric records to disclosure. See *State* v. *Blake*, 106 Conn. App. 345, 352, 942 A.2d 496 ("[t]he linchpin of the determination of the defendant's access to the records is whether they sufficiently disclose material especially probative of the [witness'] ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation" [internal quotation marks omitted]), cert. denied, 287 Conn. 922, 951 A.2d 573 (2008). To make a threshold showing that an in camera review is appropriate, the petitioner must show that the witness had a "substantially diminished" capacity to "observe, recollect and narrate" the event. *State* v. *Esposito*, supra, 192 Conn. 176. The petitioner has produced no evidence that Berke could have made a showing that Jamison may have been experiencing manifestations of a schizophrenic episode or other mental health event that would have substantially diminished her testimonial capacity at any time relevant to her account of the incident or when she was testifying at the criminal trial.

The petitioner, therefore, fails to establish that Berke could have made a threshold showing that at any pertinent time Jamison had a mental health

broadly and its exceptions narrowly . . . [and has] sometimes used language suggesting that, when no statutory exception applies, the privilege is absolute. . . . The broad sweep of the statute covers not only disclosure to a defendant or his counsel, but also disclosure to a court even for the limited purpose of an in camera examination." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Fay*, 326 Conn. 742, 751–52, 167 A.3d 897 (2017).

The petitioner has produced no evidence that Jamison would have, at the time of trial, consented to a review of her records, especially given that Jamison testified to the habeas court that she would not sign a release for her records because she was afraid that evidence of her mental health would be used against her in custody disputes.[3] As the petitioner has not provided evidence that Jamison, during the trial, would have consented to a review of her psychiatric records, the petitioner's claim fails.

We, therefore, conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal because the petitioner has failed to demonstrate that his claim of ineffective assistance of habeas and trial counsel was adequate to deserve encouragement to proceed further. We, accordingly, dismiss the petitioner's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

illness that affected her testimonial capacity in any respect, let alone to a sufficient degree to warrant further inquiry. See id., 180.

[3] Jamison gave the following testimony at the petitioner's third habeas trial when she was questioned by the petitioner's counsel:

"Q. Do you recall not actually signing [a] release . . . for your . . . mental health records for our investigator?

"A. No. Because I don't trust [my daughter's] father.

"Q. Okay.

"A. I think in the future he would try to hold my mental [records] against me when it comes to my daughter and my granddaughter, so I won't sign them.

"Q. Okay. Would you be willing to now?

"A. No."

BRANDON SCOTT *v.* CCMC FACULTY PRACTICE PLAN, INC., ET AL.
(AC 40716)

Alvord, Sheldon and Moll, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant neurosurgeon, K, and the defendant C Co. for medical malpractice in connection with a spinal cord injury that the plaintiff sustained during a surgery that K performed on him to implant a spinal cord stimulator in order to control the plaintiff's severe neuropathic pain. Specifically, the plaintiff alleged that the defendants breached the applicable standard of care when K performed surgery on the plaintiff and that, as a result of the injuries caused by the defendants' negligence, the plaintiff has been permanently deprived of his ability to carry on and enjoy life's activities. The trial court rendered judgment in favor of the defendants in accordance with a jury verdict, from which the plaintiff appealed to this court. On appeal, he claimed that the trial court improperly permitted the defendants to introduce evidence that, after the surgery, the plaintiff's pain substantially resolved due to a syrinx that had developed within his spinal cord to establish a reduction in damages, which the plaintiff maintained had to be categorized as "benefits evidence" under the Restatement (Second) of Torts (§ 920), and that its admission was improper because it was outside the pleadings and contrary to public policy. The plaintiff also claimed that the trial court erred when it failed to give his requested jury instructions regarding the syrinx evidence. *Held* that this court was not required to consider the merits of the plaintiff's claims as to the trial court's rulings with respect to the syrinx evidence because, even if the rulings were improper, they were harmless, as the jury did not reach the issue of damages because, as evidenced by its answers to certain jury interrogatories, it first determined that the defendants had not breached the standard of care: the plaintiff could not prevail on his claim that the rulings were harmful because the syrinx evidence permeated the case, as a review of the trial transcripts revealed that the syrinx evidence did not permeate the case but, rather, the issue of liability was dominant and hotly contested, and although all four neurosurgical experts testified concerning the syrinx theory, the overwhelming majority of expert testimony concerned whether K's actions during the surgery deviated from the standard of care; moreover, the plaintiff's claim that the rulings were harmful because the jury could have considered the syrinx evidence in its determination of liability was

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

unavailing, as the plaintiff did not, at trial, object to the syrinx evidence on the basis that the jury might improperly consider such evidence in its determination of liability and, thus, could not claim on appeal that such a use would have been harmful to him, the record revealed no testimony or argument in which the defendants or their experts had discussed the syrinx evidence in the context of liability, and the issue of damages was not intertwined with the issue of breach of the standard of care; accordingly, it was not reasonably probable that the trial court's rulings on the syrinx evidence likely affected the result of the trial.

Argued February 11—officially released July 16, 2019

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, denied the plaintiff's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict for the defendants; subsequently, the court denied the plaintiff's motion in arrest of judgment, to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Alinor C. Sterling, with whom, on the brief, were *Sean K. McElligott* and *Sarah Steinfeld*, for the appellant (plaintiff).

Michael R. McPherson, with whom was *Joyce A. Lagnese*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Brandon Scott, appeals from the judgment of the trial court, rendered following a jury trial, in favor of the defendants, Paul Kanev, a neurosurgeon, and CCMC Faculty Practice Plan, Inc. On appeal, the plaintiff claims that the trial court (1) improperly permitted the defendants to introduce evidence that the plaintiff's pain substantially resolved due to a syrinx that had developed within his spinal cord to establish a reduction in damages (syrinx evidence), and (2) erred when it failed to instruct the jury with

respect to such evidence. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In December, 2004, the plaintiff began to experience severe and intractable neuropathic pain in his groin area.[1] To treat the pain, the plaintiff was prescribed a "remarkable" amount of various narcotic medications. The plaintiff became bedridden and could not walk more than a few steps at a time. He experienced severe anxiety and was diagnosed with major depressive disorder. In addition, he gained approximately 100 pounds, and his physician described him as morbidly obese. The Social Security Administration classified him as totally and permanently disabled.

The plaintiff first visited Dr. Kanev, a neurosurgeon with CCMC Faculty Practice Plan, Inc., on April 9, 2007. Dr. Kanev recommended that he implant a spinal cord stimulator[2] to control the pain and considered it "the last resort and only option" for the plaintiff. On May 8, 2007, Dr. Kanev performed surgery on the plaintiff to implant the spinal cord stimulator. During the course of the procedure, the plaintiff sustained a spinal cord injury. Dr. Kanev, upon realizing that the plaintiff had lost sensation in the lower portion of his body, made no further attempt to implant the spinal cord stimulator and terminated the procedure. The spinal cord injury left the plaintiff paralyzed from the waist down.

Following the surgery, the plaintiff continued to experience severe neuropathic pain. By January, 2008, a

[1] At trial, this condition was also referred to as "pudendal pain." The plaintiff described his pain as "severe horrific pain in the penis, rectum, perineum, testicles and inner thighs," which included "[s]tabbing pains, burning pains, pinpricking pains, twisting pains, pulling pains, and pains of foreign objects in his rectum."

[2] Dr. Kanev testified that "spinal cord stimulation blocks the conduction of the neuropathic pain, preventing it from ever reaching the brain," and "the pain that [the patient] is feeling becomes replaced by the tingling of the stimulation electrode."

syrinx began to form within the plaintiff's spinal cord.[3] In June, 2009, doctors drained the syrinx. That same year, the plaintiff had a morphine pump surgically implanted to control the pain, and he was able to begin reducing the amount of narcotic medications he was taking. By September, 2011, the plaintiff's neuropathic pain substantially resolved.[4]

The plaintiff subsequently brought this medical malpractice action against the defendants.[5] In his operative complaint,[6] the plaintiff alleged that the defendants breached the applicable standard of care when Dr. Kanev performed surgery on the plaintiff by (1) inserting the needle at the tenth and eleventh vertebrae, (2) inserting the needle at the eleventh and twelfth vertebrae, (3) failing to enter the epidural space below the level of the spinal cord, (4) inserting the needle at an improper angle, and (5) attempting a retrograde placement of the electrode. The plaintiff alleged that, as a result of the injuries caused by the defendants' negligence, he "has been permanently deprived of his ability to carry on and enjoy life's activities and his earning capacity has been permanently diminished."

During discovery, in addition to their initial disclosure of expert witnesses, the defendants filed a supplemental expert witness disclosure, in which they

[3] Giancarlo Barolat, a neurosurgeon, testified that a syrinx is a "cavity that is formed within the spinal cord and is filled with fluid."

[4] The plaintiff was able to stop taking all narcotic medications and stopped use of the morphine pump. The plaintiff, at the time of trial, testified that he continues to experience a low level of neuropathic pain that is manageable without medication. He also testified that he is able to work part-time and attend college. In addition, the plaintiff testified that he recently became engaged to be married and plans to attend graduate school.

[5] The plaintiff asserted claims against CCMC Faculty Practice Plan, Inc., in its capacity as Dr. Kanev's employer.

[6] The plaintiff's second amended complaint, which is the operative complaint in this case, was filed on March 22, 2016.

indicated that they planned to call Robert Levy, a neurosurgeon, to testify regarding the syrinx evidence. Specifically, the disclosure stated that Dr. Levy would testify "that following injury to the spinal cord, [the plaintiff] developed what is referred to as a syrinx, which is a fluid filled cyst within the spinal cord. . . . Dr. Levy is expected to testify that the development of [the plaintiff's] syrinx and its subsequent drainage, on a more probable than not basis, explains why [the plaintiff's] pudendal pain has substantially resolved."

On April 14, 2016, the plaintiff filed a motion in limine to preclude the admission of the syrinx evidence. The plaintiff argued that the defendants were attempting to use the evidence to claim "that although they paralyzed [the plaintiff], their actions resulted in an improvement of his condition, which entitles them to a damages credit." The plaintiff argued that this evidence, and any argument related to this evidence, must be precluded because it is "completely outside the pleadings" and "would need to be pleaded as a special defense." The plaintiff also argued that "[t]he theory the defendants are advancing through their experts is . . . completely inconsistent with the goals of Connecticut tort law" with respect to "deterrence and compensation of [an] innocent, injured party." On May 3, 2016, the defendants filed an objection to the plaintiff's motion. They argued that the evidence was admissible, under § 920 of the Restatement (Second) of Torts, to mitigate damages.

On May 9 and 12, 2016, the court held a hearing on the plaintiff's motion in limine. The court concluded that although § 920 of the Restatement (Second) of Torts was not implicated, the defendants' evidence was admissible with respect to the plaintiff's claim of damages for loss of life's enjoyment. The court explained: "It's in the nature of [the plaintiff's] ability to engage in and enjoy life's daily activities from this day forward or from whenever the pain stopped forward. That's

what it's about. It's about [the plaintiff's] damages, one category of [his] damages."

A jury trial commenced on May 12, 2016. During trial, the plaintiff submitted a written request to charge that asked the court to instruct the jury to disregard the syrinx evidence or, in the alternative, to instruct the jury that the defendants had the burden to prove that (1) their negligent acts proximately caused the resolution of the plaintiff's pain in 2011, and (2) in the absence of their negligence, the plaintiff's pain would have continued for the rest of his life and no treatment or procedure would have controlled that pain. The court declined to give the instructions requested by the plaintiff.[7]

When the case was submitted to the jury, the trial court submitted written interrogatories for the jury to answer. The first five interrogatories, in separate subparts, asked the jury whether Dr. Kanev was professionally negligent.[8] The jury answered that Dr. Kanev was not negligent. Finding no liability, the jury returned a verdict for the defendants, thus precluding its consideration of the interrogatories that addressed causation

[7] The court concluded: "To the extent that the filing asked that the court charge the jury to disregard the evidence and argument concerning the beneficial effect of the defendants' negligence, I respectfully decline to charge the jury, and I will allow argument." The court reasoned that the evidence was not, as the plaintiff argued, being admitted under § 920 of the Restatement (Second) of Torts. It reiterated that "[the evidence is] in the case [because] the damages of [the plaintiff's] loss of enjoyment of life has got to include his current state." The court also declined to give the plaintiff's requested instruction regarding the burden of proof because, it noted, the plaintiff has the burden of proof on damages.

[8] Specifically, the breach related interrogatories asked whether Dr. Kanev deviated from the standard of care when he (1) inserted the needle at the tenth and eleventh vertebrae, (2) inserted the needle at the eleventh and twelfth vertebrae, (3) failed to enter the epidural space below the level of the spinal cord, (4) inserted the needle at an improper angle, and (5) attempted a retrograde placement of the electrode. Four of the five interrogatories also asked whether Dr. Kanev's conduct "unnecessarily increased the risk of spinal cord injury."

and damages.[9] The plaintiff moved to set aside the verdict. The court denied the motion and rendered judgment in favor of the defendants in accordance with the jury verdict. This appeal followed.

On appeal, the plaintiff first claims that the court erred in admitting the syrinx evidence,[10] which the plaintiff maintains must be categorized as "benefits evidence" under § 920 of the Restatement (Second) of Torts,[11] despite the court's explanation that the evidence was not admissible as "benefits evidence" but, rather, was admissible insofar as it related to the plaintiff's claim of damages for loss of life's enjoyment. The plaintiff argues that permitting "benefits evidence" in this case was improper because it was outside the pleadings and contrary to public policy. The plaintiff also claims that the trial court erred when it failed to give his requested jury instructions regarding the syrinx evidence.[12] The defendants respond that, because the jury

[9] "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 247 n.3, 842 A.2d 1100 (2004).

[10] Specifically, the plaintiff claims that the syrinx evidence was improperly admitted under § 920 of the Restatement (Second) of Torts in order for the defendants to prove that their negligence had conferred a special benefit to the plaintiff—that they had caused the development of the syrinx, which substantially resolved the plaintiff's pain—and for the value of that benefit to be considered in mitigation of damages.

[11] Section 920 of the Restatement (Second) of Torts provides: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."

[12] Specifically, the plaintiff argues that the court should have instructed the jury to disregard the defendants' evidence that the syrinx caused the plaintiff's pain to substantially resolve, and any argument based on such evidence, because (1) the resolution of the plaintiff's pain was too remote in time from the defendants' actions, (2) there was "a complete absence of medical literature to support [the defendants'] argument," and (3) it was

did not reach the issue of damages, any purported error in admitting the evidence was harmless. We agree with the defendants.

Before a party is entitled to a new trial because of an erroneous evidentiary or instructional ruling, "he or she has the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 400, 933 A.2d 1197 (2007) (involving instructional ruling); *Kalams* v. *Giacchetto*, 268 Conn. 244, 249, 842 A.2d 1100 (2004) (involving evidentiary ruling). "[T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely affected] the result." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010).

"[W]hen a jury does not reach an issue in returning a verdict, alleged improprieties relating to that issue are harmless." Id.; see also *Kalams* v. *Giacchetto*, supra, 268 Conn. 246, 250 (holding that any error in precluding testimony on causation in medical malpractice action was harmless because jury found no breach of standard of care and did not reach causation); *Phaneuf* v. *Berselli*, 119 Conn. App. 330, 335–36, 988 A.2d 344 (2010) (holding that instructional error regarding causation

impermissible "benefits evidence" under § 920 of the Restatement (Second) of Torts.

The plaintiff further argues, as he did before the trial court, that the court should have instructed the jury that the defendants had the burden to prove that (1) their negligent acts proximately caused the resolution of the plaintiff's pain in 2011, and (2) in the absence of their negligence, the plaintiff's pain would have continued for the rest of his life and no treatment or procedure would have controlled that pain. This argument is predicated on the plaintiff's contention that the syrinx evidence was "benefits evidence" under § 920 of the Restatement (Second) of Torts.

Finally, the plaintiff argues that the trial court also erred in failing to provide the defendants' proposed charge on damages because "it would have given the jury some guidance about the nature of their claim," and "an imperfect curative instruction is better than no curative instruction at all."

was harmless because jury found for defendant on liability and did not reach causation).

We conclude that we need not consider the merits of the plaintiff's arguments as to the trial court's rulings with respect to the syrinx evidence because, even if we assume that the rulings were improper, they were harmless. See *Kalams* v. *Giacchetto*, supra, 268 Conn. 250.[13] The jury did not reach the issue of damages because, as evidenced by its answers to the jury interrogatories, it first determined that the defendants had not breached the standard of care.

The plaintiff claims that the rulings were harmful because (1) the syrinx evidence "permeated the case," and (2) the jury could have considered the syrinx evidence in its determination of liability.[14] We are not persuaded.

[13] The plaintiff argues that the present case is distinguishable from *Kalams* v. *Giacchetto*, supra, 268 Conn. 246, because "[t]he record here . . . provides no assurance that the jury considered the elements in sequence." In the present case, when the jury initially delivered its verdict form to the court, it failed to deliver completed interrogatories. When the court inquired where the interrogatories were, the jurors stated that they could not find them. The court thereafter provided the jury with another copy of the interrogatories. The jury, after completing the interrogatories, returned a verdict for the defendants. Based on this sequence of events, the plaintiff argues: "Here, it is not possible to presume that the jury did not reach the [syrinx evidence] before it considered breach." We disagree.

Apart from submitting the interrogatories to the jury, the court instructed the jury in relevant part: "[A] civil trial such as this has two issues: liability and damages. You will reach the issue of damages only if you find liability in favor of the plaintiff. If you find that liability is established, you will have occasion to apply my instructions concerning damages. If you find that liability has not been established, then you will not consider damages." We presume that the jury followed these instructions. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 402 ("[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them" [internal quotation marks omitted]).

[14] The plaintiff, citing *Pin* v. *Kramer*, 119 Conn. App. 33, 45, 986 A.2d 1101 (2010), aff'd, 304 Conn. 674, 41 A.3d 657 (2012), also argues that the defendants' counsel made comments during trial that "explicitly attacked the medical negligence system." We fail to see how any such alleged comments, which are not themselves challenged on appeal, relate to any harm caused by the rulings on the syrinx evidence.

