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Table of Contents

CONNECTICUT REPORTS

Britton *v.* Commissioner of Correction (Order), 337 C 901 59
Caires *v.* JPMorgan Chase Bank, N.A. (Orders), 337 C 901, 904 . . . . . 59, 62
Dougan *v.* Sikorsky Aircraft Corp., 337 C 27. 29
Negligence; workplace asbestos exposure; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that claim for medical monitoring in absence of manifestation of physical injury was not cognizable under Connecticut law; medical monitoring, discussed; whether plaintiffs had established genuine issue of material fact as to whether medical monitoring was reasonably necessary for each individual plaintiff.
Gershon *v.* Back (Order), 337 C 901 59
Lance W. *v.* Commissioner of Correction (Order), 337 C 902 60
Nash Street, LLC *v.* Main Street America Assurance Co., 337 C 1 3
Action seeking to recover proceeds allegedly due under commercial general liability insurance policy issued by defendant insurer; summary judgment; whether defendant had duty to defend in action brought by plaintiff against insured and alleging property damage resulting from collapse of house that had been lifted off foundation; whether trial court improperly granted defendant's motion for summary judgment; whether there existed possibility that plaintiff's complaint in action against insured alleged liability for property damage that was not excluded under insurance policy; whether trial court incorrectly determined that certain exclusions in insurance policy relieved defendant of its duty to defend.
Property Tax Management, LLC *v.* Worldwide Properties, LLC (Order), 337 C 903 61
Robinson *v.* Commissioner of Correction (Order), 337 C 903 61
State *v.* Cicarella (Order), 337 C 902 60
State *v.* Luciano (Order), 337 C 903. 61
Volume 337 Cumulative Table of Cases 63

CONNECTICUT APPELLATE REPORTS

Bosque *v.* Commissioner of Correction, 205 CA 480 . . . . . 88A
Habeas corpus; dismissal of habeas petition as untimely pursuant to applicable statute (§ 52-470 (d) and (e)); whether habeas court abused its discretion in denying petition for certification to appeal; whether petitioner was entitled to review of his unpreserved claims on appeal under State *v.* Golding *(213 Conn. 233) or for plain error; failure to raise claims as grounds for appeal in petition for certification to appeal as required by § 52-470 (g).*
Finley *v.* Western Express, Inc., 205 CA 473. . . . . 81A
Uninsured motorist benefits; mootness; whether trial court properly rendered summary judgment for defendants; whether trial court properly determined that there was no genuine issue of material fact that vehicle operated by plaintiff was covered by insurance policy that did not contain provision for uninsured motorist coverage because Tennessee law governed parties' dispute and Tennessee law did not require defendants to provide such coverage.
Gonzalez *v.* Commissioner of Correction, 205 CA 511 . . . . . 119A
Habeas corpus; whether trial counsel rendered ineffective assistance; whether petitioner's right to due process was violated because statutory (§§ 53a-8 and 53a-55a) scheme underlying conviction of manslaughter in first degree with firearm as accessory does not require state to prove as essential element of accessorial

(continued on next page)

liability that petitioner intended principal's use of firearm; claim that rule petitioner sought to establish applied existing constitutional principles; whether rule petitioner sought to establish placed category of private conduct beyond power of state to punish and, thus, satisfied exception in Teague *v.* Lane *(489 U.S. 288) to prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings.*

Kemon *v.* Boudreau, 205 CA 448 . . . . . 56A

Trusts; probate appeal; whether trial court erred in determining that plaintiff had abandoned various counts at trial on basis of his counsel's statements at closing argument; whether trial court erred in rendering judgment for defendant in probate appeal instead of dismissing appeal for lack of subject matter jurisdiction because appeal became moot during its pendency.

Kissel *v.* Center for Women's Health, P.C., 205 CA 394 . . . . . 2A

Medical malpractice; product liability; motion to dismiss; motion for directed verdict; motion to set aside verdict; statute of limitations; whether trial court improperly denied motion to dismiss medical malpractice complaint for failure to attach written opinion letter as required by statute (§ 52-190a); whether plaintiff was required to cure defect with medical malpractice complaint within limitation period; whether trial court improperly denied motions for directed verdict and to set aside verdict on ground that plaintiff failed to establish causation element of product liability claim.

Moulthrop *v.* State Board of Education, 205 CA 489 . . . . . 97A

Administrative appeal; appeal from decision by defendant revoking plaintiff's initial educator and professional educator certificates pursuant to statute (§ 10-145b (i) (2)); whether there was substantial evidence to support finding that plaintiff was directly involved in or responsible for schoolwide cheating during administration of Connecticut Mastery Test; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

Volume 205 Cumulative Table of Cases 141A

SUPREME COURT PENDING CASES

Summaries 1B

NOTICES OF CONNECTICUT STATE AGENCIES

DSS—Notices of Medicaid State Plan Amendments 1C

MISCELLANEOUS

CT Bar Examining Committee—Notice of Application with and without Exam 1D

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CONNECTICUT REPORTS

Vol. 337

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NASH STREET, LLC *v.* MAIN STREET AMERICA ASSURANCE COMPANY ET AL.
(SC 20389)

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

Syllabus

The plaintiff sought to recover proceeds allegedly due under a commercial general liability insurance policy issued by the defendant insurer to its insured, B Co. The plaintiff contracted with B Co. to renovate the plaintiff's damaged house, including site grading and foundation work, which involved, inter alia, the lifting of the house off of the foundation. The house collapsed after it was lifted by B Co.'s subcontractor. At the time of the collapse, the only work being performed on the house was related to the lifting. The plaintiff brought a separate action against B Co. for property damage arising from the collapse. B Co. tendered defense of the case to the defendant pursuant to the insurance policy, and the defendant declined to defend. The plaintiff subsequently brought the present action against the defendant, seeking recovery under a default judgment that the plaintiff had secured against B Co. in the separate action. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding that the defendant had no duty to defend or to indemnify B Co. based on the applicability of two provisions in the insurance policy excluding coverage for property damage to "that particular part of real property" on which the insured or anyone working on the insured's behalf is "performing operations if the property damage arises out of those operations" and for property

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

damage to "that particular part of any property that must be restored, repaired or replaced because" the insured's work "was incorrectly performed on it." The plaintiff thereafter appealed, claiming that the trial court improperly granted the defendant's motion for summary judgment because, at the time B Co. tendered defense of the case to the defendant, there existed at least a possibility that the complaint alleged a liability covered under B Co.'s insurance policy that would have triggered the defendant's duty to defend. More specifically, the plaintiff claimed that the defendant had a duty to defend B Co. because the complaint alleged damage only to the house and interior renovation work, whereas the two relevant policy exclusions precluded coverage only for the defective work to the foundation itself and not for damage to the rest of the house. *Held* that the trial court improperly granted the defendant's motion for summary judgment, that court having incorrectly determined that the two exclusions relieved the defendant of its duty to defend B Co. in the plaintiff's action against B Co., as there was a possibility that the damages the plaintiff alleged in that action were not excluded under the policy; numerous courts, including this court, have recognized that legal uncertainty can give rise to an insurer's duty to defend, there was legal uncertainty in the present case as to the meaning and applicability of the two exclusions, Connecticut law favors a narrow construction of exclusions and requires that ambiguous provisions be construed in favor of the insured, many other courts have interpreted exclusions with the "that particular part" language in a manner favoring coverage, and neither this court nor the Appellate Court has previously interpreted exclusions identical to those at issue in the present case.

Argued January 14—officially released September 9, 2020**

Procedural History

Action to recover proceeds allegedly due under a commercial general liability insurance policy issued by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma*, *J.*, denied the plaintiff's motion for summary judgment and granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings*.

David G. Jordan, with whom, on the brief, was *Samantha M. Oliveira*, for the appellant (plaintiff).

** September 9, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Scott T. Ober, with whom was *Colleen M. Garlick*, for the appellee (named defendant).

Opinion

McDONALD, J. The dispositive issue before us is whether the defendant insurer had a duty to defend an action brought against its insured in an underlying action alleging property damage resulting from a house that collapsed while being lifted off its foundation. The insurance policy under review contained clauses excluding coverage for damage that occurs to "that particular part" of real property on which the insured was working. In this case, brought under the direct action statute; see General Statutes § 38a-321; the plaintiff, Nash Street, LLC, appeals from the judgment of the trial court, which granted the motion for summary judgment filed by the named defendant, Main Street America Assurance Company.[1] The plaintiff claims that the trial court improperly granted the defendant's motion for summary judgment because, at the time the insured, New Beginnings Residential Renovations, LLC, tendered defense of the underlying action to the defendant, there existed at least a possibility that the complaint alleged a liability that was covered under New Beginnings' insurance policy and, thus, triggered the defendant's duty to defend. We agree with the plaintiff and reverse the judgment of the trial court.

The parties stipulated to the following facts in the direct action. The plaintiff's property in Milford needed repairs after being damaged by Hurricanes Sandy and Irene. The plaintiff contracted with New Beginnings to renovate the house, including site grading and founda-

[1] Although the plaintiff's complaint originally named Main Street America Assurance Company and Atlantic Casualty Insurance Company as defendants, the plaintiff subsequently withdrew its claim against Atlantic Casualty Insurance Company, and that entity is not a party to this appeal. We refer to Main Street America Assurance Company as the defendant.

tion work for which the house would be lifted and temporarily placed onto cribbing. A subcontractor was retained to lift the house and to do concrete work on the foundation.

While the subcontractor was lifting the house in preparation for the foundation work, the house "shifted off the supporting cribbing and collapsed." At the time of the collapse, the only work being performed on the house was related to the lifting. New Beginnings and/or its subcontractor caused the collapse by failing to ensure that the cribbing was secure. As a result, the house sustained "extensive physical damage . . . ."

The plaintiff brought an action against, inter alios, New Beginnings for property damage arising out of the collapse. The complaint alleged, in pertinent part, that "New Beginnings was negligent in the performance of its work in the following respects . . . New Beginnings and/or its subcontractors negligently constructed or assembled the cribbing [that] caused the collapse; and . . . New Beginnings and/or its subcontractors failed to ensure that the cribbing properly supported the house. . . . As a result of New Beginnings' negligence, the cribbing failed, causing damage to the house and the renovation work therein." New Beginnings tendered defense of the case to the defendant pursuant to a commercial general liability insurance policy, and the defendant declined to defend. The plaintiff was awarded a default judgment against New Beginnings for its failure to plead in the amount of $558,007.16. No part of the judgment has been paid.

The record reveals the following additional facts. The plaintiff brought the present action against the defendant under the direct action statute, seeking recovery for the judgment against New Beginnings. In response, the defendant filed an answer and five special defenses, each claiming that the alleged damages were not cov-

ered by the insurance policy.[2] Both parties moved for summary judgment. The plaintiff argued that there was no genuine issue of material fact that there is coverage under the policy and that the exclusions are inapplicable. The defendant argued that there is no genuine issue of material fact that two of the policy's "business risk" exclusions—k (5) and (6)—preclude coverage.

Under exclusion k (5), the policy excludes coverage for property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations . . . ." Under exclusion k (6), the policy excludes coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

The plaintiff argued that "that particular part" of the property on which New Beginnings and/or its subcontractor were working was "the site grading and foundation work underneath the house . . . [and that] New Beginnings [and/or its subcontractor were] not performing any renovation or other work on the house itself." Thus, the plaintiff contended, it did not seek to recover for the damage to the work being done underneath the house—that work would be excluded under k (5) and (6). Rather, the plaintiff sought to recover for the damage to the house, including renovation work that had allegedly been completed a year before the collapse.

[2] In its special defenses, the defendant alleged that (1) the damages claimed by the plaintiff were not caused by an "occurrence," as defined by the policy, (2) coverage is precluded by the exclusion in § II B 1 k (5) of the policy, (3) coverage is precluded by the exclusion in § II B 1 k (6) of the policy, (4) coverage is precluded by the exclusion in § II B 1 *l* of the policy, and (5) coverage is precluded by the exclusion in § II B 1 m of the policy. For convenience, we hereinafter refer to § II B 1 k (5) and (6) of the policy as k (5) and (6).

The defendant argued that "that particular part" of the property on which the subcontractor was performing operations was the whole house because the whole house was being lifted. It further argued that the possibility that the house might collapse while being raised was a foreseeable risk in undertaking those operations. The defendant reasoned that all damage that occurs to a house under these circumstances is a "business risk" that falls squarely within exclusions k (5) and (6).