A review of the trial transcripts reveals that the syrinx evidence did not, as the plaintiff argues, "permeate" the case, nor was it a "central theme at trial." Rather, the issue of liability was dominant and hotly contested. Each side presented two expert witnesses to opine on whether Dr. Kanev breached the standard of care. The jury was tasked with determining which of the parties' multiple experts it believed—a battle of the experts. Although the plaintiff is correct that "all four neurosurgical experts testified concerning the [syrinx] theory," the overwhelming majority of expert testimony concerned whether Dr. Kanev's actions during the surgery, with respect to the angle and location at which he inserted the needle and entered the epidural space, as well as his attempt of a retrograde placement of the electrode, deviated from the standard of care.[15]

Next, with respect to the plaintiff's argument that the rulings were harmful because the syrinx evidence "prejudiced [his] ability to prove . . . liability," the plaintiff, on appeal, explains his theory as to how the syrinx evidence could have been considered by the jury in its determination of liability. First, the plaintiff points to the expert testimony that explained the standard of care in terms of avoiding unnecessary risks. The plaintiff argues that the syrinx evidence and related argument, if accepted, "established that paralysis was necessary to the eventual cure of [the plaintiff's] neuropathic pain." He concludes that, if the jury could find that the paralysis was considered a *necessary* risk, it could find that Dr. Kanev had avoided *unnecessary* risks, in conformance with the standard of care.

We first note that the plaintiff did not, at trial, object to the syrinx evidence on the basis that the jury might

[15] The defendants' experts testified at length as to whether Dr. Kanev's conduct fell within the standard of care before being asked to opine about what caused the plaintiff's pain to substantially resolve.

improperly consider such evidence in its determination of liability. Accordingly, the plaintiff cannot now, on appeal, claim that such a use would have been harmful to him.[16]

On June 7, 2016, in addressing his request to charge, the plaintiff argued that submitting the syrinx evidence to the jury "is prejudicial . . . because it affects, essentially, the entire case." The plaintiff argues that this single statement should be viewed as his objection to the use of the syrinx evidence with respect to liability. We are not persuaded. Immediately following this statement, the plaintiff explained: "What it does, is it says to the jury that [it] can compare [the plaintiff's] prepain going away state to his current state *in order to determine what his measure of damages is*." (Emphasis added.)

Moreover, the record reveals no testimony or argument in which the defendants or their experts had discussed the syrinx evidence in the context of liability. The defendants' position that Dr. Kanev had conformed to the standard of care was not based on the fact that the plaintiff's neuropathic pain had substantially resolved or that Dr. Kanev's actions contributed to that resolution. Rather, the defendants' experts testified that Dr. Kanev had not breached the standard of care because (1) with respect to the location where he inserted the needle, Dr. Kanev would have had difficulty entering underneath the plaintiff's spinal cord due to scar tissue at that location, and (2) with respect to the angle at which he inserted the needle, Dr. Kanev would have had difficulty entering at a more shallow angle

[16] For this same reason, we find unpersuasive the plaintiff's argument that the rulings on the syrinx evidence were harmful because, unlike in *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 399–401, "the charge given . . . allows the jury to consider the [syrinx evidence] at any time for any purpose." In the present case, the plaintiff had not requested a limiting instruction such as the one provided in *Hurley*.

due to the plaintiff's obesity. Both of the defendants' experts opined that the plaintiff suffered a spinal cord injury, not because of any negligence on the part of Dr. Kanev, but because of an undiscovered herniated disc located at the plaintiff's eleventh and twelfth vertebrae.

Finally, in support of his argument, the plaintiff cites to our Supreme Court's decision in *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 9 A.3d 364 (2010).[17] *Klein*, however, is distinguishable from the present case. In *Klein*, the jury found that the defendant had not breached the standard of care. Id., 256. On appeal, the defendant argued that, although the trial court had improperly excluded the plaintiff's expert testimony, because that testimony would have been irrelevant to the issue of breach and dealt *only* with the question of causation, the impropriety was harmless. Id. Our Supreme Court disagreed. It concluded that the trial court's error was harmful because, under the circumstances of that case, "breach of the standard of care and causation were intertwined," and, therefore, the excluded testimony involved an issue "central to the question of not only causation, but breach as well."[18] Id., 256–57. In the present case, the issue of damages is not intertwined with the issue of breach of the standard of care. Moreover, what caused the plaintiff's pain to resolve was not central to the question of whether Dr. Kanev breached the standard of care.

[17] The plaintiff also cites to *Barbosa* v. *Osbourne*, 237 Md. App. 1, 183 A.3d 785 (2018). In *Barbosa*, the trial court improperly admitted evidence of contributory negligence. Id., 19–20. Although the jury found that the plaintiff failed to prove breach, which was to be considered separately from contributory negligence, the appellate court, nevertheless, found the evidentiary impropriety harmful because the evidence "pervaded every aspect of the trial below." Id., 20. We are not persuaded by the court's reasoning in *Barbosa* because, as we explain in this opinion, the syrinx evidence did not permeate the trial.

[18] Our Supreme Court explained that breach of the standard of care and causation were "intertwined" because "[t]he determination of whether the defendant had breached the standard of care could be reduced to the question of what caused the plaintiff's alleged injury . . . ." *Klein* v. *Norwalk Hospital*, supra, 299 Conn. 256–57.

Accordingly, we must conclude that it is not reasonably probable that the rulings on the syrinx evidence likely affected the result of the trial—that the defendants were not liable to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

JOAQUIN GUDINO *v.* COMMISSIONER OF CORRECTION
(AC 40696)

Lavine, Sheldon and Prescott, Js.*

Syllabus

The petitioner, who had been convicted, on a guilty plea, of murder in connection with the shooting death of the victim, sought a second petition for a writ of habeas corpus, claiming that his trial counsel and his prior habeas counsel had rendered ineffective assistance. Pursuant to a plea agreement, the petitioner initially had pleaded guilty to manslaughter in the first degree with a firearm in exchange for a recommended sentence of twenty-five years of incarceration. After reviewing the presentence investigation report, however, the trial court informed the petitioner that it was unwilling to impose the recommended sentence and permitted him to withdraw his plea. The case thereafter proceeded to trial but, prior to the close of evidence, the petitioner, pursuant to a new plea agreement, pleaded guilty to murder in exchange for a recommended sentence of forty-five years of incarceration, which the court subsequently imposed. The first habeas court denied the petitioner's first habeas petition, in which he alleged that his trial counsel had rendered ineffective assistance by, inter alia, failing to seek a dismissal of the jury panel on the basis of alleged juror misconduct. In count one of the second habeas petition, the petitioner alleged that his trial counsel rendered ineffective assistance by failing to investigate and present to the trial court certain mitigating evidence regarding his personal history and the events leading up to the shooting, which, he argued, would have persuaded the court to impose the original recommended sentence of twenty-five years. In count two, the petitioner alleged ineffective assistance of his prior habeas counsel. The habeas court dismissed count one of the petition as an improper successive claim, and it denied the

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

petition as to count two. The court thereafter granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly dismissed count one of the habeas petition alleging ineffective assistance of trial counsel on the ground that it was an improper successive claim and, therefore, was barred by the doctrine of res judicata: the petitioner conceded at his habeas trial that there were no newly discovered facts or evidence unavailable to him at the time of his first habeas petition and, although the petitioner raised different factual allegations and legal theories in support of his claims that his trial counsel rendered ineffective assistance, the grounds asserted in count one of the petition were identical to those raised in the prior petition that was denied, in that each alleged ineffective assistance of counsel; moreover, the relief sought here, namely, that the court vacate the petitioner's conviction and remand the case to the trial court so that he could argue to that court that the original twenty-five year sentence should be imposed, was legally indistinct from the relief sought in his prior habeas petition, in which he requested that the case be remanded to the trial court, without specifying any further relief, and the petitioner could not circumvent dismissal of his petition here merely by rewording his request for relief.

2. The habeas court properly determined that the petitioner failed to demonstrate that he was prejudiced by the allegedly deficient performance of his trial counsel and prior habeas counsel and, therefore, properly denied count two of the habeas petition alleging ineffective assistance of prior habeas counsel; that court properly determined that there was not a reasonable probability that, but for trial counsel's alleged failure to investigate and present to the trial court certain mitigating information, the court would have imposed the original recommended sentence of twenty-five years, as the presentence investigation report adequately addressed and apprised the trial court of the mitigating evidence of the petitioner's background and upbringing, including his history involving sexual and domestic abuse, drug use, and mental and intellectual deficits, as well as the circumstances surrounding the shooting of the victim, that report included a statement from members of the victim's family in which they vehemently opposed the twenty-five year sentence, and the trial court evinced a negative reaction to the report, particularly in light of the facts that, while the murder case was pending, the petitioner tampered with witnesses, fled the country, and never expressed any remorse for the offense.

Argued January 28—officially released July 16, 2019

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, *Sferrazza*, *J.*; judgment

dismissing the petition in part and denying the petition in part, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Andrew S. Marcucci, assigned counsel, with whom was *Naomi Fetterman*, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Joaquin Gudino, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims, among other things, that the habeas court improperly (1) dismissed count one of the amended petition alleging ineffective assistance of trial counsel on the ground that it constituted an improperly successive petition, and (2) denied count two alleging ineffective assistance of prior habeas counsel on the ground that the petitioner failed to prove that he was prejudiced by the allegedly deficient performance of both his prior habeas counsel and his trial counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

The relevant procedural history and facts[1] are as follows. In 1996, the petitioner was charged with murder in violation of General Statutes § 53a-54a. The petitioner was represented in the trial court by Attorney Robert A.

[1] The facts include those explicitly found by the habeas court, as well as those stipulated to by the parties and set forth in this court's decision in the petitioner's prior habeas appeal. See *Gudino* v. *Commissioner of Correction*, 123 Conn. App. 719, 3 A.3d 134, cert. denied, 299 Conn. 905, 10 A.3d 522 (2010).

Skovgaard. On January 28, 1998, the petitioner entered a guilty plea to a substitute information charging him with manslaughter in the first degree with a firearm in exchange for a recommended sentence of twenty-five years of incarceration. When the petitioner entered his plea, the court, *Dean*, *J.*, indicated that its willingness to impose the recommended sentence was contingent on its review of a presentence investigation report (PSI). The case was continued for preparation of the PSI and for sentencing.

On April 24, 1998, the court informed the parties that it was unwilling to impose the recommended sentence in light of unfavorable information contained in the petitioner's PSI. Accordingly, the court permitted the petitioner to withdraw his guilty plea and to enter a plea of not guilty. Following the withdrawal of the petitioner's guilty plea, the state amended the information to reinstate the charge of murder.

A jury trial commenced on July 28, 1998. At trial, several witnesses testified that the petitioner had shot the victim. Prior to the close of evidence, the petitioner and the state reached a new plea agreement, and the petitioner pleaded guilty to murder in exchange for a recommended sentence of forty-five years of incarceration. The court, *Nigro*, *J.*, subsequently imposed the recommended sentence.

In 2000, the petitioner filed his first petition for a writ of habeas corpus. See *Gudino* v. *Warden*, Superior Court, judicial district of New Haven, Docket No. CV-00-0435107-S (January 7, 2009). Attorney Paul R. Kraus was appointed by the court to represent the petitioner.

On March 13, 2007, the petitioner filed a three count amended petition. Count one alleged that his trial counsel had provided ineffective assistance of counsel. Specifically, the petitioner asserted in count one that his trial counsel was ineffective because he failed (1) to

seek a dismissal of the jury panel on the ground of alleged juror misconduct, (2) to advise the petitioner that he would lose his right to raise the juror misconduct issue on appeal if he pleaded guilty, and (3) to advise the petitioner about the possibility of pleading guilty conditionally in order to preserve his right to raise the juror misconduct issue on appeal. Count two alleged that the petitioner's decision to plead guilty was not knowingly, voluntarily, and intelligently made. Count three alleged that the trial court violated his due process rights by failing to declare a mistrial due to alleged juror misconduct.

A habeas trial was conducted by the court, *Hon. William L. Hadden*, judge trial referee. The court subsequently denied the petition and the subsequent petition for certification to appeal. This court dismissed the petitioner's appeal from the court's denial of the petition certification to appeal. *Gudino* v. *Commissioner of Correction*, supra, 123 Conn. App. 725.

On August 19, 2014, the petitioner filed his second petition for a writ of habeas corpus. It is this petition that underlies the present appeal. The habeas court, *Sferrazza*, *J.*, appointed a special public defender to represent the petitioner, who, with counsel's assistance, filed a two count amended petition, dated November 28, 2016, in which he raised claims of ineffective assistance both by his trial counsel and by his prior habeas counsel.

The petitioner alleged in count one of his amended petition that the performance of his trial counsel was constitutionally deficient in numerous ways. Many of the allegations of deficient performance centered on trial counsel's alleged failure to investigate and present to Judge Dean information regarding events leading up to the commission of the crime and the petitioner's

substance abuse history, mental health, lack of education, learning disabilities, and upbringing, that, according to the petitioner, would have persuaded the court to impose the original recommended sentence of twenty-five years of incarceration. The petitioner alleged that there is a reasonable probability that, but for the deficient performance of trial counsel, Judge Dean would have imposed the recommended twenty-five year sentence for manslaughter in the first degree with a firearm, and, thus, the petitioner would not currently be serving a forty-five year sentence for murder. In count two of his amended petition, the petitioner alleged that his prior habeas counsel, Kraus, had rendered ineffective assistance by failing to allege that his trial counsel had provided ineffective assistance for the reasons enumerated in count one of the amended petition.

On July 7, 2017, following a trial, the second habeas court dismissed, pursuant to Practice Book § 23-29 (3),[2] count one of the amended petition on the ground that it did not allege any legal grounds different from those raised in his prior petition or rely on any new evidence that was not reasonably available when the prior petition was brought. Accordingly, it dismissed count one as an improper successive claim.

With respect to count two, the court denied the petitioner relief for three reasons. First, citing *State* v. *Madera*, 198 Conn. 92, 97, 503 A.2d 136 (1985), which, in turn, relied on *Tollett* v. *Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973), the court concluded that the petitioner had waived any challenge to the allegedly deficient performance of his trial counsel with respect to the plea proceedings before Judge Dean by

[2] Practice Book § 23-29 provides in relevant part: "The judicial authority may . . . dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

later pleading guilty to murder before Judge Nigro. The habeas court reasoned that because he had waived any claim of ineffective assistance against trial counsel, he could not establish that his prior habeas counsel was ineffective for failing to raise that claim in his prior petition.

Second, the court denied the petitioner relief on count two on the alternative ground that, even if his claims were not waived by his guilty plea to murder, the petitioner had failed to demonstrate that habeas counsel's performance was constitutionally deficient. Finally, the habeas court denied the petitioner relief on the additional alternative ground that he failed to establish that any allegedly deficient performance prejudiced the petitioner. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Specifically, the habeas court concluded that even if trial counsel had presented all of the information that the petitioner alleges should have been presented to Judge Dean about the commission of the crime and the petitioner's background, it was unpersuaded that Judge Dean would have imposed the recommended twenty-five year sentence.

On July 12, 2017, the habeas court granted the petition for certification to appeal. This timely appeal followed.

I

We first address the petitioner's claim that the habeas court improperly dismissed, pursuant to Practice Book § 23-29 (3), count one of his amended petition. The petitioner argues that, contrary to the conclusion of the habeas court, count one of the amended petition does not allege an improperly successive claim because it contains new factual specifications of ineffective assistance of counsel and seeks different forms of relief from those sought in his first habeas petition. According to the petitioner, the claim raised in the first count

of his present petition was not improperly successive because his first habeas petition alleged ineffective assistance of trial counsel on the basis of counsel's failure to secure a dismissal of the jury panel for juror misconduct and his subsequent failure to inform the petitioner that, if he pleaded guilty, he would waive his right to challenge the court's juror misconduct ruling on appeal. The current petition, by contrast, alleges ineffective assistance of trial counsel on the basis of, among other things, counsel's failure to conduct a proper investigation and to present to Judge Dean critical information that would have persuaded the court to impose the recommended twenty-five year sentence. Alternatively, the petitioner argues that the claim in count one is not improperly successive because one of the forms of relief the petitioner seeks in the current petition with respect to count one is different from the relief sought in the prior petition. We are unpersuaded by the petitioner's arguments and, therefore, affirm the habeas court's judgment dismissing count one.

We begin our analysis by reviewing the doctrine of res judicata as it applies to successive petitions in habeas corpus proceedings. "Our courts have repeatedly applied the doctrine of res judicata to claims duplicated in successive habeas petitions filed by the same petitioner. . . . In fact, the ability to dismiss a petition [if] it presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition is memorialized in Practice Book § 23-29 (3)." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

Pursuant to Practice Book § 23-29 (3), "[i]f a previous application brought on the same grounds was denied,

the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing." (Footnote omitted; internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 277, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013). "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Emphasis omitted; internal quotation marks omitted.) Id., 278.

Finally, "[t]he conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citation omitted; internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

We first address the petitioner's assertion that, because his allegation of ineffective assistance of trial counsel is premised on factual allegations different from those pleaded in his previous petition, the claim is not improperly successive. In making this assertion, he relies on *Carpenter* v. *Commissioner of Correction*, 81 Conn. App. 203, 210–12, 840 A.2d 1 (2004), rev'd

in part, 274 Conn. 834, 878 A.2d 1088 (2005), for the proposition that a successive claim of ineffective assistance of counsel against the same attorney is not subject to dismissal pursuant to Practice Book § 23-29 (3) provided that it contains different factual specifications of deficient performance from those pleaded in his previous petition. The decision in *Carpenter*, however, was reversed in part by our Supreme Court because it concluded that this court should not have addressed the question of whether the petition was barred by res judicata in light of the fact that the commissioner never sought dismissal of the petition on that ground. See *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 847, 878 A.2d 1088 (2005) ("[t]he portion of the Appellate Court's judgment concluding that the petition was not a successive petition is reversed; the judgment is affirmed in all other respects").

To the contrary, the petitioner's claim is controlled by *Alvarado* v. *Commissioner of Correction*, 153 Conn. App. 645, 103 A.3d 169, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). In *Alvarado*, this court squarely held that, in the absence of allegations and facts not reasonably available to the petitioner at the time of the original petition or a claim for different relief, a subsequent claim of ineffective assistance directed against the same counsel is subject to dismissal as improperly successive. Id., 650–51. As the court in *Alvarado* stated: "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . However they are proved, the grounds that the petitioner asserted are identical in that each alleges ineffective assistance of counsel, and, therefore, the habeas petition was properly dismissed." (Citation omitted; internal quotation marks omitted.) Id., 651; see also *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d

608 (2009) (petitioner was barred, as matter of res judicata, from raising in second petition same claim of ineffective assistance of counsel raised in his first petition); *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 230–32, 888 A.2d 183 (court properly dismissed second habeas petition alleging ineffective assistance of counsel where second petition was premised on same legal grounds as first petition alleging ineffective assistance of counsel and buttressed by no new facts alleged not to have been reasonably available while first habeas petition was pending), cert. denied, 277 Conn. 917, 895 A.2d 789 (2006).