In due course, the trial court issued a memorandum of decision, denying the plaintiff's motion for summary judgment and granting the defendant's motion for summary judgment. The court stated that the parties agreed that the only issue was whether exclusions k (5) or (6) "preclude[d] coverage for the property damage to the entire house that occurred as a result of the [house's] shifting [off of] the cribbing and collapsing at the time that grading and foundation work was being performed." The court concluded that exclusions k (5) and (6) were clear and unambiguous, and " 'that particular part of real property' " on which New Beginnings or the subcontractor was performing operations was the entire house. As such, the court concluded that these exclusions precluded coverage, and, thus, the defendant had no duty to defend or to indemnify New Beginnings.

The plaintiff appealed to the Appellate Court from the trial court's judgment in favor of the defendant, and the appeal was transferred to this court.

On appeal, the plaintiff contends that the trial court improperly granted the defendant's motion for summary judgment because the court conflated the duty to defend, which arises when there is a *possibility* of coverage, with the duty to indemnify, which arises when there *actually* is coverage. The plaintiff argues that the defendant had a duty to defend New Beginnings because the plaintiff's

complaint alleged damage to the house and interior renovation work, which, under a correct interpretation of exclusions k (5) and (6), was separate from the foundation work. Specifically, the plaintiff argues that, under Connecticut law, either the exclusions must be read narrowly, so as not to preclude coverage, or, alternatively, the exclusions are ambiguous and must be construed in favor of coverage. Under either interpretation, the plaintiff contends, there was a possibility of coverage because the exclusions preclude coverage only for the defective work to the foundation itself and not for the damage to the rest of the house. For its part, the defendant contends that the trial court's granting of summary judgment in its favor was proper because exclusions k (5) and (6) unambiguously preclude coverage. We conclude that summary judgment was improper because exclusions k (5) and (6) did not relieve the defendant of its duty to defend New Beginnings in the underlying action.[3]

[3] In granting the defendant's motion for summary judgment, the trial court ruled that the defendant had neither a duty to defend *nor a duty to indemnify* New Beginnings in the underlying action. Because we conclude that, with respect to exclusions k (5) and (6), the defendant breached its duty to defend, we need not consider whether it has a duty to indemnify in order to reverse the trial court's judgment as to both duties. Under this court's precedent, an insurer that breaches its duty to defend has breached its contract with the insured, and it may not subsequently argue that the contract absolves it of its duty to indemnify. See, e.g., *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 817, 67 A.3d 961 (2013) (recognizing as "central holding of our cases" principle that insurer that breaches duty to defend is "estop[ped] . . . from seek[ing] the protection of [the] contract in avoidance of its indemnity provisions" (internal quotation marks omitted)); see also *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 149, 156, 681 A.2d 293 (1996) (in action for breach of duty to defend brought under § 38a-321 by plaintiff against insurer, "insurer may not hide behind the language of the policy after the insurer abandons its insured" (internal quotation marks omitted)); *Missionaries of the Co. of Mary, Inc.* v. *Aetna Casualty & Surety Co.*, 155 Conn. 104, 113–14, 230 A.2d 21 (1967) ("[t]he [insurer] having, in effect, waived the opportunity which was open to it to perform its contractual duty to defend under a reservation of its right to contest the obligation to indemnify the plaintiff, reason dictates that the [insurer] should reimburse the [insured] for the full amount of the obligation reasonably incurred by it"). This is true regardless of whether

Whether the trial court properly rendered summary judgment in favor of the defendant is a question of law subject to our plenary review. See *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 671, 189 A.3d 99 (2018). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198–99, 931 A.2d 916 (2007).

We begin that review by noting that the plaintiff brought this action under our direct action statute, § 38a-321, which places the plaintiff in the shoes of the insured, subject to all the same rights and protections as the insured. See *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 262, 184 A.3d 741 (2018); *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 149 n.7, 681 A.2d 293 (1996). The plaintiff's claim, then, turns only on whether there

the insured brings an action for recovery against the insurer or whether the judgment creditor brings an action against the insurer under § 38a-321. See *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 262, 184 A.3d 741 (2018) (pursuant to § 38a-321, "the plaintiffs ultimately suffered the actual harm and are thus subrogated to all the rights of the insured"). For the same reason, we do not reach the two other issues presented on appeal, namely, whether the trial court correctly concluded that (1) the phrase "that particular part" in the policy exclusions is unambiguous, and (2) the plaintiff's property damage is excluded from coverage under exclusions k (5) and (6).

was a possibility of coverage that triggered the insurer's duty to defend. See *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 470–71, 870 A.2d 1048 (2005) ("[A]n insurer's duty to defend its insured is triggered without regard to the merits of its duty to indemnify. . . . [So, when] an insurer is guilty of a breach of its contract to defend, it is liable to pay to the insured not only his reasonable expenses in conducting his own defense but, in the absence of fraud or collusion, the amount of a judgment [or settlement] obtained against the insured up to the limit of liability fixed by its policy." (Citation omitted; internal quotation marks omitted.)); *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 600, 840 A.2d 1158 (2004) (in action brought by plaintiff against insurer after settling with insured, plaintiff need not establish insured's liability or resolve coverage dispute if there was possibility of coverage); *Black* v. *Goodwin, Loomis & Britton, Inc.*, supra, 156, 160 (explaining, in action for breach of duty to defend brought under § 38a-321, that, "to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled so long as . . . a potential liability on the facts known to the [insured is] shown to exist" and that "insurer may not hide behind the language of the policy after the insurer abandons its insured" (internal quotation marks omitted)).

This is because "the duty to defend is broader than the duty to indemnify. . . . An insurer's duty to defend is triggered if at least one allegation of the complaint falls even possibly within the coverage." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 739, 95 A.3d 1031 (2014). "The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts [that] bring the injury within the coverage. . . . If an allegation

of the complaint falls even possibly within the coverage, then the [insurer] must defend the insured." (Citation omitted; internal quotation marks omitted.) *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 600. "In contrast to the duty to defend, the duty to indemnify is narrower: while the duty to defend depends only on the allegations made against the insured, the duty to indemnify depends [on] the facts established at trial and the theory under which judgment is actually [rendered] in the case. . . . Thus, the duty to defend is triggered whenever a complaint alleges facts that potentially could fall within the scope of coverage . . . ." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 739.

Because all that is necessary to trigger an insurer's duty to defend is a possibility of coverage, any uncertainty as to whether an alleged injury is covered works in favor of providing a defense to an insured, and uncertainty may be either factual or legal. See, e.g., *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, 252 F.3d 608, 620 (2d Cir. 2001); see also, e.g., *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601. Factual uncertainty arises when it is unclear from the face of the complaint whether an alleged injury occurred in a manner that is covered by the policy. See *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 620–22. For example, if a policy was active only for the 2019 calendar year and a complaint did not specify when the alleged injury took place, there would be factual uncertainty as to whether the injury was covered because it is impossible to know from the face of the complaint whether the alleged injury took place during the coverage period. This factual uncertainty would give rise to a duty to defend, lasting at least until a court determined when the injury occurred. See, e.g., id., 621–22.

Legal uncertainty arises when it is unclear how a court might interpret the policy language at issue, and, as a result, it is unclear whether the alleged injury falls within

coverage. See id. Legal uncertainty can arise in at least two ways. First, as this court has recognized, ambiguous policy language can give rise to the duty to defend. See, e.g., *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601. Second, a duty to defend may arise if there is a question as to whether "the cases governing the insurance policy [will] be read to impose coverage in a given situation . . . ." *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620. That is, when there is a split of authority in other jurisdictions as to the meaning of a particular policy provision, and no appellate authority in the relevant jurisdiction has opined on the matter, the uncertainty as to how a court might interpret the policy gives rise to the duty to defend. See *American Best Food, Inc.* v. *Alea London, Ltd.*, 168 Wn. 2d 398, 410, 229 P.3d 693 (2010).

Numerous courts, including this one, have recognized that legal uncertainty can give rise to an insurer's duty to defend. See, e.g., *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620 (under New York law, duty to defend is triggered by uncertainty as to whether "cases governing the insurance policy [will] be read to impose coverage in a given situation"); *Blackhawk-Central City Sanitation District* v. *American Guarantee & Liability Ins. Co.*, 214 F.3d 1183, 1193 (10th Cir. 2000) (under Colorado law, insurer had duty to defend because it could not show that its interpretation of policy exclusion was "only reasonable interpretation"); *Interstate Fire & Casualty Co.* v. *1218 Wisconsin, Inc.*, 136 F.3d 830, 835 (D.C. Cir. 1998) (under District of Columbia law, doubt giving rise to duty to defend "may be legal as well as factual"); *Monarch Greenback, LLC* v. *Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1078 (D. Idaho 1999) (under Idaho law, duty to defend arises when "the application of an exclusion involves a fairly debatable question of law"); *Makarka* v. *Great American Ins. Co.*, 14 P.3d 964, 969 (Alaska 2000) ("duty to defend may . . . exist [when] the resolution of

a contested legal question may lead to covered liability"); *Scottsdale Ins. Co.* v. *Morrow Land Valley Co., LLC*, 411 S.W.3d 184, 193–94 (Ark. 2012) (insurer had duty to defend when word " 'pollutants' " in policy exclusion was ambiguous); *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601 (word "intoxication" in policy exclusion was "sufficiently ambiguous" to trigger duty to defend); *Sentinel Ins. Co., Ltd.* v. *First Ins. Co. of Hawai'i, Ltd.*, 76 Haw. 277, 289–90, 875 P.2d 894 (1994) (insurer had duty to defend when there was "notable dispute nationwide" on legal coverage question and no appellate court ruling in jurisdiction); *Soto* v. *Country Mutual Ins. Co.*, Docket No. 2-14-1166, 2015 WL 5307297, *10 (Ill. App. September 9, 2015) (holding that insurer had breached its duty to defend when insurer's argument against coverage "require[d] the reconciliation and cross-referencing of several seemingly contradictory provisions" and "coverage dispute [could not] be resolved short of [an] interpretation akin to that which would occur in a declaratory judgment action"), appeal denied, 48 N.E.3d 677 (Ill. 2016); *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 407–11 (insurer had duty to defend when cases from other jurisdictions suggested that exclusion did not apply, and there was no controlling case from Washington courts); *Red Arrow Products Co.* v. *Employers Ins. of Wausau*, 233 Wis. 2d 114, 124, 607 N.W.2d 294 (App.) (duty to defend arises from "genuine dispute over the status of the law or the facts . . . at the time of the tender of defense"), review denied, 234 Wis. 2d 177, 612 N.W.2d 733 (2000). But see *Republic Western Ins. Co.* v. *International Ins. Co.*, Docket No. 96-16254, 1997 WL 414566, *2 (9th Cir. July 23, 1997) (decision without published opinion, 121 F.3d 716) (under California law, when "the only potential for coverage . . . turns on the resolution of a purely legal question of policy interpretation, the insurer does not have a duty to defend").

This court has recognized the first type of legal uncertainty, caused by ambiguous policy language. See *Went-*

land v. *American Equity Ins. Co.*, supra, 267 Conn. 601. We have not had occasion, however, to consider the second. We find instructive the following cases from the United States Court of Appeals for the Second Circuit and the Washington Supreme Court, in which the courts concluded that, when no appellate authority of a jurisdiction has interpreted particular policy language, but courts in other jurisdictions have interpreted the same language in a manner that could result in coverage, the legal uncertainty as to how a court might interpret the language may give rise to a duty to defend.[4]

In *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 608, the plaintiff clothing companies and their parent company, which were referred to collectively as Hugo Boss in the Second Circuit's decision, were sued for, inter alia, trademark infringement for using the word "BOSS" on certain products, allegedly violating a concurrent use agreement they had with a competitor, and the plaintiffs tendered defense of the case to their insurer, the defendant. See id., 610–12. The insurer

[4] We do not suggest that the absence of a controlling decision is, in and of itself, sufficient to give rise to the duty to defend. There must also be sufficient reason to conclude that the court could construe the policy language in favor of coverage. As the Second Circuit explained, "[t]here are, of course, cases in which the policy is so clear that there is no uncertainty in fact or law, and hence no duty to defend. . . . Under some circumstances, the allegations contained in the complaint against the insured will by themselves eliminate all potential doubt and relieve the insurer of any duty to defend. [When], for example, a complaint alleges an intentional tort, and the insurance contract provides coverage only for harms caused by negligence, there would be no uncertainty as to the applicability of the policy exclusion, and hence, no duty to defend the particular [action] brought." (Footnote omitted.) *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 620–21; see also *Makarka* v. *Great American Ins. Co.*, supra, 14 P.3d 969–70 ("A duty to defend may . . . exist [when] the resolution of a contested legal question may lead to covered liability against the insured. . . . [Nevertheless, when] coverage turns solely on the interpretation of policy language that has never been reviewed by [the Supreme Court of Alaska], that fact alone is not enough to create a possibility of coverage that require[s] a defense." (Footnotes omitted.)).

declined to defend on the ground that an exclusion precluded coverage because "BOSS" did not fall under the term "trademarked slogans," within the meaning of the policy. (Internal quotation marks omitted.) Id., 612–13. Whether there was coverage, therefore, depended on the meaning of the words "trademarked slogan." Looking to federal case law, the Second Circuit determined that the overwhelming majority of courts had concluded that "trademarked slogan" was unambiguous, which would preclude coverage under the facts of the case. Id., 618–20. The court noted, however, that one United States District Court decision from the Southern District of New York had concluded that "trademarked slogan" was ambiguous. Id., 620–21 and n.11. The Second Circuit concluded that this contrary decision "rendered uncertain the question of whether the courts would deem the term 'trademarked slogan' to be unambiguous."[5] (Emphasis omitted.) Id., 621 n.11.

The court explained that the question of whether "the cases governing the insurance policy [would] be read to impose coverage . . . [would] ultimately be resolved by [the] courts . . . [perhaps] in favor of the insurer, thereby precluding coverage and the duty to indemnify. But until they are, the insurer cannot avoid its duty to defend." Id., 620. The court continued: "It was, therefore, incumbent upon [the insurer] to undertake a defense of Hugo Boss until the uncertainty sur-

[5] We express no opinion as to whether we agree with the Second Circuit that, when a "vast majority" of courts agree as to the meaning of a policy provision, one contrary decision creates uncertainty sufficient to trigger an insurer's duty to defend. *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, supra, 252 F.3d 618–20, 620–21 n.11. As we explain subsequently in this opinion, exclusions k (5) and (6) are standard provisions that are common in insurance policies across the country, and there is a significant split of authority as to the meaning of the exclusions, which creates a greater degree of uncertainty here than was present in *Hugo Boss Fashions, Inc.* Accordingly, we need not decide whether one contrary case gives rise to the duty to defend.

rounding the term [trademarked slogan] was resolved. Had [the insurer] sought a declaratory judgment immediately upon Hugo [Boss'] filing of its insurance claim, a court might have eliminated this uncertainty by reading the term as [the insurer] has claimed it should be read . . . . Moreover, it might have done so before [the insurer] expended a great deal of money putting up a defense for Hugo Boss. But until such a ruling issued, the question of whether [the insurer] might be held liable to indemnify Hugo Boss was in doubt. And, given this doubt, [the insurer's] failure to provide a defense . . . was a violation of its contractual duties." Id., 622–23.

Similarly, in *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 398, the Washington Supreme Court considered "whether an insurer breached its duty to defend as a matter of law when, relying [on] an equivocal interpretation of case law, it gave itself the benefit of the doubt rather than give that benefit to its insured." Id., 402. After a man was shot nine times by another patron at the plaintiff's nightclub, club security guards "dumped him on the sidewalk." (Internal quotation marks omitted.) Id., 402–403. The defendant, the club's insurer, declined to defend the injured man's action against the club on the ground that an "assault and battery" exclusion in the policy precluded coverage for the incident. Id., 403. Washington courts had never before interpreted the exclusion, but many other courts had, finding a distinction between preassault and postassault negligence. See id., 407–408. Because the complaint in the injured man's underlying action against the club alleged both preassault and postassault negligence, if Washington were to adopt the same distinction, the exclusion would not apply to all of the alleged injuries. The Washington Supreme Court concluded that "[t]he lack of any Washington case directly on point and a recognized distinction between preassault and

postassault negligence in other states presented a legal uncertainty with regard to [the insurer's] duty. Because any uncertainty works in favor of providing a defense to an insured, [the insurer's] duty to defend arose when [the injured man] brought [the action] against [the nightclub]." Id., 408.

Applying these principles to the present case, we are mindful that our inquiry is not whether exclusions k (5) and (6) *actually* preclude coverage; nor does this case require us to determine conclusively what those exclusions mean. The only question we must answer is whether there was any *possibility* of coverage at the time New Beginnings tendered defense to the defendant.[6] See, e.g., *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 739 ("[a]n insurer's duty to defend is triggered if at least one allegation of the complaint falls *even possibly* within the coverage" (emphasis added; internal quotation marks omitted)); *Capstone Building Corp.* v. *American*

[6] This approach incentivizes insurers to honor the contractual duty to defend insureds in cases in which there is a genuine dispute as to coverage arising from legal uncertainty. If the inquiry in this procedural posture were whether there was *actually* coverage, insurers could decline to defend, wait for judgment or settlement in the underlying action between the plaintiff and the insured, and then litigate the question of indemnity, thereby effectively avoiding the duty to defend. This would deprive insureds of a bargained for contractual right for which insureds pay a premium. It would also be inconsistent with our well established rule that an insurer that breaches its duty to defend cannot then use the contract to escape its indemnity obligations. See *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 813 n.58, 67 A.3d 961 (2013).

Nevertheless, we note that, although an insurer who breaches its duty to defend may not litigate indemnity, the insurer may defend against a claim of breach of the duty to defend, in an action brought by either the insured or the injured party under the direct action statute, by establishing that there is no possibility that coverage existed and no legal uncertainty regarding the existence of such coverage. See, e.g., *Tiedemann* v. *Nationwide Mutual Fire Ins. Co.*, 164 Conn. 439, 444, 324 A.2d 263 (1973) (under predecessor to § 38a-321, insurer was able to argue that there was no possibility of coverage as defense to breach of duty to defend).

Motorists Ins. Co., 308 Conn. 760, 817, 67 A.3d 961 (2013) ("the insured is not required to prove actual liability, only potential liability on the facts known to the [insured]" (internal quotation marks omitted)); *Soto* v. *Country Mutual Ins. Co.*, supra, 2015 WL 5307297, *8 ("[W]e are not determining the ultimate question of coverage. Instead, we are asked to consider whether, when the complaint was presented, there was clearly no potential for coverage under the liability policy." (Emphasis omitted.)); see also *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, supra, 273 Conn. 470–71; *Wentland* v. *American Equity Ins. Co.*, supra, 267 Conn. 601; *Black* v. *Goodwin, Loomis & Britton, Inc.*, supra, 239 Conn. 160; cf. *Missionaries of the Co. of Mary, Inc.* v. *Aetna Casualty & Surety Co.*, 155 Conn. 104, 113, 230 A.2d 21 (1967) (because court found insurer breached duty to defend, court found it "unnecessary to reach [the] issue" of whether insurer also had breached its duty to indemnify). More specifically, because the plaintiff alleged damage to "the house and the renovation work therein," we must consider whether legal uncertainty existed regarding the coverage issue in dispute. That is, was it possible, at the time New Beginnings tendered defense to the defendant, that this court, if presented with the issue, could construe "that particular part" in exclusions k (5) and (6) to mean that any portion of the alleged damage would fall outside the scope of the exclusions?

The plaintiff contends that, under Connecticut law, either the exclusions must be construed narrowly, so as not to preclude coverage, or, alternatively, the exclusions are ambiguous and must be construed in favor of coverage. Under either construction, the plaintiff argues, there was a possibility of coverage because the exclusions cover only the defective work on the foundation and do not exclude coverage for the damage to the house or interior renovations caused by the defec-

tive work done underneath the house. The defendant contends that, under the facts of this case—in which the insured was required to lift the entire house—exclusions k (5) and (6) unambiguously exclude coverage for all damage to the house caused by the collapse, which was a foreseeable business risk for a business that lifts houses.[7]

Exclusions k (5) and (6) are not unique to the insurance policy in the present case; they are standard exclusions used in policies across the country, and there has been considerable litigation as to the exclusions' meaning and applicability. Courts have generally interpreted the "that particular part" language in one of three ways, adopting either a broad or narrow construction, or concluding that the language is ambiguous. Under the broad interpretation, "that particular part" excludes all damage to the insured's work product caused by the insured's defective work, even if the scope of the damage far exceeds the portion of the property on which the defective work was actually performed. See, e.g., *Jet Line Services, Inc.* v. *American Employers Ins. Co.*, 404 Mass. 706, 711, 537 N.E.2d 107 (1989) (all damage to tank caused by explosion was excluded from coverage, even though contractor was cleaning only

[7] The defendant also argues that the purpose of a commercial general liability policy is to provide coverage for unforeseeable business risks, not to protect against foreseeable risks. Because the possibility that the insured might drop a house while lifting it was a foreseeable risk, the defendant contends that it would be contrary to the purpose of a commercial general liability insurance policy to conclude that exclusions k (5) and (6) do not apply to all damage to the house. We are not persuaded. The general purpose of a commercial general liability policy does not render other interpretations of the policy unreasonable. See *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, 167 N.H. 245, 251, 110 A.3d 822 (2015); see also *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, 557 F.3d 207, 217 n.3 (5th Cir. 2009) ("[i]f insurers believe that this interpretation expands coverage beyond that which commercial general liability insurance policies are supposed to provide, the . . . exclusion can of course be rewritten to make clear that it excludes this sort of property damage from coverage").

bottom of tank at time of explosion). Under the narrow interpretation, "that particular part" applies only to the specific components on which the insured performed defective work and not to wider damage to the insured's work product caused by the defective work. See, e.g., *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, 557 F.3d 207, 215, 217 (5th Cir. 2009) (under Texas law, exclusion applied only to exterior portions of building that contractor did not properly water seal, not to interior portions that sustained water damage as result). Finally, courts that determine that both, or other, interpretations are reasonable conclude that the language is ambiguous and, as a result, construe the language in favor of the insured. See, e.g., *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, 167 N.H. 245, 249, 252, 110 A.3d 822 (2015).

Consistent with our precedent favoring a narrow interpretation of insurance policy exclusions; see, e.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 239, 173 A.3d 888 (2017) ("[w]hen construing exclusion clauses, the language should be construed in favor of the insured unless [the court] has a high degree of certainty that the policy language clearly and unambiguously excludes the claim" (internal quotation marks omitted)); several courts, including the federal Courts of Appeals for the Fifth and Sixth Circuits, have adopted the narrow interpretation of "that particular part." See, e.g., *Fortney & Weygandt, Inc.* v. *American Manufacturers Mutual Ins. Co.*, 595 F.3d 308, 311 (6th Cir. 2010) (adopting reasoning and conclusion of Fifth Circuit's decision in *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, supra, 557 F.3d 215, 217, with respect to k (6)[8] and noting that words " '[t]hat particular part'

[8] In many insurance policies containing identical or very similar exclusions, the exclusions are not lettered and numbered the same as the policy in this case. To avoid confusion, in discussing other cases construing these exclusions, we refer to all of these identical or similar exclusions as k (5) or (6), even if they were not so identified in the cases we discuss.

. . . are trebly restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally"); *Mid-Continent Casualty Co.* v. *JHP Development, Inc.*, supra, 218 (under plain reading of policy, exclusions k (5) and (6) apply only to property damage to particular part of property that was subject of defective work). These decisions from federal courts of appeals, combined with Connecticut's preference for interpreting exclusions narrowly and the lack of a Connecticut appellate authority on point, demonstrate that it was possible that this court could adopt a narrow interpretation of exclusions k (5) and (6). In doing so, we might have concluded that "that particular part" of the house on which the defective work was performed was only that portion underneath the house that was not properly supported, leading to the collapse of and damage to the entire house.

Numerous other courts, including the Supreme Courts of New Hampshire and Missouri, have concluded that the exclusions are ambiguous and, therefore, must be construed in favor of coverage. See *Columbia Mutual Ins. Co.* v. *Schauf*, 967 S.W.2d 74, 80 (Mo. 1998) ("applying the exclusion to real property . . . is far from easy . . . [because] [h]ouses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions"); *Cogswell Farm Condominium Assn.* v. *Tower Group, Inc.*, supra, 167 N.H. 251–52 (exclusion k (6) was ambiguous because both broad and narrow interpretations were reasonable). Connecticut law also requires that ambiguous insurance policy provisions be construed in favor of coverage. See, e.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 327 Conn. 238–39 ("[W]hen the words of an insurance contract are, without violence, suscepti-

ble of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses." (Internal quotation marks omitted.)); see also *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 740 ("if an ambiguity arises that cannot be resolved by examining the parties' intentions . . . [c]ourts . . . often apply the contra proferentem rule and interpret a policy against the insurer" (internal quotation marks omitted)). These decisions from sister state supreme courts, combined with Connecticut's rule regarding the interpretation of ambiguous policy provisions and the lack of a Connecticut appellate decision on point, suggest that it is also possible that this court might have concluded that exclusions k (5) and (6) are ambiguous and, thus, must be construed against the defendant. In doing so, we might have concluded that the exclusions do not cover the full extent of the damages alleged in the complaint.