We turn next to the petitioner's assertion that count one should not have been dismissed as improperly successive because it sought different relief from his prior petition. Specifically, the petitioner relies on the fact that in his amended petition, he requests the court to vacate his conviction and remand this case to the trial court to permit him "the opportunity to persuade the trial court that the original plea bargain should be imposed," whereas in his prior petition, he simply had requested that the case be remanded to the trial court without specifying any further relief. This assertion is meritless.

This court previously rejected in *Carter* v. *Commissioner*, supra, 133 Conn. App. 387, the assertion that a petitioner can avoid dismissal of a successive petition by rewording his request for relief. In *Carter*, the petitioner claimed that the court improperly dismissed his insufficiency of the evidence claim as a successive petition barred by res judicata. Id., 394. The petitioner claimed that, by seeking the remedy of a judgment of acquittal, his petition sought different relief from his previous petition in which he requested a new trial. Id. The petitioner, however, also requested in his first petition, " 'such other relief [as] law and justice require.' " Id. Further, "because the petitioner's claim

in that first habeas was the insufficiency of evidence leading to his conviction, if he had been successful the only appropriate remedy would have been an order of acquittal . . . .'' Id. The court ''was not persuaded by [the petitioner's] novel argument,'' stating that, ''[t]he reason of the law is not so thin . . . as to reward a petitioner merely for rewording the relief requested in two separate petitions . . . .'' Id.

We agree with the habeas court that the relief requested in both the first and second habeas actions ''are legally indistinct for purposes of evaluating whether the present action is a successive petition under Practice Book § 23-29 (3).'' Further, we agree with the habeas court that ''[t]he essential purpose of both the former and present claims . . . is to vacate the petitioner's guilty plea to murder and the resulting sentence and return the case to the criminal docket for further adjudication.'' In both petitions, the petitioner requested that his conviction and sentence be vacated and his case be remanded to the trial court. Despite his attempt at reformulation, the petitioner functionally seeks the same relief in both petitions.

Because the petitioner is bringing a claim on the same legal ground and seeking the same relief, he can avoid dismissal only by alleging and demonstrating that evidence necessary to support the newly asserted facts was not reasonably available at the time of the prior petition. See Practice Book § 23-29 (3). The petitioner, however, conceded during his habeas trial that there were no new facts or evidence not reasonably available to Kraus at the time he filed his previous petition. Therefore, the habeas court properly concluded that the petitioner's claim of ineffective assistance of trial counsel was an improperly successive claim and, thus, is barred by the doctrine of res judicata. Accordingly, we affirm the habeas court's judgment dismissing the first count of the amended petition, in which that claim is alleged.

II

We next address the petitioner's claim that the habeas court improperly denied count two of his petition. Specifically, the petitioner argues that the habeas court improperly concluded that (1) he had waived any claims against prior habeas counsel and trial counsel by pleading guilty before Judge Nigro,[3] (2) he failed to demonstrate that the performance of both prior habeas counsel and trial counsel was constitutionally deficient and (3) he failed to demonstrate that there is a reasonable probability that, but for trial counsel's deficient performance, Judge Dean would have imposed the recommended twenty-five year sentence for manslaughter in the first degree with a firearm.

With respect to the petitioner's first argument, the state concedes that the habeas court misapplied *Tollett* v. *Henderson*, supra, 411 U.S. 258, in concluding that the petitioner had waived at least some of the claims alleged in count two of his amended petition. In light of this partial concession, and because the judgment of the habeas court must be affirmed on at least one of the alternative grounds decided by the court, we decline to opine on whether the rule of waiver set forth in *Tollett* applies in this case. Instead, we conclude that the habeas court properly concluded that the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance of his trial and prior habeas counsel.

We begin our analysis with the law governing the petitioner's claim, as well as our standard of review. "The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred

[3] The petitioner also contends that the habeas court improperly raised the issue of waiver sua sponte. It is unnecessary for us to address this assertion in light of our conclusion that the habeas court properly denied this count for at least one alternative reason.

to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . With respect to the prejudice prong, the petitioner

must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .'' (Citations omitted, internal quotations omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–65, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

''A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.'' *Strickland* v. *Washington*, supra, 466 U.S. 670.

Finally, ''[i]t is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary.'' (Internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, supra, 169 Conn. App. 465.

Turning to the present case, we agree with the habeas court that the petitioner failed to prove the prejudice prong of *Strickland* with respect to trial counsel's alleged deficient performance, and, therefore, his claim of ineffective assistance against habeas counsel also fails.[4] Specifically, the petitioner failed to prove that

[4] The habeas court's ability to assess whether Judge Dean would have been persuaded by the presentation of additional mitigating information was made more difficult by the fact that no transcript exists of the April 24, 1998 sentencing proceeding before Judge Dean because the recording of the proceeding is inaudible. In an attempt to reconstruct the substance of the proceeding, the habeas court admitted as a full exhibit a copy of a newspaper article that describes the proceeding in a limited fashion.

a reasonable probability exists that, but for his trial counsel's failure to investigate and present further mitigating evidence to support the initial plea agreement, Judge Dean would have imposed the recommended sentence.

In support of his claim, the petitioner contends that Judge Dean was unaware of certain information about the facts leading up to the commission of the offense and the petitioner's background and upbringing. Specifically, the petitioner argues that Judge Dean was unaware that the petitioner was intoxicated at the time of the shooting; that trial counsel did not provide enough details regarding the petitioner's home life, particularly that the petitioner reported that he was sexually abused as a child and witnessed domestic abuse; and the PSI report did not indicate specific diagnoses and intellectual disabilities with which Leonard Kenowitz, a substance abuse psychologist and counselor called as an expert witness by the petitioner at the second habeas trial, had diagnosed the petitioner.

The habeas court determined, and we agree, that contrary to the petitioner's averments, the PSI explored these topics. The PSI discussed at length the petitioner's home life, trouble at school, depression, and propensity for violence at a young age. Additionally, the PSI report discussed the argument between the petitioner and the victim the day of the shooting, an altercation between the petitioner and the victim the week prior, the petitioner's regular use of phencyclidine (PCP), and his mental and intellectual deficits. Therefore, substantial mitigating evidence was contained in the PSI presented to Judge Dean.

Despite this mitigating information, the PSI report stated: "[The petitioner] is unfortunately the predictable result of a broken home, an overworked school system, and criminally influenced peers. He is, however, not the only child with those burdens, and those others,

for the most part, do not kill in such a cold-blooded manner." The PSI also stated that "[the petitioner's] initial brushes with the law and subsequent consequences in the criminal justice system were not enough to deter him from future criminal activities" and, "[g]iven the circumstances of this cold-blooded killing, [the petitioner's] history, and for the safety of the community, it is respectfully recommended that the maximum sentence be imposed."

The habeas court, in its memorandum of decision, noted Judge Dean's strong negative reaction to the PSI. Indeed, at the sentencing hearing Judge Dean stated: "It is a terrible PSI—not one good thing in the whole PSI. There's nothing in this PSI that would give me a basis for a [twenty-five year] sentence." The habeas court also noted that Judge Dean's negative view of the information contained in the PSI was informed by the substantial aggravating factors relating to the underlying offense and the petitioner's actions while the case was pending, including tampering with witnesses and "evad[ing] detection and punishment." The petitioner had pleaded guilty to a premeditated shooting and, after the commission of the offense, fled the country.

Moreover, the habeas court emphasized that the petitioner failed to show any remorse for his crime. In its memorandum of decision, the habeas court stated, "[t]he petitioner *never expressed remorse for killing the victim* or even recognition that he caused the legal troubles in which he found himself embroiled. His attitude about the homicide consisted of exploring the ways to avoid conviction and punishment." (Emphasis added.) Finally, the family members of the victim made it clear to the court in a written statement, which was incorporated into the PSI, that they vehemently opposed the recommendation of the twenty-five year plea sentence.

In light of these facts and what the habeas court could glean from the limited record about Judge Dean's

view of the petitioner's attitude and suitability for a low sentence, the habeas court simply was unpersuaded that a more fulsome sentencing presentation by the petitioner's trial counsel would have convinced Judge Dean that a twenty-five year sentence was appropriate in these circumstances.[5] The petitioner has failed to demonstrate that the factual findings that underlie Judge Sferrazza's conclusion are clearly erroneous or that his ultimate legal conclusion regarding prejudice was incorrect. Accordingly, we affirm the judgment of the habeas court dismissing count one and denying count two of the amended petition.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN MOSBY ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NORWALK ET AL.
(AC 42007)

Elgo, Bright and Beach, Js.

Syllabus

The plaintiff M, who brought this action seeking damages for breach of contract, appealed to this court from the judgment of the trial court rendered in favor of the defendant Board of Education of the City of Norwalk and the defendant union, after the court granted the board's motion to dismiss and the union's motion for summary judgment. The court had granted the motion to dismiss on the basis of improper service

[5] The petitioner, in his appellate brief, makes a passing reference to certain instances of deficient performance by his trial counsel occurring after Judge Dean had declined to impose the recommended sentence. The petitioner argues that the habeas court failed to consider these issues in deciding that he was not prejudiced by any deficient performance. Because the petitioner did not adequately brief this claim, we decline to address it. See *In re Elijah C.*, 326 Conn. 480, 495, 165 A.3d 1149 (2017) ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Internal quotation marks omitted.]).

of process pursuant to statute (§ 52-57 [b]), and it rendered summary judgment in favor of the union on the ground that M lacked standing to commence his claim against the union. *Held:*

1. The trial court properly granted the board's motion to dismiss: although M claimed that the board properly was served as a school district pursuant to § 52-57 (b) (4), the language of § 52-57 (b) unambiguously distinguishes the particular ways that service is required to be made upon a school district and a municipal board, and this court would not torture the language in § 52-57 (b) to construe a school board of education as being the equivalent of a school district where the plain meaning of the statute makes a clear distinction between the two; accordingly, because process properly is served against a school board of education only when it is made upon the clerk of the town, city or borough, and service in the present case was not made upon the Norwalk city clerk pursuant to § 52-57 (b) (5), service was defective.
2. This court declined to review M's claim that the trial court improperly granted the union's motion for summary judgment for lack of standing, M having failed to brief the claim adequately; M's brief presented no facts or legal analysis in support of this claim but, rather, contained merely conclusory statements that the trial court erred in granting summary judgment, and there was no analysis of the court's decision granting the motion for summary judgment.

Argued April 16—officially released July 16, 2019

Procedural History

Action to recover damages for breach of contract, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, granted the motion to dismiss filed by the defendant Board of Education of the City of Norwalk; thereafter, the court, *Jacobs*, *J.*, granted the motion for summary judgment filed by the defendant United Public Service Employees Union; subsequently, the court, *Jacobs*, *J.*, rendered judgment in favor of the defendants, from which the named plaintiff appealed to this court. *Affirmed.*

John Mosby, self-represented, the appellant (named plaintiff).

M. Jeffry Spahr, deputy corporation counsel, for the appellee (named defendant).

John M. Walsh, *Jr.*, for the appellee (defendant United Public Service Employees Union).

Opinion

BEACH, J. The self-represented plaintiff, John Mosby,[1] appeals from the judgment of the trial court rendered in favor of the defendants, the Board of Education of the City of Norwalk (board), and United Public Services Employees Union (union), following the granting of the board's motion to dismiss and the union's motion for summary judgment. On appeal, Mosby claims that the court erred in (1) granting the motion to dismiss in favor of the board on the ground of improper service of process, and (2) granting the motion for summary judgment in favor of the union on the ground that Mosby lacked standing to commence this action against the union. We affirm the judgment of the court.

The trial court's memorandum of decision granting the union's motion for summary judgment sets forth the following relevant and undisputed facts. "As custodians employed by the [board], the plaintiffs were members of Local 1042 Council #4, which negotiated Collective Bargaining Agreements with the [board] in 1997, 2003, and 2011. At the time of [Mosby's] retirement on November 5, 1999, he received medical benefits as set forth in . . . the 1997 Agreement. . . .

"Five of the plaintiffs, who all retired between February 9, 2009, and June 30, 2011, received retirement benefits pursuant to the 2003 Agreement . . . . One of the plaintiffs, who retired on June 30, 2012, received retirement benefits pursuant to the 2011 Agreement. All of the plaintiffs are currently receiving the coverage and benefits to which they are entitled pursuant to the Agreements which were in effect on the dates of their retirements.

[1] This action was brought by seven self-represented plaintiffs: John Mosby; Marcus Davis; Mace Greene; Winzer Teel; Jim Giordano; Emma Lawrence; and Steve Fulton. John Mosby was the only plaintiff to appeal from the judgment of the trial court.

"Local 1042 Council #4 was decertified by the Connecticut State Board of Labor Relations on August 26, 2015, and the defendant [union] was certified as the exclusive representative of all custodians employed by the board. The defendant [union] was not a party to the negotiations or the resulting Agreements in 1997, 2003, or 2011."

The plaintiffs' complaint alleged that the board and the union had breached a contract between them governing the plaintiffs' retirement health insurance benefits. On November 29, 2016, the board filed a motion to dismiss the action against it for improper service of process. The court granted the motion to dismiss on January 17, 2017.

On August 9, 2017, the union filed a motion for summary judgment claiming that the plaintiffs lacked standing to pursue this claim. On August 21, 2017, Mosby filed an opposition to the union's motion for summary judgment. Following a hearing, the court granted the union's motion for summary judgment by memorandum of decision dated March 27, 2018, concluding that the plaintiffs lacked standing to bring this action and that the union could not have breached the agreement at issue because it did not become involved in the collective bargaining process until August 26, 2015. This appeal followed.

I

Mosby first claims that the trial court erred in granting the board's motion to dismiss by concluding that he had not effected service of process properly. In particular, Mosby argues that the board properly was served as a school district pursuant to General Statutes § 52-57 (b) (4). In response, the board asserts that proper service on it could be accomplished only by following the procedures prescribed in § 52-57 (b) (5).

"The Superior Court has no authority to render a judgment against a person who was not properly served with process." *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 337, 951 A.2d 632 (2008). The issue of whether a court has jurisdiction "presents a question of law. . . . Our review of the court's legal conclusion is, therefore, plenary. . . . Our review of the trial court's factual findings is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) Id., 337–38.

"[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . [S]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of [personal] jurisdiction over that party. . . . Therefore, [p]roper service of process is not some mere technicality. . . .

"[W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. . . . [A]n action commenced by such improper service must be dismissed." (Citations omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 529–530, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014).

The language of subdivisions (4) and (5) of § 52-57 (b), on which the parties rely to support their respective positions, prescribes the methods of service required in order for the court to obtain jurisdiction over particular classes of defendants. Section 52-57 (b) (4) provides that process shall be served "*against a school district, upon its clerk or one of its committee* . . . ." (Emphasis added.) Section 52-57 (b) (5) provides that process

shall be served "*against a board, commission, department or agency of a town, city or borough*, notwithstanding any provision of law, *upon the clerk of the town, city or borough*, provided two copies of such process shall be served upon the clerk and the clerk shall retain one copy and forward the second copy to the board, commission, department or agency . . . ." (Emphasis added.) As such, these subdivisions unambiguously distinguish the particular ways that service is required to be made upon a school district and a municipal board. The issue, thus, is whether the board in the present case properly is categorized as a "school district" or "a board of a town."

Our Supreme Court's decision in *Board of Education* v. *State Employees Retirement Commission*, 210 Conn. 531, 542–43, 556 A.2d 572 (1989), recognized in a different context the distinction between a school district and a school board of education. In that case, our Supreme Court concluded that a municipal board of education is not a school district within the meaning of General Statutes § 7-452 (1). The plaintiffs argued that "a board of education is the equivalent of a school district" and, thus, qualifies as a municipality pursuant to § 7-452 (1).[2] (Internal quotation marks omitted.) Id., 542. In support of their argument, the plaintiffs relied on General Statutes § 10-240, which provides that "[e]ach town shall through its board of education maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts . . . ." Id. In rejecting the plaintiffs' argument, the court reasoned that "[c]learly, § 10-240 provides that [e]ach *town* . . . shall be a school district . . . and that each town's board of education is merely the instrumentality

[2] General Statutes § 7-452 (1) defines a "municipality," in part, as "any town . . . school district . . . ." The statute does not expressly include in the definition a board of education.

through which the *town* maintain[s] the control of all the public schools within its limits. The plain language of [§ 7-452 (1)] provides that *each town*, *not each board of education*, *is a school district* for the purposes recited therein. We will not torture the words or sentence structure of a statute to import an ambiguity where the ordinary meaning of the language leaves no room for it. . . . Thus, we conclude that *a board of education is not a school district*, and, accordingly, the plaintiffs do not fall within the definition of municipality set forth in § 7-452 (1)." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 542–43.[3]

In accordance with our Supreme Court's reasoning in *State Employees Retirement Commission*, we will not torture the language in § 52-57 (b) to construe a school board of education as being the equivalent of a school district where the plain meaning of the statute makes a clear distinction between the two. We, thus, agree with the board that process properly is served against a school board of education only when it is made "upon the clerk of the town, city, or borough" pursuant to § 52-57 (b) (5). See *Board of Education* v. *Local 1282*, 31 Conn. App. 629, 632, 626 A.2d 1314 ("[t]he designation of a particular officer or officers on whom service may be made excludes all others."), cert. granted, 227 Conn. 909, 632 A.2d 688 (1993) (appeal withdrawn January 3, 1994).

In the present case, Mosby asserted in his opposition to the board's motion to dismiss that service was hand delivered to Patricia Rivera, secretary of the board, on

[3] In addition, several Superior Court decisions have held that, in the context of § 52-57 (b), a municipal board of education properly is served pursuant to § 52-57(b) (5) rather than § 52-57 (b) (4). See *Dvorsky* v. *Board of Education*, Superior Court, judicial district of Litchfield, Docket No. CV-11-6004173-S (May 6, 2011); *Saggese* v. *Board of Education*, Superior Court, judicial district of Litchfield, Docket No. CV-06-5000542 (December 12, 2006) (42 Conn. L. Rptr. 481); *Estrella* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-04-0200832-S (October 21, 2005) (40 Conn. L. Rptr. 180).

or about September 14, 2016. Because service was not made upon the Norwalk city clerk, pursuant to § 52-57 (b) (5), service was defective. Accordingly, the trial court properly granted the board's motion to dismiss for improper service of process.

II

Mosby next claims that the court improperly rendered summary judgment in favor of the union for lack of standing. The union asserts, and we agree, that this claim is inadequately briefed.