Faced with a lack of any Connecticut appellate authority on point and with numerous state supreme and federal appellate court cases that have adopted interpretations of exclusions k (5) and (6) that are consistent with Connecticut law and would favor the plaintiff, the defendant was presented with a legal uncertainty with regard to its duty to defend.[9] Because such an uncertainty works in favor of providing a defense to an insured, exclusions k (5) and (6) did not relieve the defendant of its duty to defend New Beginnings.

[9] We recognize that these cases do not involve identical factual situations to the present case. We nevertheless find them instructive because, as we explained, there need only have been a mere possibility of coverage for the plaintiff to prevail. Additionally, the insurer bears the burden of proving that an exclusion applies. E.g., *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 327 Conn. 239. Because the burden lies with the insurer, the plaintiff need only sufficiently rebut the defendant's argument.

Although our case law does not require it, the prudent, if not ordinary, course would have been for the defendant to defend its insured under a reservation of rights and separately pursue a declaratory judgment action to resolve the legal uncertainty at issue. See, e.g., *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 726–27 ("The purpose of a declaratory judgment action . . . is to secure an adjudication of rights [when] there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties. . . . [O]ur declaratory judgment statute provides a valuable tool by which litigants may resolve uncertainty of legal obligations." (Internal quotation marks omitted.)); see also General Statutes § 52-29; Practice Book § 17-55. When an insurer declines to defend, it must accept the risk that a court may conclude that, by doing so, the insurer breached its duty to defend. See *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 739–40 n.25. As the Appellate Court of Illinois has explained: "[The] [d]efendant [insurer] . . . unilaterally determined that there was no possibility of coverage for the damages alleged by the [plaintiff's action] . . . . [The] [d]efendant's unilateral decision . . . was simply a calculated gamble; however, under these circumstances, we conclude that, even if there existed an exclusion that [the] defendant determined barred coverage, it improvidently chose to sit back and do nothing. . . . [When] there [is] a serious dispute . . . regarding whether [a] claim might possibly fall within policy coverage and give rise to a duty to defend, the insurer . . . should . . . seek a declaratory judgment as to its rights and obligations before or pending trial or defend the insured under [a] reservation of rights . . . ." (Citation omitted; internal quotation marks omitted.) *Soto* v. *Country Mutual Ins. Co.*, supra, 2015 WL 5307297, *10.

The defendant relies on four cases—one from a state supreme court and three from trial courts—that, it

claims, involve facts and exclusions identical to those in this case. In each case, the court determined that "that particular part" excluded coverage for damage to the entire house. See *Lafayette Ins. Co.* v. *Peerboom*, 813 F. Supp. 2d 823, 834 (S.D. Miss. 2011) ("[u]nlike the insureds in [other cases], [the insured] performed work, not on the foundation only, but on the entire house . . . and this fact distinguishes the present case from . . . cases [in which] a contractor undertakes to work on a discrete part of a structure and defects in his work cause damage to other property"); *Auto-Owners Ins. Co.* v. *Chorak & Sons, Inc.*, Docket No. 07 C 4454, 2008 WL 3286986, *3 (N.D. Ill. August 8, 2008) ("[T]he structure on which [the insured] was working was the entire house . . . that is, [the insured] had to raise the entire house in order to complete the assigned task. . . . [Its] work was allegedly incorrectly performed, and that incorrect performance caused damage to the house. Thus, the damage to the house caused by the operations is excluded from coverage . . . ." (Citations omitted.)); *Grinnell Mutual Reinsurance Co.* v. *Lynne*, 686 N.W.2d 118, 125–26 (N.D. 2004) ("We construe ambiguous contract provisions narrowly; however, this case fits within even a narrow interpretation of the business risk exclusion. . . . The particular part of real property on which [the insured] was working was the house. Thus, damage to the house resulting from [the insured's] work will not be covered by the policy due to the exclusions included in the policy." (Citations omitted.)); see also *Barber* v. *Berthiaume*, Superior Court, judicial district of New Haven, Docket No. CV-05-4009532-S (October 19, 2009) (48 Conn. L. Rptr. 662, 663) (following *Grinnell Mutual Reinsurance Co.* v. *Lynne*, supra, 126, because it involved "an identical fact pattern and issue"). The defendant argues that, consistent with these cases, exclusions k (5) and (6) clearly and unambiguously exclude coverage for all of

the damages alleged in the plaintiff's complaint against New Beginnings and, thus, relieve the defendant of its duty to defend. We are not persuaded.

Although the cases the defendant cites involve similar facts and identical exclusions to those in the present case, the cases are procedurally distinguishable, and the distinction is crucial because the different procedural postures require fundamentally different inquiries with respect to the duty to defend. In this case, the defendant declined to defend the underlying case, and the plaintiff thereafter won a judgment, which it seeks to collect from the defendant. On appeal, our inquiry into whether there was a duty to defend involves a retrospective examination of whether there was *any possibility* of coverage when New Beginnings tendered defense to the defendant. In contrast, in three of the four cases that the defendant cites, the insurers did not decline to defend their insureds; they agreed to defend under a reservation of rights and then brought declaratory judgment actions to determine whether they were required to defend cases that were then pending. See *Lafayette Ins. Co.* v. *Peerboom*, supra, 813 F. Supp. 2d 824; *Auto-Owners Ins. Co.* v. *Chorak & Sons, Inc.*, supra, 2008 WL 3286986, *1; *Grinnell Mutual Reinsurance Co.* v. *Lynne,* supra, 686 N.W.2d 120–21. In those cases, the courts did not consider whether there was a *possibility* of coverage; they considered whether there *actually* was coverage.[10] To determine if there is a duty to defend, a court considers *whether there was* uncertainty as to coverage at the relevant time. To determine if there is a duty to indemnify, as in the cases cited by the defendant, a court *resolves* any uncertainty as to coverage. See, e.g., *DaCruz* v. *State Farm Fire & Casu-*

[10] The fourth case the defendant cites did not involve a declaratory judgment action, but that case dealt with indemnity, not the duty to defend. Indeed, that case makes no reference to the duty to defend. See *Barber* v. *Berthiaume*, supra, 48 Conn. L. Rptr. 662–63.

alty Co., 268 Conn. 675, 688, 846 A.2d 849 (2004) ("the duty to defend is triggered whenever a complaint alleges facts that *potentially* could fall within the scope of coverage, whereas the duty to indemnify arises only if the evidence adduced at trial establishes that the conduct *actually* was covered by the policy" (emphasis in original)). The insurer's use of the declaratory judgment action allows the court directly to address the duty to indemnify rather than only the duty to defend. But, as we have explained, the duty to defend is broader than the duty to indemnify, such that it is possible that, in a given case, if the duty to indemnify has not been resolved, an insurer will have a duty to defend, even if it ultimately has no duty to indemnify. See id. The cases the defendant cites are unpersuasive because they provide an analysis—whether there was actually coverage—distinct from that which we undertake in this case, namely, whether there was any possibility of coverage.[11] Cf. *American Best Food, Inc.* v. *Alea London, Ltd.*, supra, 168 Wn. 2d 411 ("[The insurer] relies [on] *Leingang* v. *Pierce County Medical Bureau, Inc.*, 131 Wn. 2d 133, 930 P.2d 288 (1997), which involved . . . the duty to indemnify, not the duty to defend. We do not find *Leingang* helpful because the duties to defend and indemnify are quite different.").

In sum, we conclude that the trial court incorrectly determined that exclusions k (5) and (6) relieved the defendant of its duty to defend New Beginnings in the underlying action that the plaintiff brought against New Beginnings. At the time New Beginnings tendered

[11] We note that, in the present case, the trial court's memorandum of decision suffers from this same deficiency. See *Nash Street, LLC* v. *Main Street America Assurance Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-16-6022149-S (December 13, 2018) ("the sole issue to be decided is whether one or both policy exclusions preclude coverage for the property damage to the entire house that occurred as a result of the house shifting [off its] cribbing and collapsing at the time that grading and foundation work was being performed").

defense of the underlying action to the defendant, there was a possibility that the damages the plaintiff alleged were covered by the policy. This possibility existed because of legal uncertainty as to the meaning and applicability of exclusions k (5) and (6), which arose from a combination of the following factors: Connecticut law favors a narrow construction of exclusions and requires that ambiguous provisions be construed in favor of the insured, multiple state supreme court and federal court of appeals decisions have interpreted exclusions identical to those in the present case in a manner favorable to the insured, and no Connecticut appellate authority has interpreted exclusions k (5) and (6). The defendant was not entitled to summary judgment because exclusions k (5) and (6) do not relieve the defendant of its duty to defend. Because the defendant's summary judgment motion concerned only two of its special defenses; see footnote 2 of this opinion; we do not have occasion to consider the merits of the defendant's three remaining special defenses. We leave it to the trial court to evaluate the remaining special defenses, should the defendant pursue them on remand. Cf. W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2019–2020 Ed.) § 61-1, p. 67, authors' comments ("a decision by the Appellate Court reversing summary judgment . . . returns the case to the procedural posture it would have been in if the trial court denied [the motion for] summary judgment").

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

In this opinion the other justices concurred.

DANNY DOUGAN *v.* SIKORSKY AIRCRAFT CORPORATION ET AL.
(SC 20271)

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

Syllabus

The plaintiffs sought to recover damages from the defendants, S Co. and its general contractor, C Co., alleging, inter alia, that they had been negligently exposed to asbestos while working for subcontractors on a construction project at S Co.'s facility. Specifically, the plaintiffs sought compensatory and punitive damages, the costs of medical monitoring for asbestos related diseases, and the establishment of a court monitored fund to pay those costs. The defendants moved for summary judgment on the ground that the plaintiffs had not suffered any actual injuries and, instead, were seeking medical monitoring for the risk of future injuries, which the defendants claimed is not cognizable under Connecticut law. The trial court determined that, because the plaintiffs conceded that they had not been diagnosed with an asbestos related disease, they had failed to establish a genuine issue of material fact as to the existence of a physical injury. Addressing an issue of first impression under Connecticut law, the court then concluded that a claim for medical monitoring for an increased risk of future injury, in the absence of any present, physical harm, was not cognizable under Connecticut law. Thereafter, the court granted the defendants' motion for summary judgment and rendered judgment for the defendants. On the plaintiffs' appeal, *held* that the trial court's judgment was affirmed on the alternative ground that, even if this court were to recognize a cause of action for medical monitoring in the absence of the present manifestation of physical injury, the plaintiffs nevertheless failed to establish a genuine issue of material fact as to other elements of a medical monitoring claim, namely, whether medical monitoring was reasonably necessary for each individual plaintiff.

Argued December 18, 2019—officially released September 14, 2020**

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence in exposing the named plaintiff to asbestos, and for other relief, brought to the Superior Court in the judicial district of Tolland and transferred to the judicial district of Hartford, Complex

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

** September 14, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Litigation Docket, where Philip Badorek et al. were added as plaintiffs; thereafter, the court, *Miller*, *J.*, granted in part the motion of the named defendant et al. to strike and granted in part the plaintiffs' motion for class certification; subsequently, the court, *Moll*, *J.*, granted the motions of the named defendant et al. for summary judgment, vacated the order granting class certification, and rendered judgment for the named defendant et al., from which the plaintiffs appealed. *Affirmed.*

Keith Yagaloff, for the appellants (plaintiffs).

John W. Cerreta, with whom was *James H. Rotondo*, for the appellees (named defendant et al.).