Mosby's brief presents no facts or legal analysis in support of this claim, but, rather, merely contains conclusory statements that the court erred in "granting summary judgment" and by "not taking into consideration that the court found merit and genuine issues of material fact and the court had set a trial date." There is also no analysis of the court's decision granting the motion for summary judgment. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Accordingly, we decline to review this claim on the basis that it was inadequately briefed.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LEON MERCER (AC 40875)

Lavine, Prescott and Bright, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and unlawful restraint in the first degree, the defendant appealed to this court. He claimed that he was deprived of his constitutional rights to due process and effective assistance of counsel during the plea bargaining stage of the proceedings because the state initially charged him with a crime predicated on its misunderstanding of the victim's age. *Held* that the record lacked basic information required for a review of the defendant's claim and, thus, was inadequate to conduct a meaningful review of his claim: the defendant did not cite a single specific instance of deficient performance by his trial counsel and, instead, argued that the plea offer to him was probably more severe than what it would have been if the victim's true age had been known to the court and the prosecutor, and that his trial counsel was unable to provide competent legal assistance because he was proceeding on the basis of misinformation about the charges, and there was no evidence showing that, even if a more favorable plea offer had been made, the defendant would have accepted it; moreover, an evidentiary hearing in the proper forum would provide the trier of fact with the evidence that is necessary to evaluate the competency of the assistance of counsel and the harmfulness, if any, to the defendant due to any deficiency in counsel's performance.

Argued May 21—officially released July 16, 2019

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and unlawful restraint in the first degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *John Smriga*, state's attorney, and *Marc Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Leon Mercer, appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and unlawful restraint in the first degree in violation of General Statutes § 53a-95. On appeal, the defendant claims that he was deprived of his constitutional rights to due process and effective assistance of counsel during the plea bargaining stage of the proceedings because the state initially charged him with a crime predicated on its misunderstanding of the victim's age.[1] We are unable to reach the merits of the defendant's appeal due to an inadequate record. Accordingly, we affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, procedural history, and information relating to the defendant's charges are relevant to our resolution of this appeal. On April 4, 2014, the defendant and his wife, Andrea Mercer (Mercer) were with Tangela S. (Tangela),[2] Mercer's half-sister, and other guests, at Tangela's apartment. They all left the apartment to drink wine at the Ramada Inn, leaving Tangela's six children, including the sixteen year old victim, and the two children of one of the guests in the apartment. The adults returned from the Ramada Inn at approximately 1 a.m. on April 5, 2014. The victim awoke when they entered.

The defendant was drunk, behaving in an obnoxious manner, and insulting Mercer. One of the other guests told him to leave, and the defendant stated that he was

[1] The defendant's due process claim is integrated within his claim of ineffective assistance of counsel and is not raised or briefed separately. We, therefore, construe and address the claim as a claim of ineffective assistance of counsel. See *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 669, 157 A.3d 1169, cert. denied 325 Conn. 923, 159 A.3d 1172 (2017).

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

going to his car. Instead of leaving the apartment and going to his car, however, the defendant entered the bedroom where the victim was located. He and the victim engaged in conversation before the defendant pulled the covers off the victim's legs and started rubbing them. The victim repeatedly tucked the blankets back under her in an effort to stop the defendant from rubbing her legs and told the defendant to leave. The defendant pulled the covers off her, turned her over, put his hand over her nose and mouth, unbuttoned her pants, and forcibly touched her clitoris. Not long after, Tangela and Mercer walked down the hallway toward the bedroom. The defendant jumped up, rushed out of the bedroom, and quickly left the apartment. The victim told her mother what the defendant had done, and Tangela reported it to the police.

On August 27, 2015, the defendant was arrested. Because the state thought that the victim was under the age of sixteen at the time of the incident, the state's September 14, 2015 long form information charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), unlawful restraint in the first degree in violation of § 53a-95, and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The age of the victim is an important factor in determining the severity of the charges. Sexual assault in the first degree, in violation of § 53a-70 (a) (1), is a class A felony, rather than class B, if the victim is under the age of sixteen,[3] and a necessary element for the charge of risk of injury to a child in violation of § 53-21 (a) (2) is that the victim is under sixteen.[4]

[3] General Statutes § 53a-70 (b) (2) provides in relevant part: "Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age . . . ." See also General Statutes § 53a-70 (b) (1) ("[e]xcept as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony").

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65,

On March 11, 2016, the defendant rejected a plea offer of ten years incarceration, execution suspended after four years, in connection with those three charges and proceeded to trial. On April 27, 2017, the first day of jury selection, the state filed a substitute long form information in which it additionally charged the defendant with sexual assault in the fourth degree for "subject[ing] another person, under sixteen (16) years of age, to sexual contact without such person's consent" in violation of General Statutes § 53a-73a (a) (2).[5] It was not until after court adjourned for the day on April 27, 2017, that the state confirmed that the victim was sixteen—not fifteen as it had previously erroneously believed—at the time of the incident.

On April 28, 2017, the second day of jury selection,[6] the state filed a substitute amended information that charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), sexual assault in the fourth degree for in violation of § 53a-73a (a) (2),[7] and unlawful restraint in the first degree in violation of § 53a-95, correcting the charges as to the victim's age.

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 . . . ."

[5] General Statutes § 53a-73a (b) provides: "Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony."

[6] We note that on the first day of jury selection, three venirepersons were asked whether the fact that the victim was under the age of sixteen would create a problem for them. Of the three venirepersons, the state and defense each exercised a preemptory challenge, and one venireperson was accepted as the first juror.

On appeal, the defendant raises an "incidental" claim that the error in the victim's age "*may*" have affected the exercise of peremptory challenges. (Emphasis in original.) Because defense counsel did not raise this issue in the trial court, and the record before us regarding the preemptory challenges is inadequate for review, we do not address it.

[7] The state later withdrew the charge of sexual assault in the fourth degree because the statute of limitations had expired.

Following a trial, the jury found the defendant guilty of sexual assault in the first degree and unlawful restraint in the first degree. The court sentenced the defendant to a total effective term of twelve years of incarceration, execution suspended after five years, two years of which were mandatory, and ten years of probation. The defendant appealed.

The defendant's overarching claim on appeal is that he was deprived of his right to effective assistance of counsel. "Our Supreme Court has held that, [a]lmost without exception . . . a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . *Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. . . . [O]n the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review to situations in which the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development. . . . Our role . . . is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing . . . any decision of ours . . . would be entirely speculative." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Leon*, 159 Conn. App. 526, 531–32, 123 A.3d 136, cert. denied, 319 Conn. 949, 125 A.3d 529 (2015).

The defendant does not cite a single specific instance of deficient performance by his trial counsel. Rather, he argues that the plea offer was "probably more severe

than what would have been offered if the [victim's] true age had been known to the court and [the] prosecutor," and that his counsel was unable to render competent legal assistance during the plea bargaining process because "the attorney [was] proceeding on the basis of misinformation about the charges—and possible penalties."

As previously stated in this opinion, an evidentiary hearing in the proper forum provides a trier of fact with the evidence that is necessary to evaluate the competency of the assistance of counsel and the harmfulness, if any, to the defendant due to any deficiency in counsel's performance. See id. In the present case, the record is lacking basic information required for us to review the defendant's claim—especially as we have no evidence before us that, even if a more favorable plea offer had been made, as the defendant argues and speculates, he would have accepted it.

We, therefore, conclude that the record is inadequate for us to conduct a meaningful review.

The judgment is affirmed.

In this opinion the other judges concurred.

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Superior Court Rules

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July 16, 2019

NOTICE

SUPERIOR COURT

On June 13, 2019, the judges of the Superior Court adopted the revisions to the Practice Book that are contained herein.

These revisions become effective on January 1, 2020, except that the amendments to Rule 5.4 of the Rules of Professional Conduct become effective today, July 16, 2019, upon promulgation, by being published in this Connecticut Law Journal; the amendments to Section 2-27A become effective on October 1, 2019, and are applicable to calendar year 2019 and each calendar year thereafter; and new Section 30-12 becomes effective on October 1, 2019.

Attest:

Joseph J. Del Ciampo
Director of Legal Services

INTRODUCTION

Contained herein are revisions to the Rules of Professional Conduct, the Superior Court rules, and one Practice Book form. These revisions are indicated by brackets for deletions and underlines for added language. The designation ''NEW'' is printed with the title of each new rule and form. This material should be used as a supplement to the Practice Book until the next edition becomes available.

The Amendment Notes to the Rules of Professional Conduct and the Commentaries to the Superior Court rules and forms are for informational purposes only.

Rules Committee of the
Superior Court

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AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENTARY: A lawyer must pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

A lawyer's work load must be controlled so that each matter can be handled competently.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthi-

ness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4 (a) (2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify

each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased lawyer or **[**disabled**]** a lawyer with disabilities).

AMENDMENT NOTE: The revisions to the commentary conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Rule 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in Connecticut;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety days of receipt of the notice. If a client cannot be given notice, the representation of that client may be

transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

COMMENTARY: The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller. The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation.

The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon

the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17 (a).

This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5 (e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice. The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice

area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice. Negotiations between a seller and a prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6 (c) (5). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within ninety days. If nothing is heard from the client within that time, consent to the sale is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule

requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. This procedure is contemplated as an in camera review of privileged materials.

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements between Client and Purchaser. The sale may not be financed by increases in fees charged exclusively to the clients of the purchased practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards. Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0

for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule. This Rule applies to the sale of a law practice by representatives of a **[**deceased, disabled or disappeared**]** lawyer with disabilities or a lawyer who is deceased or has disappeared. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

AMENDMENT NOTE: The revisions to the commentary conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who purchases the practice of a **[**deceased, disabled or disappeared**]** lawyer with disabilities or a lawyer who is deceased or has disappeared may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) A lawyer may share legal fees from a court award or settlement with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENTARY: The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subsection (c), such arrangements should not interfere with the lawyer's professional judgment.

This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8 (f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

AMENDMENT NOTE: The revisions to this rule conform it to the provisions of No. 17-202 of the 2017 Public Acts and adopt language similar to Rule 5.4 (a) (4) of the ABA Model Rules of Professional Conduct regarding the sharing of fees and includes language that makes it clear that the rule includes fees obtained through either a court award or settlement.

Rule 7.1. Communications concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENTARY: This Rule governs all communications about a lawyer's services, including advertising **[**permitted by Rule 7.2**]**. Whatever means are used to make known a lawyer's services, statements about them must be truthful. **[**Statements, even if literally true, that are m**]**Misleading truthful statements are **[**also**]** prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is **[**also**]** misleading if **[**there is**]** a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement also is misleading if presented in a way that leads a reasonable person to believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

A**[**n advertisement**]** communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented without a disclaimer indicating that the communicated result is based upon the particular facts of that case so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without

reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's services or fees with **[**the services or fees**]** those of other lawyers or law firms may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4 (3). See also Rule 8.4 (5) for the prohibition against stating or implying an ability to improperly influence **[**improperly**]** a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not

associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as ''Springfield Legal Clinic,'' an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

Letterhead identification of the lawyers in the office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0 (d), because to do so would be false and misleading.

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

Rule 7.2. [Advertising]Communications concerning a Lawyer's Services: Specific Rules

(a) **[**Subject to the requirements set forth in Rules 7.1 and 7.3, a**]**A lawyer may **[**advertise**]** communicate information regarding the lawyer's services through **[**written, recorded or electronic communication, including public**]** any media.

(b) (1) A copy or recording of a**[**n advertisement or**]** communication regarding the lawyer's services shall be kept for three years after its last dissemination along with a record of when and where it was used. An electronic **[**advertisement or**]** communication regarding the lawyer's services shall be copied once every three months on a compact disc or similar technology and kept for three years after its last dissemination.

(2) A lawyer shall comply with the mandatory filing requirement of Practice Book Section 2-28A.

(c) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit or qualified lawyer referral service**[**. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority**]**;

(3) pay for a law practice in accordance with Rule 1.17**[**.**]**;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that

provides for the other person to refer clients or customers to the lawyer, if:

(A) the reciprocal referral agreement is not exclusive; and

(B) the client is informed of the existence and nature of the agreement; and

(5) give a nominal gift as an expression of appreciation, provided that such a gift is neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services, and such gifts are limited to no more than two per year to any recipient.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer is currently certified as a specialist in that field of law by a board or other entity which is approved by the Rules Committee of the Superior Court of this state or by an organization accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

[(d)**]**(e) Any **[**advertisement or**]** communication made **[**pursuant to**]** under this Rule **[**shall**]** must include the name and contact information of at least one lawyer admitted in Connecticut responsible for its content. In the case of television advertisements, the name, address and telephone number of the lawyer admitted in Connecticut shall be displayed in bold print for fifteen seconds or the duration of the commercial, whichever is less, and shall be prominent enough to be readable.

[(e) Advertisements on the electronic media such as television and radio may contain the same factual information and illustrations as permitted in advertisements in the print media.**]**

(f) Every **[**advertisement and written**]** communication that contains information about the lawyer's fee, including those indicating that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of a recovery, or that the fee will be a percentage of the recovery, shall disclose whether and to what extent the client will be responsible for any court costs and expenses of litigation. The disclosure concerning court costs and expenses of litigation shall be in the same print size and type as the information regarding the lawyer's fee and, if broadcast, shall appear for the same duration as the information regarding the lawyer's fee. If the information regarding the fee is spoken, the disclosure concerning court costs and expenses of litigation shall also be spoken.

(g) A lawyer who **[**advertises**]** communicates a specific fee or range of fees for a particular service shall honor the **[**advertised**]** fee or range of fees described in the communication for at least ninety days unless the **[**advertisement**]** communication specifies a shorter period; provided that, for **[**advertisements**]** communications in the yellow pages of telephone directories or other media not published more frequently than annually, the **[**advertised**]** fee or range of fees described in the communication shall be honored for no less than one year following publication.

[(h) No lawyers shall directly or indirectly pay all or part of the cost of an advertisement by a lawyer not in the same firm unless the

advertisement discloses the name and address of the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(i) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of Rule 7.3, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, fax numbers, website and e-mail addresses and domain names, and a designation such as ''attorney'' or ''law firm.''

(2) Date of admission to the Connecticut bar and any other bars and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the state or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer practices or is designated, subject to the requirements of Rule 7.4, or is certified pursuant to Rule 7.4A.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Fee for initial consultation and fee schedule.

(9) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(10) Nothing in this Rule prohibits a lawyer or law firm from permitting the inclusion in the law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.**]**

[(j)**]**(h) **[**Notwithstanding the provisions of subsection (d), a**]**A lawyer and service may participate in an internet based client to lawyer matching service, provided the service otherwise complies with the Rules of Professional Conduct. If the service provides an exclusive referral to a lawyer or law firm for a particular practice area in a particular geographical region, then the service must comply with subsection **[**(d)**]**(e).

COMMENTARY: **[**To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.**]**

This Rule permits public dissemination of information concerning a lawyer or law firm's name **[**or firm name**]**, address, e-mail address, website, and telephone number; the kinds of services the lawyer will

undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; whether and to what extent the client will be responsible for any court costs and expenses of litigation; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against ''undignified'' advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.**]**

Record of [Advertising] <u>Communications</u>. Subsection (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a

requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others To Recommend a Lawyer. Except as permitted under subsection (c) (1) through (c) **[**(3)**]**(5), lawyers are not permitted to pay others for recommending the lawyer's services **[**or for channeling professional work in a manner that violates Rule 7.3**]**. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible ''recommendations.''

Subsection (c) (1)**[**, however,**]** allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper advertisements, television and radio airtime, domain name registrations, sponsorship fees, advertisements, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public relations personnel, business development staff, television and radio employees or spokespersons, and website designers. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

Pursuant to subsection (c) (4), a lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer.

Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4 (c). Except as provided in Rule 1.5 (e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate subsection (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Subsection (c) (5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if the value of the gift is more than $50, or otherwise indicates a sharing of either legal fees or the ultimate recovery in the referred case, or if the gift is offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend

the lawyer, any payment to the lead generator is consistent with Rules 1.5 (e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Paying Others To Recommend a Lawyer above (definition of ''recommendation''). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appro-

priate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act **[**(requiring that organizations that are identified as lawyer referral services: [i] permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; [ii] require each participating lawyer to carry reasonably adequate malpractice insurance; [iii] act reasonably to assess client satisfaction and address client complaints; and [iv] do not make referrals to lawyers who own, operate or are employed by the referral service)**]**.

A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. **[**Nor could the lawyer allow in person, telephonic, or real-time contacts that would violate Rule 7.3.**]**

Communications about Fields of Practice. Subsection (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer ''concentrates in,'' ''focuses on,'' or that the practice is ''limited to'' particular fields of practice, but such communications are subject to the ''false and misleading'' standard applied in Rule 7.1 to communications concerning a lawyer's services.

The Patent and Trademark Office has a long established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such lawyer is currently certified as a specialist in that field of law by a board or other entity which is approved by the Rules Committee of the Superior Court of this state or by an organization accredited by the American Bar Association. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information. This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an e-mail address or a physical office location.

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

Rule 7.3. Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

[(a)**]**(b) A lawyer shall not **[**initiate personal,**]** solicit professional employment by live **[**telephone, or real-time electronic**]** person-to-person contact**[**, including telemarketing contact, for the purpose of obtaining professional employment, except in the following circumstances:**]** when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain unless the contact is:

(1) **[**If the target of the solicitation is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client**]** With a lawyer or a person who has a family, close personal or prior business or professional relationship with the lawyer;

(2) Under the auspices of a public or charitable legal services organization;

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization;

(4) **[**If the target of the solicitation is**]** With a person who routinely uses for business purposes the type of legal services offered by the lawyer or with a business organization, a not-for-profit organization or governmental body and the lawyer seeks to provide services related to the organization.

[(b)**]**(c) A lawyer shall not **[**contact or send a written or electronic communication to any person for the purpose of obtaining**]** solicit professional employment even when not otherwise prohibited by subsection (b) if:

(1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer;

(2) **[**It has been**]** The target of the solicitation has made known to the lawyer **[**that the person does not want to receive such communications from**]** a desire not to be solicited by the lawyer;

(3) The **[**communication**]** solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

[(4) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;**]** or

[(5)**]**(4) The **[**written or electronic communication**]** solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the **[**communication**]** solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than forty days prior to the mailing of the **[**communication**]** solicitation, or the recipient is a person or entity within the scope of subsection (b) of this Rule.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

[(c)**]**(e) Every written **[**communication**]** solicitation, as well as any **[**communication**]** solicitation by audio or video recording, or other electronic means, used by a lawyer for the purpose of obtaining professional employment from anyone known to be in need of legal services in a particular matter, must be clearly and prominently labeled ''Advertising Material'' in red ink on the first page of any written **[**communication**]** solicitation and the lower left corner of the outside envelope or container, if any, and at the beginning and ending of any **[**communication**]** solicitation by audio or video recording or other electronic means. If the written **[**communication**]** solicitation is in the form of a self-mailing brochure or pamphlet, the label ''Advertising Material'' in red ink shall appear on the address panel of the brochure or pamphlet. **[**Brochures**]** Communications solicited by clients or any other person, or if the recipient is a person or entity within the scope of subsection (b) of this Rule, need not contain such marks. No reference shall be made in the **[**communication**]** solicitation to the **[**communication**]** solicitation having any kind of approval from the Connecticut bar. Such written

[communications**]** solicitations shall be sent only by regular United States mail, not by registered mail or other forms of restricted delivery.

[(d) The first sentence of any written communication concerning a specific matter shall be: ''If you have already retained a lawyer for this matter, please disregard this letter.''

(e) A written communication seeking employment in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal matter.

(f) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked ''Sample'' in bold letters in red ink in a type size one size larger than the largest type used in the contract and the words ''Do Not Sign'' in bold letters shall appear on the client signature line.

(g) Written communications shall be on letter-sized paper rather than legal-sized paper and shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets.

(h) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the target of the solicitation.**]**

[(i)**]**(f) Notwithstanding the prohibitions in **[**subsection (a)**]** this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses **[**in-person or telephone**]** live person-to-person contact to **[**solicit**]**

enroll members[hips] or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENTARY: [A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a] Subsection (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication [typically does not constitute] is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to [Internet] electronic searches.

[Unrestricted solicitation involves definite social harms. Among these are harassment, overreaching, provocation of nuisance litigation and schemes for systematic fabrication of claims, all of which were experienced prior to adoption of restrictions on solicitation. Measures reasonably designed to suppress these harms are constitutionally legitimate. At the same time, measures going beyond realization of such objectives would appear to be invalid under relevant decisions of the United States Supreme Court.]

''Live person-to-person contact'' means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter

without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

The potential for [abuse] overreaching inherent in [direct in-person, live telephone or real time electronic solicitation] live person-to-person contact justifies [their] its prohibition, [particularly] since lawyers have alternative means of conveying necessary information [to those who may be in need of legal services]. In particular, communications can be mailed or transmitted by e-mail or other electronic means that [do not involve real time contact and] do not violate other laws [governing solicitations]. These forms of communications [and solicitations] make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to [direct in-person, telephone or real-time electronic] live person-to-person persuasion that may overwhelm a person's judgment.

[The use of general advertising and written, recorded and electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1.] The contents of [direct in-person, live telephone, or real-time electronic] live person-to-person contact can be disputed and [are] may not be subject to a third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in [abusive practices] overreaching against a former client, or a person with whom the lawyer has a close personal, [or] family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for [abuse] overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or

contract issues; and other people who routinely retain lawyers for business transactions or formations. **[**Consequently, the general prohibition in Rule 7.3 (a) and the requirements of Rule 7.3 (c) are not applicable in those situations. Also, nothing in this Commentary**]** Subsection (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[In determining whether a contact is permissible under Rule 7.3 (b), it is relevant to consider the time and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Moreover, if after sending a letter or other communication to a member of the public as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the person may violate the provisions of Rule 7.3 (b).

The requirement in Rule 7.3 (c) that certain communications be marked ''Advertising Material'' does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from any person known to be in need of legal services within the meaning of this Rule.**]**

A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c) (3), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 (c) (2) is prohibited. Live person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

This Rule [is] does not [intended to] prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Subsection **[**(i)**]**(f) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, subsection **[**(i)**]**(f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c). **[**See Rule 8.4 (a).**]**

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

[Rule 7.4. Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation ''Patent Attorney'' or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation ''Admiralty,'' ''Proctor in Admiralty'' or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law except as provided herein and in Rule 7.4A.

COMMENTARY: This Rule permits a lawyer to indicate fields of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. A lawyer may indicate that the lawyer ''concentrates in,'' ''focuses on,'' or that the practice is ''limited to'' particular fields of practice as long as the statements are not false or misleading in violation of Rule 7.1. However, the lawyer may not use the terms ''specialist,'' ''certified,'' ''board-certified,'' ''expert'' or any similar variation, unless the lawyer has been certified in accordance with Rule 7.4A.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.**]**

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising:

amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

Rule 7.4A. Certification as Specialist

(a) **[**Except as provided in Rule 7.4, a**]** A lawyer shall not state or imply that he or she is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field of law by a board or other entity which is approved by the Rules Committee of the Superior Court of this state or by an organization accredited by the American Bar Association. Among the criteria to be considered by the Rules Committee in determining upon application whether to approve a board or entity as an agency which may certify lawyers practicing in this state as being specialists, shall be the requirement that the board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competence, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.

(b) Upon certifying a lawyer practicing in this state as being a specialist, the board or entity that certified the lawyer shall notify the Statewide Grievance Committee of the name and juris number of the lawyer, the specialty field in which the lawyer was certified, the date of such certification and the date such certification expires.

(c) A lawyer shall not state that he or she is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

(d) Certification as a specialist may not be attributed to a law firm.

(e) Lawyers may be certified as specialists in the following fields of law:

(1) Administrative law: The practice of law dealing with states, their political subdivisions, regional and metropolitan authorities and other public entities including, but not limited to, their rights and duties, financing, public housing and urban development, the rights of public employees, election law, school law, sovereign immunity, and constitutional law; practice before federal and state courts and governmental agencies.

(2) Admiralty: The practice of law dealing with all matters arising under the Carriage of Goods by Sea Act (COGSA), Harter Act, Jones Act, and federal and state maritime law including, but not limited to, the carriage of goods, collision and other maritime torts, general average, salvage, limitation of liability, ship financing, ship subsidies, the rights of injured sailors and longshoremen; practice before federal and state courts and governmental agencies (including the Federal Maritime Commission).

(3) Antitrust: The practice of law dealing with all matters arising under the Sherman Act, Clayton Act, Federal Trade Commission Act, Hart-Scott-Rodino Antitrust Improvements Act and state antitrust statutes including, but not limited to, restraints of trade, unfair competition, monopolization, price discrimination, restrictive practices; practice before federal and state courts and governmental agencies.

(4) Appellate practice: The practice of law dealing with all procedural and substantive aspects of civil and criminal matters before federal

and state appeals courts including, but not limited to, arguments and the submission of briefs.

(5) Business bankruptcy: The practice of law dealing with all aspects of the United States Bankruptcy Code when the debtor was engaged in business before the institution of a Chapter 7, 9, or 11 proceeding. This includes, but is not limited to, business liquidations, business reorganizations, and related adversary and contested proceedings.

(6) Child welfare law: The practice of law representing children, parents or the government in all child protection proceedings including emergency, temporary custody, adjudication, disposition, foster care, permanency planning, termination, guardianship, and adoption. Child welfare law does not include representation in private child custody and adoption disputes where the state is not a party.

(7) Consumer bankruptcy: The practice of law dealing with all aspects of the United States Bankruptcy Code when the debtor was not engaged in business before the institution of a Chapter 7, 12, or 13 proceeding. This includes, but is not limited to, liquidations, wage earner plans, family farmers and related adversary and contested proceedings.

(8) Civil rights and discrimination: The practice of law dealing with all matters arising under federal and state law relating to proper treatment in the areas of, among others, public accommodations, voting, employment, housing, administration of welfare and social security benefits; practice before federal and state courts and governmental agencies.

(9) Civil trial practice: The practice of law dealing with representation of parties before federal or state courts in all noncriminal matters.

(10) Commercial transactions: The practice of law dealing with all aspects of commercial paper, contracts, sales and financing, including, but not limited to, secured transactions.

(11) Consumer claims and protection: The practice of law dealing with all aspects of consumer transactions including, but not limited to, sales practices, credit transactions, secured transactions and warranties; all matters arising under the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Magnuson-Moss Act, the Truth in Lending Act, state statutes such as the ''Little FTC'' acts, and other analogous federal and state statutes.

(12) Corporate and business organizations: The practice of law dealing with all aspects of the formation, operation and dissolution of corporations, partnerships (general and limited), agency and other forms of business organizations.

(13) Corporate finance and securities: The practice of law dealing with all matters arising under the Securities Act of 1933, Securities Exchange Act of 1934, Investment Advisors Act (or the Federal Securities Code, if adopted) and other federal and state securities statutes; financing corporate activities; mergers and acquisitions; practice before the Securities and Exchange Commission and state securities commissions.

(14) Criminal: The practice of law dealing with the prosecution or representation of persons accused of crimes at all stages of criminal

proceedings in federal or state courts including, but not limited to, the protection of the accused's constitutional rights.

(15) Elder law: The practice of law involving the counseling and representation of older persons and their representatives relative to the legal aspects of health and long term care planning and financing; public benefits; alternative living arrangements and attendant residents' rights under state and federal law; special needs counseling; surrogate decision making; decision making capacity; conservatorships; conservation, disposition, and administration of the estates of older persons and the implementation of decisions of older persons and their representatives relative to the foregoing with due consideration to the applicable tax consequences of an action, involving, when appropriate, consultation and collaboration with professionals in related disciplines. Lawyers certified in elder law must be capable of recognizing issues that arise during counseling and representation of older persons or their representatives with respect to the following: Abuse, neglect or exploitation of older persons; estate, trust, and tax planning; other probate matters. Elder law specialists must be capable of recognizing the professional conduct and ethical issues that arise during representation.

(16) Environmental: The practice of law dealing with all aspects of the regulation of environmental quality by both federal and state governments; control of air pollution, water pollution, noise pollution, toxic substances, pesticides, and civilian uses of nuclear energy; solid waste/resource recovery; all matters arising under the National Environmental Policy Act, Clean Air Act, Federal Water Pollution Control

Act, Noise Control Act, Solid Waste Disposal Act, Toxic Substance Control Act and other federal and state environmental statutes; practice before federal and state courts and governmental agencies.

(17) Estate planning and probate: The practice of law dealing with all aspects of the analysis and planning for the conservation and disposition of estates, giving due consideration to the applicable tax consequences, both federal and state; the preparation of legal instruments in order to effectuate estate plans; administering estates, including tax related matters, both federal and state.

(18) Family and matrimonial: The practice of law dealing with all aspects of antenuptial and domestic relationships, separation and divorce, alimony and child support, distribution of assets, child custody matters and adoption, giving due consideration to the tax consequences, and court proceedings relating thereto.

(19) Government contracts and claims: The practice of law dealing with all aspects of the negotiation and administration of contracts with federal and state governmental agencies.

(20) Immigration and naturalization: The practice of law dealing with obtaining and retaining permission to enter and remain in the United States including, but not limited to, such matters as visas, change of status, deportation and naturalization; representation of aliens before courts and governmental agencies; protection of aliens' constitutional rights.

(21) International: The practice of law dealing with all aspects of the relations among states, international business transactions, inter-

national taxation, customs and trade law and foreign and comparative law.

(22) Labor: The practice of law dealing with all aspects of employment relations (public and private) including, but not limited to, unfair labor practices, collective bargaining, contract administration, the rights of individual employees and union members, employment discrimination; all matters arising under the National Labor Relations Act (Wagner Act), Labor Management Relations Act (Taft-Hartley Act), Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), Fair Labor Standards Act, Title VII of The Civil Rights Act of 1964, Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA), other federal statutes and analogous state statutes; practice before the National Labor Relations Board, analogous state boards, federal and state courts, and arbitrators.

(23) Military: The practice of law dealing with the presentation of parties before courts-martial and other military tribunals in disputes arising under the Uniform Code of Military Justice; the representation of veterans and their dependents in seeking government benefits due to them on account of military service; handling civil law problems of the military.

(24) Natural resources: The practice of law dealing with all aspects of the regulation of natural resources such as coal, oil, gas, minerals, water and public lands; the rights and responsibilities relating to the ownership and exploitation of such natural resources.

(25) Patent, trademark and copyright: The practice of law dealing with all aspects of the registration, protection and licensing of patents,

trademarks or copyrights; practice before federal and state courts in actions for infringement and other actions; the prosecution of applications before the United States Patent and Trademark Office; counseling with regard to the law of unfair competition as it relates to patents, trademarks and copyrights.

(26) (A) Residential real estate: The practice of law dealing with all aspects of real property transactions involving single one-to-four family residential dwellings when the client uses such dwelling or expresses in writing the intent to use such dwelling as the client's primary or other residence including, but not limited to, real estate conveyances, title searches and property transfers, leases, condominiums, cooperatives, and other common interest communities, planned unit developments, mortgages, condemnation and eminent domain, zoning and land use planning, property taxes, and determination of property rights.

(B) Commercial real estate: The practice of law dealing with all aspects of real property transactions except for residential real estate as defined in subparagraph (A) of this subdivision, including, but not limited to, real estate conveyances, title searches and property transfers, leases, condominiums, cooperatives and other common interest communities, planned unit developments, mortgages, condemnation and eminent domain, zoning and land use planning, property taxes, real estate development and financing (with due consideration to tax and securities consequences) and determination of property rights.

(27) Taxation: The practice of law dealing with all matters arising under the Internal Revenue Code, Employee Retirement Income Security Act (ERISA), state and local tax laws and foreign tax laws, including

counseling with respect thereto; practice before federal and state courts and governmental agencies.

(28) Workers' compensation: The practice of law dealing with the representation of parties before federal and state agencies, boards and courts in actions to determine eligibility for workers' compensation, and disability.

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

Rule 7.4C. Application by Board or Entity To Certify Lawyers as Specialists

Any board or entity seeking the approval of the Rules Committee of the Superior Court for authority to certify lawyers practicing in this state as being specialists in a certain field or fields of law as set forth in Rule 7.4A (e), shall file **[**an original and six copies of**]** its application with the Legal Specialization Screening Committee pursuant to Rule 7.4B on form JD-ES-63. The application materials shall be filed in a format prescribed by the Legal Specialization Screening Committee, which may require them to be filed electronically.

AMENDMENT NOTE: The amendment to this rule removes an inconsistency between the language of the first and second sentences of this rule and clarifies that the Legal Specialization Screening Committee will prescribe the format of the application submission, rather than requiring the application to be filed in multiple hard copies. This

amendment is also consistent with the Regulations of the Legal Specialization Screening Committee, which were updated in January, 2016, to require that applicants file one hard copy and one electronic copy of their applications.

[Rule 7.5. Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENTARY: A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the ''ABC Legal Clinic.'' Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is

acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as ''Springfield Legal Clinic,'' an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to subsection (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, ''Smith and Jones,'' for that title suggests partnership in the practice of law.**]**

AMENDMENT NOTE: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

AMENDMENTS TO THE GENERAL PROVISIONS OF THE SUPERIOR COURT RULES

Sec. 2-27A. Minimum Continuing Legal Education

(a) On an annual basis, each attorney admitted in Connecticut shall certify, on the registration form required by Section 2-27 (d), that the attorney has completed in the last calendar year no less than twelve credit hours of appropriate continuing legal education, at least two hours of which shall be in ethics/professionalism. The ethics and pro-

fessionalism components may be integrated with other courses. This rule shall apply to all attorneys except the following:

(1) Judges and senior judges of the Supreme, Appellate or Superior Courts, judge trial referees, family support magistrates, family support magistrate referees, workers' compensation commissioners, elected constitutional officers, federal judges, federal magistrate judges, federal administrative law judges or federal bankruptcy judges;

(2) Attorneys who are disbarred, resigned pursuant to Section 2-52, on inactive status pursuant to Section 2-56 et seq., or retired pursuant to Sections 2-55 or 2-55A;

(3) Attorneys who are serving on active duty in the armed forces of the United States for more than six months in such year;

(4) Attorneys for the calendar year in which they are admitted;

(5) Attorneys who earn less than $1000 in compensation for the provision of legal services in such year;

(6) Attorneys who, for good cause shown, have been granted temporary or permanent exempt status by the Statewide Grievance Committee.

(b) Attorneys may satisfy the required hours of continuing legal education:

(1) By attending legal education courses provided by any local, state or special interest bar association in this state or regional or national bar associations recognized in this state or another state or territory of the United States or the District of Columbia (hereinafter referred to as ''bar association''); any private or government legal employer; any court of this or any other state or territory of the United States or

the District of Columbia; any organization whose program or course has been reviewed and approved by any bar association or organization that has been established in any state or territory of the United States or the District of Columbia to certify and approve continuing legal education courses; and any other nonprofit or for-profit legal education providers, including law schools and other appropriate continuing legal education providers, and including courses remotely presented by video conference, webcasts, webinars, or the like by said providers.

(2) By self-study of appropriate programs or courses directly related to substantive or procedural law or related topics, including professional responsibility, legal ethics, or law office management and prepared by those continuing legal education providers in subsection (b) (1). Said self-study may include viewing and listening to all manner of communication, including, but not limited to, video or audio recordings or taking online legal courses. The selection of self-study courses or programs shall be consistent with the objective of this rule, which is to maintain and enhance the skill level, knowledge, ethics and competence of the attorney and shall comply with the minimum quality standards set forth in subsection (c) (6).

(3) By publishing articles in legal publications that have as their primary goal the enhancement of competence in the legal profession, including, without limitation, substantive and procedural law, ethics, law practice management and professionalism.

(4) By teaching legal seminars and courses, including the participation on panel discussions as a speaker or moderator.

(5) By serving as a full-time faculty member at a law school accredited by the American Bar Association or approved by the state bar examining committee, in which case, such attorney will be credited with meeting the minimum continuing legal education requirements set forth herein.

(6) By serving as a part-time or adjunct faculty member at a law school accredited by the American Bar Association or approved by the state bar examining committee, in which case, such attorney will be credited with meeting the minimum continuing legal education requirements set forth herein at the rate of one hour for each hour of classroom instruction and one hour for each two hours of preparation.

(7) By serving as a judge or coach for a moot court or mock trial course or competition that is part of the curriculum at or sanctioned by a law school accredited by the American Bar Association or approved by the state bar examining committee.

(c) Credit computation:

(1) Credit for any of the above activities shall be based on the actual instruction time, which may include lecture, panel discussion, and question and answer periods. Credit for the activity listed in subsection (b) (7) shall be based upon the actual judging or coaching time, up to four hours for each activity per year. Self-study credit shall be based on the reading time or running time of the selected materials or program.