Opinion

ROBINSON, C. J. This appeal requires us to consider the proof necessary to establish a claim for medical monitoring, the availability of which is a question of first impression under Connecticut law. The plaintiffs Philip Badorek, Michael Daley, William Grem IV, and Fred Ferrara[1] appeal from the judgment of the trial court rendered in favor of the defendants Sikorsky Aircraft

[1] The named plaintiff, Danny Dougan, was the fifth plaintiff in the proceedings before the trial court. Dougan died in December, 2017, while his appeal was pending before the Appellate Court. Dougan was initially the only plaintiff to appeal, and, after he died, the defendants moved to dismiss the appeal. The defendants argued that Dougan's claims for medical monitoring were moot and that, because he was the only plaintiff on appeal, the case should be dismissed. Carol Ann Slicer, the executor of Dougan's estate, then filed a motion for leave to substitute herself for Dougan. The Appellate Court granted this motion. Dougan's estate then filed an objection to the motion to dismiss, contending that the claims were not moot and that, because of technical difficulties, the other plaintiffs had not been named in the appeal. The Appellate Court granted the defendants' motion to dismiss Dougan's appeal but also permitted the remaining plaintiffs to file a late appeal, which is presently before this court. See footnote 3 of this opinion. As a result, we consider only the claims of the four remaining plaintiffs, and all references herein to the plaintiffs collectively are to them.

Corporation (Sikorsky) and Carrier Corporation (Carrier)[2] on their medical monitoring claims, which stemmed from a workplace asbestos exposure at Sikorsky's cogeneration project in Stratford. On appeal,[3] the plaintiffs claim that the trial court improperly granted the defendants' motion for summary judgment because (1) a genuine issue of material fact exists with respect to the issue of physical injury because the plaintiffs each currently suffer from a subclinical injury as a result of asbestos exposure, and (2) Connecticut law permits a cause of action[4] for medical monitoring. We conclude that the trial court properly granted the defendants' motion for summary judgment, albeit on alternative grounds, because, even if we were to recognize a medical monitoring claim in the absence of any physical manifestation of injury under Connecticut law, the plaintiffs nevertheless failed to establish a genuine issue of material fact as to certain elements of the claim, in particular, whether the provision of medical monitoring is reasonably necessary for them. Accordingly, we affirm the judgment of the trial court.

[2] The plaintiffs withdrew their claims against the third defendant, URS Corporation AES, on July 30, 2019, during the pendency of this appeal. See footnote 6 of this opinion.

[3] After receiving permission to file a late appeal; see footnote 1 of this opinion; the plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we subsequently transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] We note that the trial court considered the plaintiffs' position as a request for a medical monitoring remedy rather than an independent cause of action. On appeal, the plaintiffs request either the recognition of a stand-alone cause of action or a remedy. Although there are some differences between the two approaches, the elements of proof for either approach to medical monitoring are the same. See 1 J. McLaughlin, Class Actions (16th Ed. 2019) § 5:18 ("The distinction between recognizing medical monitoring as an independent cause of action and allowing it solely as a remedial measure has practical consequences. If medical monitoring is not an independent cause of action, then the plaintiff must establish all elements of an independent basis of recovery, and the defendants may assert all available affirmative defenses as against individuals. However, the elements of proof for medical monitoring as a cause of action and as a remedy remain the same and must be established by the plaintiffs." (Footnote omitted.)).

The record reveals the following undisputed relevant facts and procedural history. In September, 2009, Sikorsky began work on a cogeneration project at its manufacturing facilities in Stratford. Sikorsky hired Carrier as the general contractor responsible for the project, which involved building a new cogeneration plant and renovating Sikorsky's existing boiler house. Three of the plaintiffs, Badorek, Daley, and Grem, were employed by B-G Mechanical Contractors, Inc. (B-G Mechanical), one of Carrier's subcontractors on the cogeneration project. B-G Mechanical employees were responsible for removing pipe from Sikorsky's boiler house. As a result, these plaintiffs were present at various times at the site from March, 2010, to July, 2010. The fourth plaintiff, Ferrara, was employed by Tucker Mechanical, Inc., another subcontractor, and was present on site for a period of time in March, 2010.[5]

At some point during the project, some workers began to complain of sore throats. Then, on July 7 or 8, 2010, a B-G Mechanical employee discovered what he believed to be asbestos present in the boiler house. Sikorsky then performed testing that confirmed the presence of asbestos in the boiler house and in an exterior dumpster. As a result, Sikorsky halted the project on or about July 23, 2010, in order to remediate the asbestos. The plaintiffs asserted in their complaint that Sikorsky was aware of the presence of asbestos in the boiler house before work on the project began. In response, Sikorsky admitted that, after performing surveys in 2001 and 2008, asbestos had been discovered in a small amount of pipe insulation in the boiler house basement but averred that the Sikorsky employees in

[5] The defendants contend that Ferrara was not involved in pipe demolition or removal and that he never entered the basement where the asbestos was found. Viewing the evidence in the light most favorable to the plaintiffs, we accept their argument that this is irrelevant, as asbestos was also found on the main floor of the boiler house and in an exterior dumpster, areas where Ferrara worked.

charge of the cogeneration project were unaware of this fact.

The named plaintiff, Danny Dougan; see footnote 1 of this opinion; brought a class action complaint in May, 2012, against Sikorsky, Carrier, and URS Corporation AES (URS).[6] The operative complaint, filed on April 1, 2013, includes claims of negligence, battery, recklessness, and strict liability for violations of the federal Clean Air Act, 42 U.S.C. § 7401 et seq., on behalf of Dougan, Grem, Daley, Badorek, and Ferrara individually, as well as "all others similarly situated who were exposed to asbestos while working at the [Sikorsky cogeneration project in Stratford] from the period of approximately March, 2010, to mid-July, 2010, and who are now seeking to pursue remedies for said exposure." The plaintiffs sought compensatory damages, punitive damages, the costs of medical monitoring, and the establishment of a "court monitored fund" for the payment of medical monitoring of asbestos related diseases.[7]

[6] The initial complaint also named A/Z Corporation, Clean Harbors of Connecticut, Inc., and Clean Harbors Environmental Services, Inc., as defendants; the action was later withdrawn as to those parties.

[7] The plaintiffs moved for class certification in July, 2013, and requested that the trial court certify a class of approximately forty persons who were allegedly exposed to asbestos during the Sikorsky cogeneration project. The defendants objected and submitted affidavits from two experts, Charles L. Blake, an industrial hygienist, and Mark Metersky, a pulmonologist. Specifically, the defendants argued, inter alia, that the plaintiffs failed to demonstrate that common questions predominate, and, as such, class certification would be inappropriate. The trial court granted in part and denied in part the plaintiffs' request to certify the class in February, 2016. In its memorandum of decision, the trial court concluded that the plaintiffs had not demonstrated sufficient commonality in their claims for medical monitoring due to certain individual inquiries, such as each "class member's current medical condition . . . ." Nevertheless, the court proceeded to certify the class but excluded certain issues from class treatment, such as a class member's need for medical monitoring. Simultaneously, the court also granted in part and denied in part motions to strike filed by Sikorsky and Carrier, striking the plaintiffs' federal Clean Air Act claims but permitting their other strict liability claims to proceed.

In March, 2016, Carrier and Sikorsky moved for summary judgment on all counts of the plaintiffs' complaint.[8] The defendants contended that the plaintiffs had not suffered actual injuries and, instead, sought medical monitoring for a risk of future injury, which they claimed is not a cognizable claim under Connecticut law. Specifically, they argued that (1) the court should not recognize a remedy for medical monitoring based on exposure alone, (2) even under the plaintiffs' theory of recovery, summary judgment is appropriate because Dougan could not prove that his need for medical monitoring resulted from asbestos exposure, and because the other four plaintiffs failed to produce any expert testimony demonstrating their need for medical monitoring, and (3) certain claims failed as a matter of law, specifically, the plaintiffs' claims for battery, strict liability, and punitive damages. The defendants filed numerous exhibits in support of their motion, including excerpts of deposition transcripts of the plaintiffs' two medical experts, M. Saud Anwar and Oyebode Taiwo, and the defendants' medical expert, Barry W. Levine. Levine's deposition testimony discussed his examination of Dougan and the general effects of asbestos exposure, including the long latency period before asbestos related diseases manifest. In their depositions, both Anwar and Taiwo stated that they had not formed any opinions regarding the claims of Grem, Badorek, Daly, or Ferrara. Additionally, Anwar acknowledged that "a significant percentage of people who are exposed to and inhale asbestos . . . never develop clinical symptoms . . . ."

The plaintiffs filed an objection to the summary judgment motion, contesting the defendants' characteriza-

[8] Shortly thereafter, URS filed its second motion for summary judgment, asserting largely the same claims as Sikorsky and Carrier. URS had filed its first motion for summary judgment in 2014, but the trial court did not decide this motion before granting URS' second motion for summary judgment on March 28, 2017.

tion of their knowledge of the presence of asbestos, the current status of the law of medical monitoring, and the public policy reasons against extending liability. Along with their objection, the plaintiffs included an affidavit from Anwar. Anwar's three page affidavit specifically addressed his treatment of Dougan and concluded that Dougan suffered from a "significantly increased risk of contracting a serious disease," and also discussed generally the risks of asbestos, such as the injuries asbestos fibers cause to a person's lungs when inhaled. Additionally, the affidavit stated that "[o]ther individuals who were exposed to asbestos during the demolition work at Sikorsky should be monitored for the early detection and intervention of an asbestos related disease . . . ." The plaintiffs also submitted other exhibits concerning the presence of asbestos at Sikorsky and the defendants' actions surrounding the incident, but they provided no further expert testimony.

On March 28, 2017, the trial court granted the defendants' motion for summary judgment. See footnote 8 of this opinion. In its memorandum of decision, the trial court reviewed the evidence in the record and determined that no expert had examined or reviewed the medical records of any of the plaintiffs other than Dougan and that all of the plaintiffs admitted that they had not been diagnosed with an asbestos related disease, specifically, "mesothelioma, lung cancer, asbestosis, or pleural effusions." As a result, the trial court determined that the plaintiffs had not presented evidence demonstrating a genuine issue of material fact as to physical injury. The trial court then applied the public policy test outlined in *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 650–51, 126 A.3d 569 (2015), and declined to recognize a cause of action for medical monitoring under Connecticut law that would allow recovery for an increased risk of future injury rather

than a present injury. Accordingly, the court granted the defendants' motion for summary judgment, vacated the class certification order, and rendered judgment for the defendants on the remaining counts. See footnotes 7 and 8 of this opinion. The trial court later denied the plaintiffs' motion for reargument or reconsideration. This appeal followed. See footnotes 1 and 3 of this opinion.

On appeal, the plaintiffs argue that the trial court incorrectly concluded that medical monitoring claims in the absence of clinical symptoms should not be permitted under Connecticut tort law. The plaintiffs further argue that the trial court incorrectly determined that there was no genuine dispute of material fact as to their injuries because they suffer from subclinical injuries as a result of their asbestos exposure. In response, the defendants counter that the trial court properly declined to create a medical monitoring remedy for asymptomatic plaintiffs exposed to toxic substances in the absence of physical harm. As an alternative ground for affirming the judgment of the trial court, the defendants argue that, even if this court were to recognize medical monitoring as a cause of action, the plaintiffs' claims would still fail because they are not supported by "reliable, scientific evidence . . . ."[9] We agree with the defendants that, even if we were to recognize a remedy in Connecticut for medical monitoring in the absence of the present manifestation of physical harm, the plaintiffs' claims would still fail as a matter of law because

[9] The defendants raised this issue as an alternative ground to affirm the trial court's judgment in their preliminary statement of the issues pursuant to Practice Book § 63-4 (a) (1); they also raised this issue before the trial court in their motion for summary judgment. See, e.g., *Thomas* v. *West Haven*, 249 Conn. 385, 390–91 n.11, 734 A.2d 535 (1999) (discussing procedural requirements for considering alternative grounds), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Chamerda* v. *Opie*, 185 Conn. App. 627, 645–46, 197 A.3d 982 (same), cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

the plaintiffs failed to prove that monitoring was medically necessary.

We first set forth the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party 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. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820–21, 116 A.3d 1195 (2015).

"When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . ." (Internal quotation marks omitted.)