(2) Credit for attorneys preparing for and presenting legal seminars, courses or programs shall be based on one hour of credit for each two hours of preparation. A maximum of six hours of credit may be

credited for preparation of a single program. Credit for presentation shall be on an hour for hour basis. Credit may not be earned more than once for the same course given during a calendar year.

(3) Credit for the writing and publication of articles shall be based on the actual drafting time required. Each article may be counted only one time for credit.

(4) Continuing legal education courses ordered pursuant to Section 2-37 (a) (5) or any court order of discipline shall not count as credit toward an attorney's obligation under this section.

(5) Attorneys may carry forward no more than two credit hours in excess of the current annual continuing legal education requirement to be applied to the following year's continuing legal education requirement.

(6) To be eligible for continuing legal education credit, the course or activity must: (A) have significant intellectual or practical content designed to increase or maintain the attorney's professional competence and skills as a lawyer; (B) constitute an organized program of learning dealing with matters directly related to legal subjects and the legal profession; and (C) be conducted by an individual or group qualified by practical or academic experience.

(d) Attorneys shall retain records to prove compliance with this rule for a period of seven years.

(e) Violation of this section shall constitute misconduct.

(f) Unless it is determined that the violation of this section was wilful, a noncompliant attorney must be given at least sixty days to comply with this section before he or she is subject to any discipline.

(g) A Minimum Continuing Legal Education Commission (''commission'') shall be established by the Judicial Branch and shall be composed of four Superior Court judges and four attorneys admitted to practice in this state, all of whom shall be appointed by the chief justice of the Supreme Court or his or her designee and who shall serve without compensation. The charge of the commission will be to provide advice regarding the application and interpretation of this rule and to assist with its implementation including, but not limited to, the development of a list of frequently asked questions and other documents to assist the members of the bar to meet the requirements of this rule.

COMMENTARY—2017: It is the intention of this rule to provide attorneys with relevant and useful continuing legal education covering the broadest spectrum of substantive, procedural, ethical and professional subject matter at the lowest cost reasonably feasible and with the least amount of supervision, structure and reporting requirements, which will aid in the development, enhancement and maintenance of the legal knowledge and skills of practicing attorneys and will facilitate the delivery of competent legal services to the public.

The rule also permits an attorney to design his or her own course of study. The law is constantly evolving and attorneys, like all other professionals, are expected to keep abreast of changes in the profession and the law if they are to provide competent representation.

Subsection (a) provides that Connecticut attorneys must complete twelve credit hours of continuing legal education per calendar year. Subsection (a) also lists those Connecticut attorneys, who are exempt from compliance, including, among others: judges, senior judges, attor-

neys serving in the military, new attorneys during the year in which they are admitted to practice, attorneys who earn less than $1000 in compensation for the provision of legal services in the subject year, and those who obtain an exempt status for good cause shown. The subsection also provides an exemption for attorneys who are disbarred, resigned, on inactive status due to disability, or are retired. The exemption for attorneys who earn less than $1000 in compensation in a particular year is not intended to apply to attorneys who claim that they were not paid as a result of billed fees to a client. All compensation received for the provision of legal services, whether the result of billed fees or otherwise, must be counted. There is no exemption for attorneys who are suspended or on administrative suspension. Subsection (d) requires an attorney to maintain adequate records of compliance. For continuing legal education courses, a certificate of attendance shall be sufficient proof of compliance. For self-study, a contemporaneous log identifying and describing the course listened to or watched and listing the date and time the course was taken, as well as a copy of the syllabus or outline of the course materials, if available, and, when appropriate, a certificate from the course provider, shall be sufficient proof of compliance. For any other form of continuing legal education, a file including a log of the time spent and drafts of the prepared material shall provide sufficient proof of compliance.

COMMENTARY—2019: The change to this section adds workers' compensation commissioners and elected constitutional officers to the list of attorneys who are exempt from the requirements of this rule.

Sec. 2-28A. Attorney Advertising; Mandatory Filing

(a) Any attorney who advertises services to the public through any media, electronic or otherwise, or through written or recorded communication pursuant to Rule 7.2 of the Rules of Professional Conduct shall file a copy of each such advertisement or communication with the Statewide Grievance Committee either prior to or concurrently with the attorney's first dissemination of the advertisement or written or recorded communication, except as otherwise provided in subsection (b) herein. The materials shall be filed in a format prescribed by the Statewide Grievance Committee, which may require them to be filed electronically. Any such submission in a foreign language must include an accurate English language translation.

The filing shall consist of the following:

(1) A copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, DVDs, audiotapes, compact discs, print media, photographs of outdoor advertising);

(2) A transcript, if the advertisement or communication is in video or audio format;

(3) A list of domain names used by the attorney primarily to offer legal services, which shall be updated quarterly;

(4) A sample envelope in which the written communication will be enclosed, if the communication is to be mailed;

(5) A statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear,

and the anticipated time period during which the advertisement or communication will be used.

(b) The filing requirements of subsection (a) do not extend to any of the following materials:

(1) An advertisement in the public media that contains only **[**the information**]**, in whole or in part, **[**contained in Rule 7.2 (i) of the Rules of Professional Conduct**]** the following information, provided the information is not false or misleading:

(A) The name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, fax numbers, website and e-mail addresses and domain names, and a designation such as ''attorney'' or ''law firm'';

(B) Date of admission to the Connecticut bar and any other bars and a listing of federal courts and jurisdictions where the lawyer is licensed to practice;

(C) Technical and professional licenses granted by the state or other recognized licensing authorities;

(D) Foreign language ability;

(E) Fields of law in which the lawyer practices or is designated, subject to the requirements of Rule 7.1, or is certified pursuant to Rule 7.4A;

(F) Prepaid or group legal service plans in which the lawyer participates;

(G) Acceptance of credit cards;

(H) Fee for initial consultation and fee schedule; and

(l) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(2) An advertisement in a telephone directory;

(3) A listing or entry in a regularly published law list;

(4) An announcement card stating new or changed associations, new offices, or similar changes relating to an attorney or firm, or a tombstone professional card;

(5) A communication sent only to:

(A) Existing or former clients;

(B) Other attorneys or professionals; business organizations including trade groups; not-for-profit organizations; governmental bodies and/or

(C) Members of a not-for-profit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by an attorney; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the attorney who is recommended, furnished, or paid for by the organization.

(6) Communication that is requested by a prospective client.

(7) The contents of an attorney's Internet website that appears under any of the domain names submitted pursuant to subdivision (3) of subsection (a).

(c) If requested by the Statewide Grievance Committee, an attorney shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written or recorded communications.

(d) The statewide bar counsel shall review advertisements and communications filed pursuant to this section that have been selected for such review on a random basis. If after such review the statewide bar counsel determines that an advertisement or communication does not comply with the Rules of Professional Conduct, the statewide bar counsel shall in writing advise the attorney responsible for the advertisement or communication of the noncompliance and shall attempt to resolve the matter with such attorney. If the matter is not resolved to the satisfaction of the statewide bar counsel, he or she shall forward the advertisement or communication and a statement describing the attempt to resolve the matter to the Statewide Grievance Committee for review. If, after reviewing the advertisement or communication, the Statewide Grievance Committee determines that it violates the Rules of Professional Conduct, it shall forward a copy of its file to the disciplinary counsel and direct the disciplinary counsel to file a presentment against the attorney in the Superior Court.

(e) The procedure set forth in subsection (d) shall apply only to advertisements and communications that are reviewed as part of the random review process. If an advertisement or communication comes

to the attention of the statewide bar counsel other than through that process, it shall be handled pursuant to the grievance procedure that is set forth in Section 2-29 et seq.

(f) The materials required to be filed by this section shall be retained by the Statewide Grievance Committee for a period of one year from the date of their filing, unless, at the expiration of the one year period, there is pending before the Statewide Grievance Committee, a reviewing committee, or the court a proceeding concerning such materials, in which case the materials that are the subject of the proceeding shall be retained until the expiration of the proceeding or for such other period as may be prescribed by the Statewide Grievance Committee.

(g) Except for records filed in court in connection with a presentment brought pursuant to subsection (d), records maintained by the statewide bar counsel, the Statewide Grievance Committee and/or the Disciplinary Counsel's Office pursuant to this section shall not be public. Nothing in this rule shall prohibit the use or consideration of such records in any subsequent disciplinary or client security fund proceeding and such records shall be available in such proceedings to a judge of the Superior Court or to the standing committee on recommendations for admission to the bar, to disciplinary counsel, to the statewide bar counsel or assistant bar counsel, or, with the consent of the respondent, to any other person, unless otherwise ordered by the court.

(h) Violation of subsections (a) or (c) shall constitute misconduct.

COMMENTARY: The following revisions were made to incorporate the 2018 amendments to the American Bar Association's Model Rules

of Professional Conduct concerning attorney advertising: amendments to Rules 7.1 through 7.3, Rule 7.4A, and Section 2-28A and the repeal of Rules 7.4 and 7.5.

Sec. 3-9. Withdrawal of Appearance; Duration of Appearance

(a) An attorney or party whose appearance has been filed shall be deemed to have withdrawn such appearance upon the filing of a new appearance that is stated to be in place of the appearance on file in accordance with Section 3-8. Appropriate entries shall be made in the court file. An attorney or party whose appearance is deemed to have been withdrawn may file an appearance for the limited purpose of filing an objection to the in place of appearance at any time.

(b) An attorney may withdraw his or her appearance for a party or parties in any action after the appearance of other counsel representing the same party or parties has been entered. An application for withdrawal in accordance with this subsection shall state that such an appearance has been entered and that such party or parties are being represented by such other counsel at the time of the application. Such an application may be granted by the clerk as of course, if such an appearance by other counsel has been entered.

(c) In addition to the grounds set forth in subsections (a), (b), and (d), a lawyer who represents a party or parties on a limited basis in accordance with Section 3-8 (b) and has completed his or her representation as defined in the limited appearance, shall file a certificate of completion of limited appearance on Judicial Branch form JD-CL-122. The certificate shall constitute a full withdrawal of a limited appearance. Copies of the certificate must be served in accordance

with Sections 10-12 through 10-17 on the client, and all attorneys and self-represented parties of record.

(d) All appearances of counsel shall be deemed to have been withdrawn 180 days after the entry of judgment in any action seeking a dissolution of marriage or civil union, annulment, or legal separation, provided no appeal shall have been taken. In the event of an appeal or the filing of a motion to open a judgment within such 180 days, all appearances of counsel shall be deemed to have been withdrawn after final judgment on such appeal or motion or within 180 days after the entry of the original judgment, whichever is later. Nothing herein shall preclude or prevent any attorney from filing a motion to withdraw with leave of the court during that period subsequent to the entry of judgment. In the absence of a specific withdrawal, counsel will continue of record for all postjudgment purposes until 180 days have elapsed from the entry of judgment or, in the event an appeal or a motion to open a judgment is filed within such 180 day period, until final judgment on that appeal or determination of that motion, whichever is later.

(e) Except as provided in subsections (a), (b), (c) and (d), no attorney shall withdraw his or her appearance in any civil, criminal, family, juvenile or other matter after it has been entered upon the record of the court without the leave of the court.

(f) All appearances in juvenile matters shall be deemed to continue during the period of delinquency probation supervision or probation supervision with residential placement, family with service needs supervision, **[**or**]** any commitment to the Commissioner of the Department of Children and Families pursuant to General Statutes § 46b-

129 or protective supervision. An attorney appointed by the chief public defender to represent a parent in a pending neglect or uncared for proceeding shall continue to represent the parent for any subsequent petition to terminate parental rights if the attorney remains under contract to the Office of the Chief Public Defender to represent parties in child protection matters, the parent appears at the first hearing on the termination petition and qualifies for appointed counsel, unless the attorney files a motion to withdraw pursuant to Section 3-10 that is granted by the judicial authority or the parent requests a new attorney. The attorney shall represent the client in connection with appeals, subject to Section 35a-20, and with motions for review of permanency plans, revocations or postjudgment motions and shall have access to any documents filed in court. The attorney for the child shall continue to represent the child in all proceedings relating to the child, including termination of parental rights and during the period until final adoption following termination of parental rights.

COMMENTARY: The revision to subsection (e) of this section is intended to clarify that except as otherwise provided in subsections (a), (b), (c) and (d), no attorney shall withdraw his or her appearance in any civil, criminal, family, juvenile or other matter without the court's permission. For example, where a criminal defendant fails to appear after an appearance has been entered, the appearance shall not be withdrawn by the attorney without permission of the court.

The revisions to subsection (f) of this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 6-3. –Preparation; When; By Whom; Filing

(a) Judgment files in civil, criminal, family and juvenile cases shall be prepared when: (1) an appeal is taken; (2) a party requests in writing that the judgment be incorporated into a judgment file; (3) a judgment has been entered involving the granting of a dissolution of marriage or civil union, a legal separation, an annulment, injunctive relief, or title to property (including actions to quiet title but excluding actions of foreclosure), except in those instances where judgment is entered in such cases pursuant to Section 14-3 and no appeal has been taken from the judicial authority's judgment; (4) a judgment has been entered in a juvenile matter involving allegations that a child has been neglected, abused, or uncared for, or involving termination of parental rights, **[**commitment of a delinquent child**]** or commitment of a child from a family with service needs; (5) in criminal cases, sentence review is requested; or (6) ordered by the judicial authority.

(b) Unless otherwise ordered by the judicial authority, the judgment file in juvenile cases shall be prepared by the clerk and in all other cases, in the clerk's discretion, by counsel or the clerk. As to judgments of foreclosure, the clerk's office shall prepare a certificate of judgment in accordance with a form prescribed by the chief court administrator only when requested in the event of a redemption. In those cases in which a plaintiff has secured a judgment of foreclosure under authority of General Statutes § 49-17, when requested, the clerk shall prepare a decree of foreclosure in accordance with a form prescribed by the chief court administrator.

(c) Judgment files in family cases shall be filed within sixty days of judgment.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

AMENDMENTS TO THE CIVIL RULES

Sec. 8-2. Waiver of Court Fees and Costs

(a) Prior to the commencement of an action, or at any time during its pendency, a party may file with the clerk of the court in which the action is pending, or in which the party intends to return a writ, summons and complaint, an application for waiver of fees payable to the court and for payment by the state of the costs of service of process. The application shall set forth the facts which are the basis of the claim for waiver and for payment by the state of any costs of service of process; a statement of the applicant's current income, expenses, assets and liabilities; pertinent records of employment, gross earnings, gross wages and all other income; and the specific fees and costs of service of process sought to be waived or paid by the state and the amount of each. The application and any representations shall be supported by an affidavit of the applicant to the truth of the facts recited.

(b) The clerk with whom such an application is filed shall refer it to the court of which he or she is clerk. If the court finds that a party is indigent and unable to pay a fee or fees payable to the court or to pay the cost of service of process, the court shall waive such fee or fees and the cost of service of process shall be paid by the state.

(c) There shall be a rebuttable presumption that a person is indigent and unable to pay a fee or fees or the cost of service of process if (1) such person receives public assistance or (2) such person's income after taxes, mandatory wage deductions and child care expenses is one hundred twenty-five percent or less of the federal poverty level. For purposes of this subsection, ''public assistance'' includes, but is not limited to, state administered general assistance, temporary family assistance, aid to **[**the aged, blind and disabled**]** persons who are elderly, persons who are blind or visually impaired or persons with disabilities, food stamps and supplemental security income.

(d) Nothing in this section shall preclude the court from (1) finding that a person whose income does not meet the criteria of subsection (c) of this section is indigent and unable to pay a fee or fees or the cost of service of process, or (2) denying an application for the waiver of the payment of a fee or fees or the cost of service of process when the court finds that (A) the applicant has repeatedly filed actions with respect to the same or similar matters, (B) such filings establish an extended pattern of frivolous filings that have been without merit, (C) the application sought is in connection with an action before the court that is consistent with the applicant's previous pattern of frivolous filings, and (D) the granting of such application would constitute a flagrant misuse of Judicial Branch resources.

If an application for the waiver of the payment of a fee or fees or the cost of service of process is denied, the court clerk shall, upon the request of the applicant, schedule a hearing on the application.

Nothing in this section shall affect the inherent authority of the court to manage its docket.

COMMENTARY: The revisions to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

(NEW) Sec. 13-12A. Disclosure of Medicare Enrollment, Eligibility and Payments Received

In any civil action involving allegations of personal injury, information on the claimant's Medicare enrollment status, eligibility or payments received, which is sufficient to allow providers of liability insurance, including self-insurance, no fault insurance, and/or workers' compensation insurance to comply with Medicare Secondary Payer obligations, including those imposed under 42 U.S.C. § 1395y (b) (2) and (8), shall be subject to discovery by any party by interrogatory as provided in Sections 13-6 through 13-8. The interrogatories shall be limited to those set forth in Form 217. The information disclosed pursuant to this section shall not be admissible at trial solely by reason of such disclosure. Such information shall be used only for purposes of the litigation and for complying with 42 U.S.C. § 1395y (b) (8) and shall not be used or disclosed for any other purpose.

COMMENTARY: This new section requires disclosure of Medicare enrollment, eligibility and payments received in any civil action involving allegations of personal injury.

Sec. 16-4. Disqualification of Jurors and Selection of Panel

(a) A person shall be disqualified to serve as a juror if such person is found by the judicial authority to exhibit any quality which will impair this person's capacity to serve as a juror, except that no person shall

be disqualified on the basis of deafness or being hard of hearing **[**impairment**]**.

(b) The clerks shall keep a list of all persons disqualified under this section and shall send a copy of that list to the jury administrator at such time as the jury administrator may direct.

(c) The clerk of the court, in impaneling the jury for the trial of each cause, shall, when more jurors are in attendance than are required of the panel, designate by lot those who shall compose the panel.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 16-8. Oath and Admonitions to Trial Jurors

(a) The judicial authority shall cause the jurors selected for the trial to be sworn or affirmed in accordance with General Statutes §§ 1-23 and 1-25. The judicial authority shall admonish the jurors not to read, listen to or view news reports of the case or to discuss with each other or with any person not a member of the jury the cause under consideration, except that after the case has been submitted to the jury for deliberation the jurors shall discuss it among themselves in the jury room.