State Farm Fire & Casualty Co. v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

I

We begin our analysis with a review of the medical monitoring claim. Medical monitoring, either in the form of damages or as a stand-alone cause of action; see footnote 4 of this opinion; allows a plaintiff to recover the cost of diagnostic testing for an injury that may occur in the future as a result of a defendant's tortious conduct.[10] See, e.g., *Metro-North Commuter Railroad Co.* v. *Buckley*, 521 U.S. 424, 438, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) (defining medical monitoring as "the economic cost of the extra medical checkups that [the plaintiff] expects to incur as a result of his exposure to [toxins]"). Given the nature of the relief provided by medical monitoring and the prevalence of these claims in the world of toxic torts,[11] the central issue in such cases is whether to permit medical monitoring in the absence of some present manifestation of a physical injury. Although medical monitoring is no longer a novel theory of recovery in many states, whether such recovery is permitted in Connecticut is still an open question of law. See *Doe* v. *Stamford*, 241 Conn. 692, 699–700 n.8, 699 A.2d 52 (1997) (discussing

[10] Medical monitoring differs doctrinally from a claim for enhanced risk. See A. Schwartz, Annot. "Recovery of Damages for Expense of Medical Monitoring To Detect or Prevent Future Disease or Condition," 17 A.L.R.5th 327, 336, § 2 (a) (1994) ("[m]edical monitoring, as this cause of action has come to be known, has been defined as an action seeking to recover the quantifiable costs of periodic future medical examinations to detect the onset of physical harm . . . as distinguished from an enhanced risk claim which seeks compensation for the anticipated harm itself or for increased apprehension of such harm" (internal quotation marks omitted)).

[11] See A. Slagel, Note, "Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims," 63 Ind. L.J. 849, 852 (1987–1988) ("In a toxic tort case the significant personal injuries often are not detectable simultaneously upon exposure to the toxic substance, but rather are latent. In fact, most toxic injuries do not manifest themselves as clinically detectable ailments until years after exposure occurs." (Footnote omitted.)).

medical monitoring test outlined in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990), cert. denied sub nom. *General Electric Co.* v. *Knight*, 499 U.S. 961, 111 S. Ct. 1584, 113 L. Ed. 2d 649 (1991), but noting that neither party requested its adoption in workers' compensation law); see also *McCullough* v. *World Wrestling Entertainment, Inc.*, 172 F. Supp. 3d 528, 567 (D. Conn. 2016) (discussing how "[f]ew Connecticut courts" have considered viability of standalone medical monitoring claims), aff'd in part and appeal dismissed in part sub nom. *Haynes* v. *World Wrestling Entertainment, Inc.*, 827 Fed. Appx. 3 (2d Cir. 2020). Given that medical monitoring claims present an issue of first impression in Connecticut, we begin with a detailed review of the federal and sister state precedents considering these claims.

In the 1980s and 1990s, state and federal courts began permitting medical monitoring recovery in toxic exposure cases in the absence of a manifestation of present physical injury, as in the seminal case of *Ayers* v. *Jackson*, 106 N.J. 557, 604–606, 525 A.2d 287 (1987). See, e.g., *In re Paoli Railroad Yard PCB Litigation*, supra, 916 F.2d 850–52; *Burns* v. *Jaquays Mining Corp.*, 156 Ariz. 375, 380, 752 P.2d 28 (App. 1987), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (1989); *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1007–1009, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 977–78 (Utah 1993). These cases were often supported by the reasoning of an earlier medical monitoring case, *Friends for All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816, 819, 822, 838 (D.C. Cir. 1984), in which the United States Court of Appeals for the District of Columbia Circuit upheld the creation of a medical monitoring fund for children who suffered from a "neurological development disorder" after a plane crash.[12]

[12] See also *Sadler* v. *PacifiCare of Nevada, Inc.*, 130 Nev. 990, 998–99, 340 P.3d 1264 (2014) (explaining that *Friends for All Children, Inc.*, was "[o]ne

Subsequently, in 1997, the United States Supreme Court rejected a medical monitoring cause of action under federal law in *Metro-North Commuter Railroad Co.* v. *Buckley*, supra, 521 U.S. 444. In that case, an asymptomatic plaintiff requested lump sum damages under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., after he was exposed to asbestos during his duties as a railroad employee. Id., 426–27. The court considered earlier cases that permitted asymptomatic medical monitoring recovery under state law and noted that those cases imposed certain "integral" restrictions on a plaintiff's case, such as limiting recovery through the establishment of a court administered fund. Id., 440–41, 444. The court then outlined several policy considerations that weighed against the recognition of this claim, namely, the substantial number of potential plaintiffs who have been exposed to toxic substances, along with the high costs of monitoring. Id., 442. But, in light of these conflicting policy concerns and the inadequate support in the common law, the court declined to create "a new, full-blown, tort law cause of action" under the federal statute being considered. Id., 443.

State appellate courts have been divided in the wake of *Buckley* with respect to whether to permit recovery for medical monitoring in the absence of the manifestation of a physical injury under their states' respective laws.[13] See V. Schwartz & C. Silverman, "The Rise of

of the earliest cases to consider a medical monitoring claim" and that several courts subsequently relied on its reasoning to "[conclude] that a physical injury is not required in order to recover the costs of medical monitoring"); H. Zarov et al., "A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?," 12 DePaul J. Health Care L. 1, 3 (2009) ("[c]ourts and commentators generally trace the origins of medical monitoring claims to the . . . decision [of the District of Columbia Circuit] in *Friends [f]or All Children, Inc.*").

[13] For courts rejecting medical monitoring claims in the absence of physical injury after *Buckley*, see *Hinton ex rel. Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 831–32 (Ala. 2001), *Wood* v. *Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 857 (Ky. 2002), *Paz* v. *Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5–7 (Miss. 2007), *Henry* v. *Dow Chemical Co.*, 473 Mich. 63, 81, 86, 701

'Empty Suit' Litigation:™ Where Should Tort Law Draw the Line?," 80 Brook. L. Rev. 599, 620 (2015) (discussing how, after *Buckley*, courts rejected claims for medical monitoring, but, recently, "the pendulum briefly swung back toward permitting medical monitoring claims"); H. Zarov et al., "A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?," 12 DePaul J. Health Care L. 1, 2 (2009) ("[M]ost courts addressing the issue since *Buckley* have rejected claims for medical monitoring absent physical injury. Nevertheless, a few courts have issued post-*Buckley* decisions adopting claims for medical monitoring, while other courts have continued to implement pre-*Buckley* decisions. Thus, although there is a clear trend against the recognition of medical monitoring claims, the debate is far from over.").

A challenging issue presented by the plaintiffs' claims in this case is determining the nature of the harm, if any, caused by their exposure to asbestos. Past plaintiffs have sought medical monitoring for a variety of

N.W.2d 684 (2005), *Curl* v. *American Multimedia, Inc.*, 187 N.C. App. 649, 657, 654 S.E.2d 76 (2007), *Lowe* v. *Philip Morris USA, Inc.*, 344 Or. 403, 415, 183 P.3d 181 (2008), and *Alsteen* v. *Wauleco, Inc.*, 335 Wis. 2d 473, 488–91, 802 N.W.2d 212, review denied, 338 Wis. 2d 323, 808 N.W.2d 715 (2011). Cf. *Caronia* v. *Philip Morris USA, Inc.*, 22 N.Y.3d 439, 452, 5 N.E.3d 11, 982 N.Y.S.2d 40 (2013) (requiring evidence of "present physical injury or *damage to property*" (emphasis added)).

For courts allowing a claim for medical monitoring to proceed post *Buckley*, see *Petito* v. *A.H. Robins Co.*, 750 So. 2d 103, 104, 108 (Fla. App. 1999), review denied, 780 So. 2d 912 (2001), and review denied sub nom. *Zenith Goldline Pharmaceuticals, Inc.* v. *Petito*, 780 So. 2d 916 (2001), *Berry* v. *Chicago*, 133 N.E.3d 1201, 1209 (Ill. App.), appeal allowed, 132 N.E.3d 284 (Ill. 2019), *Exxon Mobil Corp.* v. *Albright*, 433 Md. 303, 378–80, 71 A.3d 30, cert. denied, 571 U.S. 1045, 134 S. Ct. 648, 187 L. Ed. 2d 449 (2013), *Donovan* v. *Philip Morris USA, Inc.*, 455 Mass. 215, 225–26, 914 N.E.2d 891 (2009), *Meyer ex rel. Coplin* v. *Fluor Corp.*, 220 S.W.3d 712, 717–18 (Mo. 2007), *Sadler* v. *PacifiCare of Nevada*, 130 Nev. 990, 998–99, 340 P.3d 1264 (2014), and *Bower* v. *Westinghouse Electric Corp.*, 206 W. Va. 133, 140, 522 S.E.2d 424 (1999).

injuries, ranging from toxins present in their blood[14] to traumatic brain injuries.[15] The plaintiffs in the present case claim that their asbestos exposure caused them to suffer a subclinical injury, which is one that is "not detectable or [that is] producing effects that are not detectable by the usual clinical tests . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) p. 1242; accord Webster's New Complete Medical Dictionary (1995) p. 667. Relying on *Donovan* v. *Philip Morris USA*, *Inc.*, 455 Mass. 215, 914 N.E.2d 891 (2009), the plaintiffs contend specifically that the trial court incorrectly determined that their subclinical injuries were not actual injuries because, once they were exposed to asbestos at the Sikorsky project, the asbestos fibers entered their lungs and damaged their cells, creating a "preclinical stage of disease." They ask us to adopt the legal framework from *Donovan* to govern medical monitoring claims arising from subclinical injuries.

In *Donovan*, the Supreme Judicial Court of Massachusetts considered a certified question from a federal district court asking whether "the plaintiffs' suit for medical monitoring, based on subclinical effects of exposure to cigarette smoke and increased risk of lung cancer, state[d] a cognizable claim and/or permit[ted] a remedy under Massachusetts state law . . . ." (Internal quotation marks omitted.) Id., 215–16. The plaintiffs, a proposed class of Marlboro cigarette smokers, argued that the defendant had "wrongfully designed, marketed, and sold" its cigarettes and requested a "court-supervised program" for medical monitoring, specifically, of "low-dose computed tomography . . . scans of the chest" to screen for lung cancer. Id., 216–17. The plaintiffs alleged that, because they had used the defendant's

[14] See *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 92 (4th Cir.), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011).

[15] See *McCullough* v. *World Wrestling Entertainment, Inc.*, supra, 172 F. Supp. 3d 535.

defective products, they suffered "objectively observable and identifiable damage to the tissues and structures of their lungs" and, as a result, are at a "substantially increased risk of cancer . . . ." Id., 221.

The Massachusetts high court accepted the plaintiffs' theory of harm and recognized a stand-alone medical monitoring cause of action for the plaintiffs' subclinical injuries under Massachusetts law. Id., 226–27. The court reasoned that, just as a shaken baby would be able to recover expenses for diagnostic testing to determine if she had suffered a brain injury, so, too, should the plaintiffs, as they "have produced sufficient proof of 'impact' . . . to safeguard against false claims: they have proffered evidence of physiological changes caused by smoking, and they have proffered expert medical testimony that, because of these physiological changes, they are at a substantially greater risk of cancer due to the negligence of Philip Morris." (Citation omitted.) Id., 224–25. The court discussed the importance of subcellular changes, stating that such "changes may occur which, in themselves, are not symptoms of any illness or disease, but are warning signs to a trained physician that the patient has developed a condition that indicates a substantial increase in risk of contracting a serious illness or disease and thus the patient will require periodic monitoring." Id., 225. The court in *Donovan* distinguished the facts of that case from those in "cases that involve exposure to levels of chemicals or radiation known to cause cancer, for which immediate medical monitoring may be medically necessary although no symptoms or subclinical changes have occurred." (Emphasis omitted.) Id. Because the record in *Donovan* presented evidence of subcellular change indicating an increased risk of cancer, the plaintiffs had adequately demonstrated injury.

The Massachusetts court outlined the following standard for its medical monitoring cause of action, requir-

ing that "each plaintiff" prove that "(1) [t]he defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint." Id., 226. In addition, the court stated that proof of these elements "usually will require competent expert testimony." Id., 227.

II

Having reviewed the background law governing medical monitoring claims, we now turn to the plaintiffs' claims in the present appeal. We begin by setting forth several assumptions that underlie our analysis. First, we will assume, without deciding, that Connecticut law recognizes a claim for subclinical cellular injury that substantially increased the plaintiffs' risk of cancer and other asbestos related diseases.[16] Second, we also

[16] We note that other courts have rejected similar arguments with respect to whether subclinical injuries are in fact physical injuries as a matter of law. See *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir.) (disagreeing with plaintiffs' argument that exposure to toxin that created "[an] alteration in the structure of [the plaintiffs'] blood is an injury" in negligence cause of action (internal quotation marks omitted)), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011); *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1249 (10th Cir. 2009) ("It is true that a number of courts have recognized [medical monitoring] claims . . . premised on subclinical effects of toxic exposure. But, tellingly, these courts *have not reasoned that subclinical injuries from a toxic agent are bodily or physical injuries*." (Emphasis altered.)); *Parker* v. *Wellman*, 230 Fed. Appx. 878, 881–83 (11th Cir. 2007) (rejecting plaintiffs' theory of subcellular harm as physical injury under Georgia law); *Bell* v. *3M Co.*, 344 F. Supp. 3d 1207, 1216 (D. Colo. 2018) (disagreeing with plaintiffs' theory that "the bioaccumu-

assume, without deciding, that the *Donovan* elements govern proof of a medical monitoring claim. Finally, we assume that the plaintiffs raised a genuine dispute of material fact as to whether they were negligently exposed to asbestos during the Sikorsky project. We nevertheless conclude that the trial court properly granted the defendants' motion for summary judgment because the plaintiffs have not established the existence of a genuine issue of material fact as to certain *Donovan* factors.[17] See, e.g., *Stuart* v. *Freiberg*, supra, 316 Conn.

lation of toxins or subclinical damage constitute[s] a present physical injury"); see also J. Grodsky, "Genomics and Toxic Torts: Dismantling the Risk-Injury Divide," 59 Stan. L. Rev. 1671, 1674 (2007) ("Although the case law addressing subcellular damage is limited . . . most courts have treated such damage as benign, de minimis, or otherwise legally inconsequential. Courts greatly prefer to draw bright lines between risk and injury, and continue to place the boundary at proof of classic medical symptoms or overt impairment." (Footnote omitted.)). But see *Sullivan* v. *Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 454–55 (D. Vt. 2019) ("It is more likely that the Vermont Supreme Court will follow the definition of bodily harm developed in [§ 15 of] the Restatement [(Second) of Torts] and apply it to latent injuries caused by chemical exposure. By defining bodily harm to include any alteration to a person's body, the Restatement [(Second) of Torts] includes changes such as abnormal blood serum results showing the presence of an unusual and potentially harmful chemical.").

One Connecticut trial court has held that a very similar theory of liability in an asbestos exposure case raised a question of fact for the jury to decide. See *Bowerman* v. *United Illuminating*, Superior Court, judicial district of New London at Norwich, Docket No. CV-94-0115436-S (December 15, 1998) (23 Conn. L. Rptr. 589, 592) ("whether . . . the scarring of lung tissue and implantation of asbestos fibers in the lungs constitute a compensable legal harm is an issue of fact if there is evidence showing such conditions to be detrimental and if there is evidence showing the existence of such conditions in the plaintiffs").

[17] We note that other federal and state courts have employed a similar analysis, deeming it unnecessary to determine whether to recognize a claim for medical monitoring because the plaintiffs' proof was inadequate to defeat a motion for summary judgment in any event. See *M.G. ex rel. K.G.* v. *A.I. duPont Hospital for Children*, 393 Fed. Appx. 884, 892–93 (3d Cir. 2010) (declining to consider whether Delaware Supreme Court would permit medical monitoring claim because plaintiff could not state such claim); *In re Marine Asbestos Cases*, 265 F.3d 861, 867 (9th Cir. 2001) (upholding grant of summary judgment because, "even if medical monitoring were available under the Jones Act to a seaman who satisfied the *Paoli* factors, the plaintiffs

823 ("a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his [claim]").

Courts, including the one in *Donovan*, generally require competent expert testimony to prove a medical monitoring claim or remedy. See, e.g., *Caronia* v. *Philip Morris USA, Inc.*, 715 F.3d 417, 448 (2d Cir. 2013) ("[a]ll of the [previously discussed] states that recognized a medical monitoring cause of action noted that such a claim cannot be established without reliable expert testimony"); *In re Paoli Railroad Yard PCB Litigation*, supra, 916 F.2d 852 (requiring competent expert testimony to establish medical monitoring cause of action); *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 227 ("[p]roof of [the *Donovan*] elements usually will require competent expert testimony"); *Ayers* v. *Jackson*, supra, 106 N.J. 606 (requiring "reliable expert testimony" to recover medical surveillance damages); *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979 n.10 ("[p]roof of [the *Donovan*] elements will usually require expert testimony"). As a result, if a plaintiff lacks expert testimony to prove a medical monitoring claim, summary judgment should be granted. See *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016) ("[s]ummary judgment in favor of a defendant is proper when expert testimony is necessary to prove an essential element of the plaintiff's case and

have failed to present sufficient evidence to raise a genuine issue of material fact as to the reasonableness and necessity of the type of medical monitoring that they seek"); *DeStories* v. *Phoenix*, 154 Ariz. 604, 610, 744 P.2d 705 (App. 1987) (upholding grant of summary judgment after concluding that, even if plaintiffs' medical monitoring theory was legally cognizable, plaintiffs' claim would still fail due to lack of evidence); cf. *Philip Morris, Inc.* v. *Angeletti*, 358 Md. 689, 782, 787, 752 A.2d 200 (2000) (declining to consider whether "medical monitoring is a cognizable claim" under Maryland law because medical monitoring class was improperly certified).

the plaintiff is unable to produce an expert witness to provide such testimony").

The defendants argue that the plaintiffs "have totally failed to provide expert evidence establishing their need for medical monitoring as a result of asbestos exposure at Sikorsky." The plaintiffs do not dispute that Anwar, their expert witness, has not provided any testimony as to any of them specifically, but they argue that they nevertheless have presented sufficient expert evidence to survive summary judgment. According to the plaintiffs, "the court [in *Donovan*] did not state that the plaintiffs needed to offer expert medical evidence that spoke to the plaintiffs' specific conditions; instead, the court accepted general expert evidence that attested to the undifferentiated effects that cigarette smoking [has] on any smoker, including the plaintiffs." Additionally, the plaintiffs assert only that "expert evidence must be used to generally inform lay jurors about the scientific correlation between asbestos exposure and the onset of asbestos related diseases." Finally, "the plaintiffs aver that the experts should not form any opinions about the plaintiffs' exposure and their need for medical monitoring or the likelihood of contracting diseases because that function should be reserved [for] the trier of fact."

We disagree with the plaintiffs that the *Donovan* court's acceptance of "general expert advice" assists this inquiry, as that court was considering whether the parties had stated a claim for medical monitoring on a motion to dismiss, not whether the plaintiffs' claims could ultimately survive summary judgment. See *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 217, 221. Accordingly, we will look to the requirements of other courts reviewing this issue, including those cited with approval in *Donovan*.

The third *Donovan* factor requires a plaintiff to demonstrate that he or she suffers from a subcellular change

that substantially increases his or her risk of disease. Id., 226. A Massachusetts federal district court recently considered whether expert testimony sufficiently demonstrated subcellular change on a motion for summary judgment. See *Genereux* v. *Hardric Laboratories, Inc.*, 950 F. Supp. 2d 329 (D. Mass. 2013), aff'd, 754 F.3d 51 (1st Cir. 2014). The defendant in *Genereux* argued that the plaintiffs would be unable to succeed at trial under *Donovan* because the plaintiffs' expert had "testified that he cannot state, with reasonable medical certainty, that any plaintiff has suffered subcellular change." Id., 333. The plaintiffs' expert concluded only that "some number of persons will have cellular changes in the blood or lung cells" and "did not state that any specific plaintiff or plaintiffs have suffered beryllium-related subcellular change." (Internal quotation marks omitted.) Id., 336. The court concluded that "*each plaintiff* must submit sufficient admissible evidence to permit a reasonable fact finder to find that he or she has suffered subcellular change." (Emphasis added.) Id., 340. Because the plaintiffs had failed to do so, the court rendered summary judgment for the defendant. Id., 341; see also *Exxon Mobil Corp.* v. *Albright*, 433 Md. 303, 385, 71 A.3d 30 ("[W]e conclude that quantifiable, reliable indicia that a defendant's actions have so increased significantly the plaintiff's risk of developing a disease are necessary to recover damages for medical monitoring costs. The indicia may be proven by a medical expert's testimony, *particularized to a plaintiff*, and demonstrating a reasonable link to toxic exposure." (Emphasis added.)), cert. denied, 571 U.S. 1045, 134 S. Ct. 648, 187 L. Ed. 2d 449 (2013).[18]

[18] One federal district court recently rejected a defendant's argument that there must be more individualized expert testimony as to causation. See *Sullivan* v. *Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 467–70 (D. Vt. 2019). After first predicting that the Vermont Supreme Court would recognize a medical monitoring remedy, the court denied the defendant's motion for summary judgment on the medical monitoring claims of a class of plaintiffs who allegedly had been exposed to perfluorooctanoic acid (PFOA) in their groundwater. Id., 452, 469–70. The defendant argued

The expert affidavit in the present case is ambiguous at best about whether each plaintiff actually suffered subcellular harm that substantially increased his risk of injury.[19] Anwar does aver that "[a]sbestos fibers are readily inhaled into the lungs where the fibers cause changes at [the] cellular level." But the affidavit does not state specifically that Grem, Ferrara, Daley, and Badorek have themselves suffered subcellular change that substantially increased their risk of serious disease, illness, or injury. As a result, it is unclear whether Anwar is concluding that all persons necessarily suffer harmful subcellular change as soon as they are exposed to asbestos, as the plaintiffs in *Donovan* established with respect to cigarette smoke after the case returned to the federal court or, instead, that one can inhale asbestos and only possibly suffer subcellular change that

that the plaintiffs lacked expert evidence demonstrating specific causation, specifically, that "that exposure to PFOA from the [defendant's] facility caused [the plaintiffs to be exposed to] an increased risk of adverse health conditions, as opposed to whether it can do so in general." (Emphasis omitted; internal quotation marks omitted.) Id., 467. The court concluded that, although the plaintiffs' experts had not reviewed the "individual plaintiffs' medical records," summary judgment was inappropriate because "proof of causation must . . . be at the population level"; id., 467–68; and declined to grant summary judgment against any specific plaintiff because any individual issues could be resolved at the damages phase. Id., 469–70.

We conclude that *Sullivan* is distinguishable. First, the class in that case was limited to individuals "who actually demonstrate[d] increased levels of PFOA in their bloodstream," whereas the present case provides no such benchmark. Id., 462. Second, although the case before us was a class action when the trial court decided the summary judgment motion, the trial court expressly declined to certify the class on the issue of "the nature and extent of [each class member's] present or future need for medical monitoring . . . ." For these reasons, *Sullivan* is a case more appropriately decided by common proof, and we are not persuaded that it is applicable or persuasive here.

[19] Anwar did examine and treat Dougan as his pulmonary specialist, and, as a result, the affidavit does detail more specifically Dougan's exposure to asbestos and the accompanying harm. Dougan therefore would likely satisfy the subcellular injury requirement under the *Donovan* standard. But, as Dougan is no longer a party to the case; see footnote 1 of this opinion; we do not consider the affidavit's statements as to Dougan.

"substantially increase[s] the risk of serious disease, illness, or injury . . . ." *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see also *Donovan* v. *Philip Morris USA, Inc.*, 268 F.R.D. 1, 16 (D. Mass. 2010) ("Indeed, subcellular harm, according to [the] plaintiffs, begins as soon as someone takes a single puff. . . . While the extent of the damage and risk may vary among class members, *allegedly twenty pack-years of smoking necessarily causes subcellular harm.* . . . I find their expert affidavits and depositions . . . sufficient on this point for class certification purposes." (Citations omitted; emphasis altered; footnote omitted.)). This ambiguity alone does not defeat summary judgment, however, because we construe the evidence in the light most favorable to the nonmoving party, and, therefore, we will read Anwar's conclusions about subcellular harm as applicable to all of the plaintiffs.

Nevertheless, we conclude that the plaintiffs have failed to present sufficient evidence as to certain other factors under *Donovan*, specifically, that "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury," and that "such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care . . . ." *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see *In re Marine Asbestos Cases*, 265 F.3d 861, 867–68 (9th Cir. 2001) (upholding summary judgment for defendants because plaintiffs did not "present sufficient evidence to raise a genuine issue of material fact as to the reasonableness and necessity" of medical monitoring, as plaintiffs "submitted no evidence that a single examination would yield any clinical benefit," and their expert affidavit "did not explain how patients would benefit from the single, baseline examination that [the] plaintiffs seek").