(b) In the presence of the jury, the judicial authority shall instruct any interpreter for a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing to refrain from participating in any manner in the deliberations of the jury and to refrain from having any communications, oral or visual, with any member of the jury except for the literal translation of jurors' remarks made during deliberations.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 16-16. Jury Deliberations

After the case has been submitted to the jury, the jurors shall be in the custody of an officer who shall permit no person to be present with them or to speak to them when assembled for deliberations except a qualified interpreter assisting a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing. The jurors shall be kept together for deliberations as the judicial authority reasonably directs. If the judicial authority permits the jury to recess its deliberations, the judicial authority shall admonish the jurors not to discuss the case until they reconvene in the jury room. The judicial authority shall direct the jurors to select one of their members to preside over the deliberations and to deliver any verdict agreed upon, and the judicial authority shall admonish the jurors that until they are discharged in the case they may communicate upon subjects connected with the trial only while they are convened in the jury room. If written forms of verdict are submitted to the jury, the member of the jury selected to deliver the verdict shall sign any verdict agreed upon.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 23-42. –Judicial Action on Motion for Permission To Withdraw Appearance

(a) The presiding judge shall fully examine the memoranda of law filed by counsel and the petitioner, together with any relevant portions of the records of prior trial court, appellate and postconviction proceedings. If, after such examination, the presiding judge concludes that the submissions establish that the petitioner's case is wholly frivolous, such judge shall grant counsel's motion to withdraw and permit the

petitioner to proceed as a self-represented party. A memorandum shall be filed under seal setting forth the basis for granting any motion under Section 23-41.

(b) If, after the examination required in subsection (a), the presiding judge does not conclude that the petitioner's case is wholly frivolous, such judge may deny the motion to withdraw, may appoint substitute counsel for further proceedings under Section 23-41, or may allow the withdrawal on other grounds and appoint new counsel to represent the petitioner.

COMMENTARY: The change to this section makes explicit the requirement that the presiding judge's memorandum of decision on motions for leave to withdraw, filed by appointed counsel pursuant to this section, is to be filed under seal. This requirement brings the rule into conformity with the Rules of Appellate Procedure, wherein the trial court's decision on a motion for leave to withdraw, filed by appointed counsel pursuant to Section 62-9 (d) (3), is sealed, in cases in which an appeal has already been filed.

Sec. 23-68. Where Presence of Person May Be by Means of an Interactive Audiovisual Device

(a) Upon motion of any party, and at the discretion of the judicial authority, any party, **[**or**]** counsel, witness, or other participant in a proceeding may appear by means of an interactive audiovisual device at any proceeding in any civil matter, including all proceedings within the jurisdiction of the small claims section, or any family matter, including all proceedings within the jurisdiction of the family support magistrate division.

(b) Upon order of the judicial authority, an incarcerated individual may be required to appear by means of an interactive audiovisual device in any civil or family matter.

(c) For purposes of this section, an interactive audiovisual device must operate so that the judicial authority; any party and his or her counsel, if any**[**,**]**; and any person appearing by means of an interactive audiovisual device pursuant to a court order under this section **[**and the judicial authority**]** can see and communicate with each other simultaneously. In addition, a procedure by which an incarcerated individual and his or her counsel can confer in private must be provided.

(d) Unless otherwise required by law or unless otherwise ordered by the judicial authority, prior to any proceeding in which a person appears by means of an interactive audiovisual device, copies of all documents which may be offered at the proceeding shall be provided to all counsel and self-represented parties in advance of the proceeding.

(e) Nothing contained in this section shall be construed to limit the discretion of the judicial authority to deny a request to appear by means of an interactive audiovisual device where, in the judicial authority's judgment, the interest of justice or the presentation of the case require that the party, **[**or**]** counsel, witness, or other participant in the proceeding appear in person.

(f) For purposes of this section, judicial authority includes family support magistrates and magistrates appointed by the chief court administrator pursuant to General Statutes § 51-193*l*.

COMMENTARY: The rule has been amended to permit witnesses and other participants in a proceeding to appear by means of an interactive audiovisual device upon motion and at the discretion of the

judicial authority. This revision broadens the application of the rule to include appearances by means of an interactive audiovisual device by expert witnesses or other witnesses which will increase the court's flexibility in scheduling matters, minimize the inconvenience to witnesses, and reduce the costs of litigation.

AMENDMENTS TO THE FAMILY RULES

Sec. 25-5. Automatic Orders upon Service of Complaint or Application

The following automatic orders shall apply to both parties, with service of the automatic orders to be made with service of process of a complaint for dissolution of marriage or civil union, legal separation, or annulment, or of an application for custody or visitation. An automatic order shall not apply if there is a prior, contradictory order of a judicial authority. The automatic orders shall be effective with regard to the plaintiff or the applicant upon the signing of the complaint or the application and with regard to the defendant or the respondent upon service and shall remain in place during the pendency of the action, unless terminated, modified, or amended by further order of a judicial authority upon motion of either of the parties:

(a) In all cases involving a child or children, whether or not the parties are married or in a civil union:

(1) Neither party shall permanently remove the minor child or children from the state of Connecticut, without written consent of the other or order of a judicial authority.

(2) A party vacating the family residence shall notify the other party or the other party's attorney, in writing, within forty-eight hours of such move, of an address where the relocated party can receive communication. This provision shall not apply if and to the extent there is a prior, contradictory order of a judicial authority.

(3) If the parents of minor children live apart during this proceeding, they shall assist their children in having contact with both parties, which is consistent with the habits of the family, personally, by telephone, and in writing. This provision shall not apply if and to the extent there is a prior, contradictory order of a judicial authority.

(4) Neither party shall cause the children of the marriage or the civil union to be removed from any medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) The parties shall participate in the parenting education program within sixty days of the return day or within sixty days from the filing of the application.

(6) These orders do not change or replace any existing court orders, including criminal protective and civil restraining orders.

(b) In all cases involving a marriage or civil union, whether or not there are children:

(1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(A) Nothing in subsection (b) (1) shall be construed to preclude a party from purchasing or selling securities, in the usual course of the parties' investment decisions, whether held in an individual or jointly held investment account, provided that the purchase or sale is: (i) intended to preserve the estate of the parties, (ii) transacted either on an open and public market or at an arm's length on a private market, and (iii) completed in such manner that the purchased securities or sales proceeds resulting from a sale remain, subject to the provisions and exceptions recited in subsection (b) (1), in the account in which the securities or cash were maintained immediately prior to the transaction. Nothing contained in this subsection shall be construed to apply to a party's purchase or sale on a private market of an interest in an entity that conducts a business in which the party is or intends to become an active participant.

(B) Notwithstanding the requirement of subparagraph (A) of subsection (b) (1) that the transaction be made in the usual course of the parties' investment decisions, if historically the parties' usual course of investment decisions involves their discussion of proposed transactions with each other before they are made, but a sale proposed by one party is a matter of such urgency as to timing that the party proposing the sale has a good faith belief that the delay occasioned by such discussion would result in loss to the estate of the parties, then the party proposing the sale may proceed with the transaction without such prior discussion, but shall notify the other party of the transaction immediately upon its execution; provided, that a sale permitted by this subparagraph (B) shall be subject to all other conditions

and provisions of subparagraph (A) of subsection (b) (1), so long as the transaction is intended to preserve the estate of the parties.

(2) Neither party shall conceal any property.

(3) Neither party shall encumber (except for the filing of a lis pendens) without the consent of the other party, in writing, or an order of a judicial authority, any property except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause any asset, or portion thereof, co-owned or held in joint name, to become held in his or her name solely without the consent of the other party, in writing, or an order of the judicial authority.

(5) Neither party shall incur unreasonable debts hereafter, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards.

(6) Neither party shall cause the other party to be removed from any medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(7) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners or renters insurance policies in full force and effect.

(8) If the parties are living together on the date of service of these orders, neither party may deny the other party use of the current

primary residence of the parties, whether it be owned or rented property, without order of a judicial authority. This provision shall not apply if there is a prior, contradictory order of a judicial authority.

(c) In all cases:

(1) The parties shall each complete and exchange sworn financial statements substantially in accordance with a form prescribed by the chief court administrator within thirty days of the return day. The parties may thereafter enter and submit to the court a stipulated interim order allocating income and expenses, including, if applicable, proposed orders in accordance with the uniform child support guidelines.

(2) The case management date for this case is _____. The parties shall comply with Section 25-50 to determine if their actual presence at the court is required on that date.

(d) The automatic orders of a judicial authority as enumerated above shall be set forth immediately following the party's requested relief in any complaint for dissolution of marriage or civil union, legal separation, or annulment, or in any application for custody or visitation, and shall set forth the following language in bold letters:

Failure to obey these orders may be punishable by contempt of court. If you object to or seek modification of these orders during the pendency of the action, you have the right to a hearing before a judge within a reasonable time.

The clerk shall not accept for filing any complaint for dissolution of marriage or civil union, legal separation, or annulment, or any application for custody or visitation, that does not comply with this subsection.

COMMENTARY: New subparagraph (A) of subsection (b) (1) is intended to allow one party to make certain investment transactions during the pendency of a dissolution action in a manner which is consistent with the parties' prior practice, without necessarily obtaining the prior consent of the other party or a court order. A transaction by one party without the consent of the other should be considered ''in the usual course of the parties' investment decisions'' only if the party making the transaction has historically and consistently been the sole decision maker with regard to transactions of similar type and magnitude. If a transaction is in the usual course of the parties' investment decisions, the other requirements of new subparagraph (A) of subsection (b) (1) must also be met in order for the transaction to be permitted. The provisions of subparagraph (A) do not apply to a transaction that permits the sale of a business under this rule, whether the party is an active participant, or not.

New subparagraph (B) of subsection (b) (1) is intended to allow, in the limited emergency circumstances described, a unilateral sale which meets all of the requirements of subparagraph (A), except that it is not of a type historically made by the sole decision of the party completing the sale.

AMENDMENTS TO THE JUVENILE RULES

Sec. 26-1. Definitions Applicable to Proceedings on Juvenile Matters

In these definitions and in the rules of practice and procedure on juvenile matters, the singular shall include the plural and the plural, the singular where appropriate.

(a) The definitions of the terms ''child,'' **[**''youth,''**]** ''abused,'' **[**''mentally deficient,''**]** ''delinquent,'' ''delinquent act,'' ''neglected,'' ''uncared for,'' ''alcohol-dependent child,'' ''family with service needs,'' ''drug-dependent child,'' ''serious juvenile offense,'' ''serious juvenile offender,'' **[**and**]** ''serious juvenile repeat offender,'' ''pre-dispositional study,'' and ''risk and needs assessment'' shall be as set forth in General Statutes § 46b-120. The definition of ''victim'' shall be as set forth in General Statutes § 46b-122.

(b) ''Commitment'' means an order of the judicial authority whereby custody and/or guardianship of a child **[**or youth**]** are transferred to the Commissioner of the Department of Children and Families.

(c) ''Complaint'' means a written allegation or statement presented to the judicial authority that a child's **[**or youth's**]** conduct as a delinquent or situation as a child from a family with service needs brings the child **[**or youth**]** within the jurisdiction of the judicial authority as prescribed by General Statutes § 46b-121.

(d) ''Detention'' means a secure building or staff secure facility for the temporary care of a child who is the subject of a delinquency complaint.

(e) ''Family support center'' means a community-based service center for children and families involved with a complaint that has been filed with the Superior Court under General Statutes § 46b-149, that provides multiple services, or access to such services, for the purpose of preventing such children and families from having further involvement with the court as families with service needs.

(f) ''Guardian'' means a person who has a judicially created relationship with a child **[**or youth**]**, which is intended to be permanent and

self-sustaining, as evidenced by the transfer to the caretaker of the following parental rights with respect to the child **[**or youth**]**: protection, education, care and control of the person, custody of the person and decision making.

(g) ''Hearing'' means an activity of the court on the record in the presence of a judicial authority and shall include (1) ''Adjudicatory hearing'': A court hearing to determine the validity of the facts alleged in a petition or information to establish thereby the judicial authority's jurisdiction to decide the matter which is the subject of the petition or information; (2) ''Contested hearing on an order of temporary custody'' means a hearing on an ex parte order of temporary custody or an order to appear which is held not later than ten days from the day of a preliminary hearing on such orders. Contested hearings shall be held on consecutive days except for compelling circumstances or at the request of the respondent; (3) ''Dispositive hearing'': The judicial authority's jurisdiction to adjudicate the matter which is the subject of the petition or information having been established, a court hearing in which the judicial authority, after considering the social study or predispositional study and the total circumstances of the child **[**or youth**]**, orders whatever action is in the best interests of the child**[**, youth**]** or family and, where applicable, the community. In the discretion of the judicial authority, evidence concerning adjudication and disposition may be presented in a single hearing; (4) ''Preliminary hearing'' means a hearing on an ex parte order of temporary custody or an order to appear or the first hearing on a petition alleging that a child **[**or youth**]** is uncared for, abused, or neglected. A preliminary hearing

on any ex parte custody order or order to appear shall be held not later than ten days from the issuance of the order; (5) ''Plea hearing'' is a hearing at which (i) a parent or guardian who is a named respondent in a neglect, uncared for or dependency petition, upon being advised of his or her rights, admits, denies, or pleads nolo contendere to allegations contained in the petition; or (ii) a child **[**or youth**]** who is a named respondent in a delinquency petition or information enters a plea of not guilty, guilty, or nolo contendere upon being advised of the charges against him or her contained in the information or petition, or a hearing at which a child **[**or youth**]** who is a named respondent in a family with service needs petition admits or denies the allegations contained in the petition upon being advised of the allegations**[**.**]**; (6) ''Probation status review hearing'' means a hearing requested, ex parte, by a probation officer regardless of whether a new offense or violation has been filed. The court may grant the ex parte request, in the best interest of the child or the public, and convene a hearing on the request within seven days.

(h) ''Indian child'' means an unmarried person under age eighteen who is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe, and is involved in custody proceedings, excluding delinquency proceedings.

(i) ''Parent'' means a biological mother or father or adoptive mother or father except a biological or adoptive mother or father whose parental rights have been terminated; or the father of any child **[**or youth**]**

born out of wedlock, provided at the time of the filing of the petition (1) he has been adjudicated the father of such child **[**or youth**]** by a court which possessed the authority to make such adjudication, or (2) he has acknowledged in writing to be the father of such child **[**or youth**]**, or (3) he has contributed regularly to the support of such child, or (4) his name appears on the birth certificate, or (5) he has filed a claim for paternity as provided under General Statutes § 46b-172a, or (6) he has been named in the petition as the father of the minor child **[**or youth**]** by the mother.

(j) ''Parties'' includes: (1) The child **[**or youth**]** who is the subject of a proceeding and those additional persons as defined herein; (2) ''Legal party'': Any person, including a parent, whose legal relationship to the matter pending before the judicial authority is of such a nature and kind as to mandate the receipt of proper legal notice as a condition precedent to the establishment of the judicial authority's jurisdiction to adjudicate the matter pending before it; and (3) ''Intervening party'': Any person who is permitted to intervene in accordance with Section 35a-4.

(k) ''Permanency plan'' means a plan developed by the Commissioner of the Department of Children and Families for the permanent placement of a child **[**or youth**]** in the commissioner's care.

Permanency plans shall be reviewed by the judicial authority as prescribed in General Statutes §§ 17a-110 (b), 17a-111b (c), 46b-129 (k), **[**46b-141,**]** and 46b-149 (j).

(*l*) ''Petition'' means a formal pleading, executed under oath, alleging that the respondent is within the judicial authority's jurisdiction to adjudi-

cate the matter which is the subject of the petition by reason of cited statutory provisions and seeking a disposition. Except for a petition for erasure of record, such petitions invoke a judicial hearing and shall be filed by any one of the parties authorized to do so by statute.

(m) ''Information'' means a formal pleading filed by a prosecutor alleging that a child **[**or youth**]** in a delinquency matter is within the judicial authority's jurisdiction.

(n) **[**''Probation'' means a legal status created in delinquency cases following conviction whereby a respondent child is permitted to remain in the home or in the physical custody of a relative or other fit person subject to supervision by the court through the court's probation officers and upon such terms as the judicial authority determines, subject to the continuing jurisdiction of the judicial authority.**]** ''Probation supervision'' means a legal status whereby a juvenile who has been adjudicated delinquent is placed by the court under the supervision of juvenile probation for a specified period of time and upon such terms as the court determines.

(o) ''Probation supervision with residential placement'' means a legal status whereby a juvenile who has been adjudicated delinquent is placed by the court under the supervision of juvenile probation for a specified period of time, upon such terms as the court determines, that include a period of placement in a secure or staff-secure residential treatment facility, as ordered by the court, and a period of supervision in the community.

[(o)**]**(p) ''Respondent'' means a person who is alleged to be a delinquent or a child from a family with service needs, or a parent or a

guardian of a child [or youth] who is the subject of a petition alleging that the child is uncared for, abused, neglected, or requesting termination of parental rights.

(q) ''Secure-residential facility'' means a hardware-secured residential facility that includes direct staff supervision, surveillance enhancements and physical barriers that allow for close supervision and controlled movement in a treatment setting.

[(p)](r) ''Specific steps'' means those judicially determined steps the parent or guardian and the Commissioner of the Department of Children and Families should take in order for the parent or guardian to retain or regain custody of a child [or youth].

[(q)](s) ''Staff secure facility'' means a residential facility: (1) that does not include construction features designed to physically restrict the movements and activities of juvenile residents who are placed therein, (2) that may establish reasonable rules restricting entrance to and egress from the facility, and (3) in which the movements and activities of individual juvenile residents may, for treatment purposes, be restricted or subject to control through the use of intensive staff supervision.

(t) ''Staff-secure residential facility'' means a residential facility that provides residential treatment for children in a structured setting where the children are monitored by staff.

[(r)](u) ''Supervision'' includes: (1) ''Nonjudicial supervision'': A legal status without the filing of a petition or a court conviction or adjudication but following the child's admission to a complaint wherein a probation officer exercises supervision over the child with the consent of the child

and the parent; (2) ''Protective supervision'': A disposition following adjudication in neglected, abused or uncared for cases created by an order of the judicial authority requesting a supervising agency other than the court to assume the responsibility of furthering the welfare of the family and best interests of the child **[**or youth**]** when the child's **[**or youth's**]** place of abode remains with the parent or any suitable or worthy person, or when the judicial authority vests custody or guardianship in another suitable and worthy person, subject to the continuing jurisdiction of the court; and (3) ''Judicial supervision'': A legal status similar to probation for a child adjudicated to be from a family with service needs or subject to supervision pursuant to an order of suspended proceedings under General Statutes § 46b-133b or § 46b-133e.

[(s)**]**(v) ''Take into Custody Order'' means an order by a judicial authority that a child be taken into custody and immediately turned over to a detention superintendent where probable cause has been found that the child has committed a delinquent act, there is no less restrictive alternative available, and the child meets the criteria set forth in Section 31a-13.

COMMENTARY: The amendments to this section conform it to General Statutes § 46b-120, as amended by No. 18-31, § 25, of the 2018 Public Acts.

Sec. 27-4A. Ineligibility for Nonjudicial Handling of Delinquency Complaint

In the case of a delinquency complaint, a child shall not be eligible for nonjudicial handling if one or more of the following apply, unless waived by the judicial authority:

(1) The alleged misconduct:

(A) is a serious juvenile offense under General Statutes § 46b-120, or any other felony or violation of General Statutes § 53a-54d;

(B) concerns the theft or unlawful use or operation of a motor vehicle; or

(C) concerns the sale of, or possession of with intent to sell, any illegal drugs or the use or possession of a firearm.

(2) The child was previously **[**convicted**]** adjudicated delinquent or adjudged a child from a family with service needs.

(3) The child admitted nonjudicially at least twice previously to having been delinquent.

(4) The alleged misconduct was committed by a child while on probation or under judicial supervision.

(5) If the nature of the alleged misconduct warrants judicial intervention.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 30-6. Basis for Detention

No child may be held in detention unless a judge of the Superior Court determines, based on the available facts that there is probable cause to believe that the child has committed the delinquent acts alleged, that there is no appropriate less restrictive alternative available and that there is (1) probable cause to believe that the level of risk that the child **[**will**]** poses **[**a risk**]** to public safety if released to the community prior to the court hearing or disposition cannot be managed in a less restrictive setting, (2) a need to hold the child in order to

ensure the child's appearance before the court or compliance with court process, as demonstrated by the child's previous failure to respond to the court process, or (3) a need to hold the child for another jurisdiction. The court in exercising its discretion to detain under General Statutes § 46b-133 (e) may consider as an alternative to detention a suspended detention order with graduated sanctions based upon a detention risk **[**assessment**]** screening for such child developed by the Judicial Branch.

COMMENTARY: The amendments to this section conform it to General Statutes § 46b-133, as amended by No. 18-31, § 33, of the 2018 Public Acts.

(NEW) Sec. 30-12. Where Presence of a Detained Child May Be by Means of an Interactive Audiovisual Device

(a) The appearance of a detained child for proceedings held in accordance with Sections 30-10 and 30-11 may, with the consent of the detained child, the consent of counsel for the detained child, and in the discretion of the judicial authority on motion of a party or on its own motion, be made by means of an interactive audiovisual device. Such interactive audiovisual device must operate so that such detained child, counsel, and the judicial authority if the proceeding is in court, can see and communicate with each other simultaneously. In addition, a procedure by which such detained child can confer with counsel in private must be provided.

(b) Unless otherwise required by law or unless otherwise ordered by the judicial authority, prior to a detention hearing in which a detained child appears by means of an interactive audiovisual device, copies

of all documents which may be offered at the detention hearing shall be provided to all counsel.

COMMENTARY: This new rule provides for a detained child to appear by means of an interactive audiovisual device at detention hearings held in accordance with Sections 30-10 and 30-11.

Sec. 30a-3. –Standards of Proof; Burden of Going Forward

(a) The standard of proof for a delinquency **[**conviction**]** adjudication is evidence beyond a reasonable doubt and for a family with service needs adjudication is clear and convincing evidence.

(b) The burden of going forward with evidence shall rest with the juvenile prosecutor.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 30a-5. Dispositional Hearing

(a) The dispositional hearing may follow immediately upon **[**a conviction or**]** an adjudication.

(b) The judicial authority may admit into evidence any testimony that is considered relevant to the issue of the disposition, in any form the judicial authority finds of probative value, but no disposition shall be made by the judicial authority until the predispositional study, unless waived, has been submitted. A written predispositional study may be waived by the judicial authority for good cause shown upon the request of the parties, provided that the basis for the waiver and the probation officer's oral summary of any investigation are both placed on the record. The predispositional study shall be presented to the judicial authority and copies thereof shall be provided to all counsel in sufficient time for them to prepare adequately for the dispositional hearing,

and, in any event, no less than forty-eight hours prior to the date of the disposition.

(c) The prosecutor and the child **[**or youth**]** and parent or guardian shall have the right to produce witnesses on behalf of any dispositional plan they may wish to offer.

(d) Prior to any disposition, the child **[**or youth**]** shall be allowed a reasonable opportunity to make a personal statement to the judicial authority in mitigation of any disposition.

(e) The judicial authority shall determine an appropriate disposition upon **[**conviction**]** adjudication of a child as delinquent in accordance with General Statutes §§ 46b-140 and 46b-141.

(f) The judicial authority shall determine an appropriate disposition upon adjudication of a child from a family with service needs in accordance with General Statutes § 46b-149 (h).

(g) The judicial authority shall determine the appropriate disposition upon a finding that a child adjudicated as a child from a family with service needs has violated a valid court order.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 30a-6. –Statement on Behalf of Victim

Whenever a victim of a delinquent act, the parent or guardian of such victim or such victim's counsel exercises the right to appear before the judicial authority for the purpose of making a statement to the judicial authority concerning the disposition of the case, no statement shall be received unless the delinquent has signed a statement of responsibility, confirmed a plea agreement or been **[**convicted**]** adjudicated as a delinquent.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 31a-5. Motion for Judgment of Acquittal

(a) After the close of the juvenile prosecutor's case-in-chief, upon motion of the child **[**or youth**]** or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit an adjudication **[**or finding of guilty**]**. Such judgment of acquittal shall not apply to any lesser included offense for which the evidence would reasonably permit a finding of guilty.

(b) The judicial authority shall either grant or deny the motion before calling upon the child **[**or youth**]** to present the respondent's case-in-chief. If the motion is not granted, the respondent may offer evidence without having reserved the right to do so.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 31a-11. Motion for New Trial

(a) Upon motion of the child **[**or youth**]**, the judicial authority may grant a new trial if it is required in the interest of justice in accordance with Section 42-53 of the rules of criminal procedure.

(b) Unless otherwise permitted by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after an adjudication **[**or finding of guilty**]** or within any further time the judicial authority allows during the five day period.

(c) A request for a new trial on the ground of newly discovered evidence shall require a petition for a new trial and shall be brought

in accordance with General Statutes § 52-270. The judicial authority may grant the petition even though an appeal is pending.

COMMENTARY: The amendments to this section conform the section to the provisions of No. 18-31 of the 2018 Public Acts.

Sec. 31a-18. Modification of Probation and Supervision

(a) At any time during the period of probation**[**,**]** supervision **[**or suspended commitment**]** or probation supervision with residential placement, after hearing and for good cause shown, the judicial authority may modify or enlarge the conditions, whether originally imposed by the judicial authority under this section or otherwise. The judicial authority may extend the period of probation supervision or probation supervision with residential placement by not more than twelve months, for a total maximum supervision period not to exceed thirty months as deemed appropriate by the judicial authority. The judicial authority shall cause a copy of any such order to be delivered to the child **[**or youth**]** and to such child's **[**or youth's**]** parent, guardian or other person having control over such child **[**or youth**]**, and the child's **[**or youth's**]** probation officer.

(b) The child, attorney, juvenile prosecutor or parent may, in the event of disagreement, in writing request the judicial authority not later than five days of the receipt thereof for a hearing on the propriety of the modification. In the absence of any request, the modification of the terms of probation may be effected by the probation officer with the approval of the supervisor and the judicial authority.

COMMENTARY: The amendments to this section conform it to General Statutes § 46b-140a, as amended by No. 18-31, § 37, of the 2018 Public Acts.

[Sec. 31a-19. Motion for Extension of Delinquency Commitment; Motion for Review of Permanency Plan

(a) The Commissioner of the Department of Children and Families may file a motion for an extension of a delinquency commitment beyond the eighteen month or four year period on the grounds that such extension is for the best interests of the child or the community. The clerk shall give notice to the child, the child's parent or guardian, counsel of record for the parent or guardian and child at the time of disposition and, if applicable, the guardian ad litem not later than fourteen days prior to the hearing upon such motion. The judicial authority may, after hearing and upon finding such extension is in the best interests of the child or the community, continue the commitment for an additional period of not more than eighteen months.

(b) Not later than twelve months after a child is committed as a delinquent to the Commissioner of the Department of Children and Families, the judicial authority shall hold a permanency hearing. Such a hearing will be held every twelve months thereafter if the child remains committed. Such hearing may include the submission of a motion to the judicial authority by the commissioner to either modify or extend the commitment.

(c) At least sixty days prior to each permanency hearing required under subsection (b) of this section, the Commissioner of the Department of Children and Families shall file a permanency plan with the judicial authority. At each permanency hearing, the judicial authority shall review and approve a permanency plan that is in the best interests of the child and takes into consideration the child's need for perma-

nency. The judicial authority shall also determine whether the Commissioner of the Department of Children and Families has made reasonable efforts to achieve the permanency plan.**]**

COMMENTARY: The repeal of this section is in conformity with the provisions of No. 18-31 of the 2018 Public Acts.

AMENDMENTS TO THE CRIMINAL RULES

Sec. 38-8. Ten Percent Cash Bail

Unless otherwise ordered by the judicial authority, 10 percent cash bail shall be automatically available for surety bonds not exceeding $20,000. For surety bond amounts exceeding $20,000, 10 percent cash bail may be granted pursuant to an order of the judicial authority. This 10 percent option applies to bonds set by court as well as bonds set at the police department.

When 10 percent cash bail is **[**granted**]** authorized either automatically or pursuant to court order, upon the depositing in cash, by the defendant or any person in his or her behalf other than a paid surety, of 10 percent of the surety bond set, the defendant shall thereupon be admitted to bail in the same manner as a defendant who has executed a bond for the full amount. If such bond is forfeited, the defendant shall be liable for the full amount of the bond. Upon discharge of the bond, the 10 percent cash deposit made with the clerk shall be returned to the person depositing the same, less any fee that may be required by statute.

COMMENTARY: The change to this section will allow for 10 percent cash bail to be automatically available for surety bonds under $20,000, both at court and at the police department.

Sec. 42-5. –Disqualification of Jurors and Selection of Panel

A person shall be disqualified to serve as a juror if such person is found by the judicial authority to exhibit any quality which will impair that person's capacity to serve as a juror, except that no person shall be disqualified on the basis of deafness or being hard of hearing **[**impairment**]**. The clerk shall keep a list of all persons disqualified under this section and shall send a copy of that list to the jury administrator at such time as the jury administrator may direct. The clerk of the court, in impaneling the jury for the trial of each cause, shall, when more jurors are in attendance than are required for the panel, designate by lot those who shall compose the panel.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 42-10. Selection of Jury; [Deaf or Hearing Impaired] Jurors Who Are Deaf or Hard of Hearing

At the request of a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing or at the request of the judicial authority, an interpreter or interpreters provided by the **[**Commission on the Deaf and Hearing Impaired**]** Judicial Branch and qualified under General Statutes § 46a-33a shall assist such juror during the juror orientation program and all subsequent proceedings, and when the jury assembles for deliberation.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts and recognize that the Commission on the Deaf and Hearing Impaired was dissolved and no longer provides interpreters to the Branch for people who are deaf or hard of hearing.

Sec. 42-14. –Oath and Admonitions to Trial Jurors

(a) The judicial authority shall cause the jurors selected for the trial to be sworn or affirmed in accordance with General Statutes §§ 1-23 and 1-25. The judicial authority shall admonish the jurors not to read, listen to or view news reports of the case or to discuss with each other or with any person not a member of the jury the cause under consideration, except that after the case has been submitted to the jury for deliberation the jurors shall discuss it among themselves in the jury room.

(b) In the presence of the jury, the judicial authority shall instruct any interpreter for a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing to refrain from participating in any manner in the deliberations of the jury and to refrain from having any communications, oral or visual, with any member of the jury except for the literal translation of jurors' remarks made during deliberations.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 42-21. Jury Deliberations

After the case has been submitted to the jury, the jurors shall be in the custody of an officer who shall permit no person to be present

with them or to speak to them when assembled for deliberations except a qualified interpreter assisting a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing. The jurors shall be kept together for deliberations as the judicial authority reasonably directs. If the judicial authority permits the jury to recess its deliberations, the judicial authority shall admonish the jurors not to discuss the case until they reconvene in the jury room. The judicial authority shall direct the jurors to select one of their members to preside over the deliberations and to deliver any verdict agreed upon, and the judicial authority shall admonish the jurors that until they are discharged in the case they may communicate upon subjects connected with the trial only while they are convened in the jury room. If written forms of verdict are submitted to the jury pursuant to Section 42-23, the member of the jury selected to deliver the verdict shall sign any verdict agreed upon.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 42-22. Sequestration of Jury

If a case involves the penalty of capital punishment or imprisonment for life or is of such notoriety or its issues are of such a nature that, absent sequestration, highly prejudicial matters are likely to come to the jury's attention, the judicial authority, upon its own motion or the motion of either party, may order that the jurors remain together in the custody of an officer during the trial and until they are discharged from further consideration of the case. Such order shall include an interpreter or interpreters assisting a **[**deaf or hearing impaired**]** juror who is deaf or hard of hearing. A motion to sequester may be made

at any time. The jury shall not be informed which party requested sequestration.

COMMENTARY: The changes to this section conform it to the provisions of No. 17-202 of the 2017 Public Acts.

Sec. 43-36. –Finding That Appeal Is Frivolous

The presiding judge shall fully examine memorandum of law of counsel and the defendant, together with any relevant portions of the record and transcript of the trial. If, after such examination, the presiding judge concludes that the defendant's appeal is wholly frivolous, such judge may grant counsel's motion to withdraw and permit the defendant to proceed as a self-represented party. The presiding judge shall file a memorandum under seal setting forth the basis for the finding that the appeal is wholly frivolous.

COMMENTARY: The change to this section makes explicit the requirement that the presiding judge's memorandum of decision on motions for leave to withdraw, filed by appointed counsel pursuant to this section, is to be filed under seal. This requirement brings the rule into conformity with the Rules of Appellate Procedure, wherein the trial court's decision on a motion for leave to withdraw, filed by appointed counsel pursuant to Section 62-9 (d) (3), is sealed, in cases in which an appeal has already been filed.

AMENDMENTS TO THE PRACTICE BOOK FORMS

(NEW) Form 217

Interrogatories

Civil Actions Alleging Personal Injury

Medicare Enrollment, Eligibility and Payments

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the _____, hereby propounds the following interrogatories to be answered under oath by the party being served within sixty (60) days of the service hereof in compliance with Practice Book Section 13-2.

Definition: ''You'' shall mean the party to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, ''You'' shall also refer to the party's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, You are required to provide all information within your knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State the following:

(a) your full name:

(b) any other name(s) by which You have been known:

(c) your date of birth:

(d) your home address:

(e) your business address:

(2) State whether You have ever been enrolled in a plan offered pursuant to any Medicare Part:

If your answer to Interrogatory (2) is affirmative, state the following:

(a) the effective date(s):

(b) your Medicare claim number(s):

(c) your name exactly as it appears on your Medicare card:

(3) State whether a plan offered pursuant to any Medicare Part has paid any bills for treatment of any injuries allegedly sustained as a result of the incident alleged in your complaint:

If your answer to Interrogatory (3) is affirmative, state the amount paid:

(4) If You are not presently enrolled in any Medicare Part, state whether You are eligible to enroll:

(5) If You are not presently enrolled in any Medicare Part, state whether You plan to apply within the next thirty-six (36) months:

BY_____

I,_____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

Subscribed and sworn to before me this _____day of _____, 20____ .

_____

Notary Public/

Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (*date*): _____ to all attorneys and self-represented parties of record and to all parties who have not appeared in this matter and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

Email address, if applicable

Telephone number

COMMENTARY: This new form, Form 217, established pursuant to new Section 13-12A, sets forth questions regarding Medicare enrollment status, eligibility or payments received, and may be used in any civil action involving allegations of personal injury. The questions are intended to allow parties' providers of liability insurance, including self-insurance, no fault insurance and workers' compensation insurance, to acquire information necessary to satisfy federal requirements regarding claimants' Medicare enrollment and reimbursement.

NOTICES

Notice Regarding Posting Dates for the Dockets and Assignments for the 2019-2020 Court Year

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 16, 2019; October 15, 2019; November 12, 2019; December 9, 2019; January 13, 2020; February 18, 2020; March 23, 2020; and April 27, 2020.

Carolyn C. Ziogas
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2019 - 2020 court year is as follows: September 5, 2019; October 7, 2019; November 12, 2019; January 2, 2020; February 3, 2020; March 2, 2020; April 6, 2020; and May 11, 2020.

Carolyn C. Ziogas
Chief Clerk

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered on the court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2019–2020 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 28, 2019
Second Term Docket	Posted to the website August 23, 2019
Third Term Docket	Posted to the website September 23, 2019
Fourth Term Docket	Posted to the website October 21, 2019
Fifth Term Docket	Posted to the website November 26, 2019
Sixth Term Docket	Posted to the website January 10, 2020
Seventh Term Docket	Posted to the website February 10, 2020
Eighth Term Docket	Posted to the website March 16, 2020
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 31, 2019
Second Term Assignment	Posted to the website September 16, 2019
Third Term Assignment	Posted to the website October 15, 2019
Fourth Term Assignment	Posted to the website November 8, 2019
Fifth Term Assignment	Posted to the website December 20, 2019
Sixth Term Assignment	Posted to the website January 31, 2020
Seventh Term Assignment	Posted to the website February 28, 2020
Eighth Term Assignment	Posted to the website April 6, 2020
Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 15, 2019
Second Term Docket	Posted to the website August 22, 2019
Third Term Docket	Posted to the website September 26, 2019
Fourth Term Docket	Posted to the website November 7, 2019
Fifth Term Docket	Posted to the website December 16, 2019
Sixth Term Docket	Posted to the website January 24, 2020
Seventh Term Docket	Posted to the website February 28, 2020
Eighth Term Docket	Posted to the website April 2, 2020
Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 14, 2019
Second Term Assignment	Posted to the website September 18, 2019
Third Term Assignment	Posted to the website October 24, 2019
Fourth Term Assignment	Posted to the website December 6, 2019
Fifth Term Assignment	Posted to the website January 15, 2020
Sixth Term Assignment	Posted to the website February 21, 2020
Seventh Term Assignment	Posted to the website March 26, 2020
Eighth Term Assignment	Posted to the website April 30, 2020

Appointment of Trustee

Pursuant to Practice Book § 2-64, on July 5, 2019 in docket number HHD-CV-19-6110605, Attorney Jack Steigelfest (juris# 302855) of Hartford, CT is appointed as trustee to inventory the late Michael S. Smiley (juris# 371739) files, to secure his clients' fund/IOLTA account(s), take and review the office mail, and take such action as seems indicated to protect the interests of Attorney Smiley's clients and to provide an accounting to the Court.

David Sheridan
Presiding Judge