When discussing the expert testimony requirement in *Donovan*, the Massachusetts Supreme Judicial Court cited the Utah Supreme Court's decision in *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 970. See *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 227. In *Hansen*, the Utah Supreme Court reversed the trial court's grant of summary judgment on the plaintiffs' medical monitoring claims and discussed the elements that a plaintiff must prove to establish such a claim. *Hansen* v. *Mountain Fuel Supply Co.*, supra, 972, 979. Although the *Donovan* elements are not identical to those in *Hansen*, there is significant overlap, and, as such, we look to the explanation in *Hansen* of how to prove medical necessity.[20]

The court in *Hansen* stated: "It also must be shown that administration of the [medical] test *to a specific plaintiff is medically advisable for that plaintiff*. To illustrate, a monitoring regime might be of theoretical value in detecting and treating a particular illness, but if a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed. . . . We emphasize that the advisable medical testing for a *specific plaintiff* must be shown to be 'consistent with contemporary scientific principles' and 'reasonably necessary.' " (Citation omitted; emphasis added.) Id., 980; see also *Ayers* v. *Jackson*, supra, 106 N.J. 606 ("we hold that the cost of medical surveillance is a compensable item of damages [when] the proofs demonstrate, through reliable expert testimony predi-

[20] Medical necessity is demonstrated through the eighth element of *Hansen*, that the "[medical] test has been prescribed by a qualified physician according to contemporary scientific principles." *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979.

cated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is *reasonable and necessary*" (emphasis added)); P. Lin, Note, "Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and *Daubert*," 17 Rev. Litig. 551, 582 (1998) ("[a]lthough claims for medical monitoring damages do not require proof of specific causation, the plaintiff's burden includes proof of medical necessity, which is similar to proof of specific causation in that it shows that the individual plaintiff can benefit from a program of medical monitoring").[21] Requiring each plaintiff to prove "reasonable necessity" is vital, as the clinical suitability of medical monitoring must be established because, if such monitoring is unnecessary, recovery would be unwarranted.

The plaintiffs' argument that experts "should not form any opinions about the plaintiffs' exposure and their need for medical monitoring . . . because that function should be reserved to the trier of fact" is against the weight of persuasive authority.[22] This is the

[21] We need not address how the reasonable necessity requirement would operate in the context of a class action involving a claim for future medical monitoring. The plaintiffs were not certified as a class with respect to this issue, and the appropriate treatment of class based claims for medical monitoring is not presented in this appeal. See footnote 7 of this opinion. As a result, we conclude that each plaintiff in the present case must establish that medical monitoring is necessary under the *Donovan* test and leave for another day under what circumstances reasonable necessity may be proven for a class of plaintiffs.

[22] The plaintiffs also argue that experts should not opine as to "the [plaintiffs'] likelihood of contracting diseases . . . ." Certain courts that permit medical monitoring have expressly stated that they do not require a specific assessment or showing of the likelihood of contracting a particular disease in the future. See *Merry* v. *Westinghouse Electric Corp.*, 684 F. Supp. 847, 851 (M.D. Pa. 1988) (concluding that "the plaintiffs . . . proffered sufficient evidence to defeat [the defendant's] summary judgment motion," even

very purpose of expert testimony in medical monitoring cases. "[I]t is for the trier of fact to decide, *on the basis of competent medical testimony*, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (Emphasis added.) *Potter* v. *Firestone Tire & Rubber Co.*, supra, 6 Cal. 4th 1009. Expert testimony limited to "generally inform[ing] lay jurors about the scientific correlation between asbestos exposure and the onset of asbestos related diseases," as the plaintiffs argue, is inadequate proof as a matter of law. In the absence of expert testimony demonstrating the necessity of future testing, a fact finder would be unable to accurately conclude whether a plaintiff should recover for medical monitoring. As the court in *Hansen* noted, exposure alone does not provide a basis for recovery, and proof of these elements, through expert testimony, provides an important check on medical monitoring. See *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 978, 980; see also *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 788 (3d Cir. 1994) (acknowledging necessary limits on medical monitoring claims, such as demonstrating that "a reasonable physician would prescribe for her or him a monitoring regime different [from] the one that would have been prescribed in the absence of that particular exposure" (internal quotation marks omitted)), cert. denied sub

though "[t]he [plaintiffs'] experts have not provided, and in fact state they cannot provide, a scientifically sound conclusion as to the precise degree of risk faced by the plaintiffs"); *Potter* v. *Firestone Tire & Rubber Co.*, supra, 6 Cal. 4th 1008 (concluding that "recovery of medical monitoring damages should not be dependent upon a showing that a particular cancer or disease is reasonably certain to occur in the future"); *Hansen* v. *Mountain Fuel Supply Co.*, supra, 858 P.2d 979 ("[b]ecause the injury in question is the increase in risk that requires one to incur the cost of monitoring, the plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure"). We agree with the plaintiffs that expert testimony on that particular issue is not necessary in this particular context.

nom. *General Electric Co.* v. *Ingram*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995).

Attached as an exhibit to their motion for summary judgment, the defendants provided an excerpt of Anwar's deposition testimony, in which he stated that he had not formed an opinion as to the plaintiffs. This admission establishes that there is no genuine issue of material fact as to whether medical monitoring is reasonably necessary for the plaintiffs. The plaintiffs attempted to counter the defendants' evidentiary showing with an affidavit from Anwar, but that affidavit does not offer an opinion as to the plaintiffs, individually or as a group. There is only one statement that may reasonably be construed as relevant to the plaintiffs' claims: "Other individuals who were exposed to asbestos during the demolition work at Sikorsky should be monitored for the early detection and intervention of an asbestos related disease, as asbestos inhalation causes a significantly increased risk of contracting a serious disease . . . ." The only fact that this statement establishes is that persons exposed to asbestos have a significantly higher risk of contracting an asbestos related disease and should be monitored. This statement does not speak to the reasonable need for the medical monitoring of the plaintiffs, and it is insufficient to overcome summary judgment. But see *In re Paoli Railroad Yard PCB Litigation*, supra, 35 F.3d 794–95 (concluding that plaintiffs had presented sufficient evidence to overcome summary judgment after experts testified that plaintiffs should receive medical monitoring due to their increased risk); *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 776 (S.D. W. Va. 2009) (expert opinion stating, inter alia, that "the plaintiffs have a significantly increased risk of disease as a result of their exposure . . . and that the increased risk warrants medical monitoring" raised question of material fact as to reasonable necessity), aff'd in part

and appeal dismissed in part, 636 F.3d 88 (4th Cir.), cert. denied, 565 U.S. 977, 132 S. Ct. 499, 181 L. Ed. 2d 347 (2011). In addition, the affidavit lacks any statement demonstrating that "early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury," the fifth element required under *Donovan*. *Donovan* v. *Philip Morris USA, Inc.*, supra, 455 Mass. 226; see *In re Marine Asbestos Cases*, supra, 265 F.3d 867 ("the plaintiffs have not shown that a treatment exists for [asbestos related] diseases, or that there is clinical value to administering any such treatment before the onset of symptoms of these diseases").

Even if we were to conclude that Anwar's affidavit was applicable to plaintiffs other than his patient, Dougan, the portions of the affidavit that could apply to the plaintiffs provide only bare assertions of the legal requirements of medical monitoring without providing the factual foundation supporting those assertions. In several places, the affidavit mirrors the language required to prove a medical monitoring claim in *Redland Soccer Club, Inc.* v. *Dept. of the Army*, 548 Pa. 178, 195–96, 696 A.2d 137 (1997). Specifically, the affidavit states that "[o]ther individuals who were exposed to asbestos . . . at Sikorsky should be monitored . . . as asbestos inhalation causes a significantly increased risk of contracting a serious disease . . . . The monitoring regimen would be different from what is normally recommended in the absence of exposure . . . . [It] is reasonably necessary according to contemporary scientific principles, and the monitoring regimen makes early detection and intervention of an asbestos related disease possible." Although the affidavit does include detailed factual statements, those statements apply only to Dougan, who is no longer a plaintiff. Without additional details supporting the plaintiffs' individual needs

for medical monitoring, the plaintiffs have not raised a genuine dispute of material fact.

We have repeatedly held that such conclusory statements included in affidavits are insufficient to defeat a motion for summary judgment. See, e.g., *Stuart* v. *Freiberg*, supra, 316 Conn. 828 (discussing how statements in affidavits relied on by plaintiffs "closely replicate portions of the pleadings" and how "these averments are conclusory, and therefore inadequate to defeat a summary judgment motion"); *Coley* v. *Hartford*, 312 Conn. 150, 166 n.12, 95 A.3d 480 (2014) (concluding that expert's affidavit was conclusory and, therefore, did not demonstrate genuine issue of material fact to defeat summary judgment motion); *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 557, 791 A.2d 489 (2002) ("[a]lthough an affidavit by an expert may be considered in opposition to a motion for summary judgment, conclusory affidavits, even from expert witnesses, do not provide a basis on which to deny such motions" (internal quotation marks omitted)). Anwar's affidavit does not provide any specific explanation as to why the plaintiffs require medical monitoring because of their asbestos exposure at Sikorsky.

As the expert in this case provided no opinion as to the plaintiffs, and in the absence of any other evidence demonstrating the reasonable necessity of medical monitoring, we conclude that the plaintiffs did not demonstrate a genuine issue of material fact. Accordingly, we conclude that the trial court properly granted summary judgment for the defendants.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 337

ORDERS

ABIN BRITTON *v.* COMMISSIONER OF CORRECTION

The petitioner Abin Britton's petition for certification to appeal from the Appellate Court, 185 Conn. App. 388 (AC 39407), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

Michael L. Regan, former state's attorney, in opposition.

Decided June 15, 2021

RICHARD CAIRES *v.* JPMORGAN CHASE BANK, N.A.

The plaintiff's petition for certification to appeal from the Appellate Court, 201 Conn. App. 908 (AC 41746), is denied.

Richard Caires, self-represented, in support of the petition.

Brian D. Rich, in opposition.

Decided June 15, 2021

ELANA GERSHON *v.* RONALD BACK

The plaintiff's petition for certification to appeal from the Appellate Court, 201 Conn. App. 225 (AC 42778), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that a New York law is substantive rather than procedural for choice-of-law purposes when that law would require a litigant in the parties' circumstances who is seeking to obtain postjudgment relief in a marital dissolution case

to file a plenary action rather than a motion to open the dissolution judgment?"

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

James P. Sexton and *Julia K. Conlin*, in support of the petition.

Joseph T. O'Connor, in opposition.

Decided June 15, 2021

STATE OF CONNECTICUT *v.*
JAMES J. CICARELLA

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 811 (AC 42788), is denied.

David V. DeRosa, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided June 15, 2021

LANCE W. *v.* COMMISSIONER OF CORRECTION

The petitioner Lance W.'s petition for certification to appeal from the Appellate Court, 204 Conn. App. 346 (AC 39968), is denied.

Erica A. Barber, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided June 15, 2021

STATE OF CONNECTICUT *v.*
ZAIRE RAULIN LUCIANO

The state's petition for certification to appeal from the Appellate Court, 204 Conn. App. 388 (AC 42263), is denied.

Rocco A. Chiarenza, assistant state's attorney, in support of the petition.

Erica A. Barber, in opposition.

Decided June 15, 2021

TYRONE ROBINSON *v.* COMMISSIONER
OF CORRECTION

The petitioner Tyrone Robinson's petition for certification to appeal from the Appellate Court, 204 Conn. App. 560 (AC 43041), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided June 15, 2021

PROPERTY TAX MANAGEMENT, LLC *v.*
WORLDWIDE PROPERTIES,
LLC, ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 204 Conn. App. 520 (AC 43682), is denied.

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

Bill L. Gouveia, in support of the petition.

Decided June 15, 2021

RICHARD CAIRES *v.* JPMORGAN CHASE BANK, N.A.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 44490) is denied.

Richard Caires, self-represented, in support the petition.

Brian D. Rich and *Logan A. Carducci*, in opposition.

Decided June 15, 2021

Cumulative Table of Cases
Connecticut Reports
Volume 337

Britton *v.* Commissioner of Correction (Order) . . . 901
Caires *v.* JPMorgan Chase Bank, N.A. (Orders) . . . 901, 904
Dougan *v.* Sikorsky Aircraft Corp. . . . 27
Negligence; workplace asbestos exposure; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that claim for medical monitoring in absence of manifestation of physical injury was not cognizable under Connecticut law; medical monitoring, discussed; whether plaintiffs had established genuine issue of material fact as to whether medical monitoring was reasonably necessary for each individual plaintiff.
Gershon *v.* Back (Order) . . . 901
Lance W. *v.* Commissioner of Correction (Order) . . . 902
Nash Street, LLC *v.* Main Street America Assurance Co. . . . 1
Action seeking to recover proceeds allegedly due under commercial general liability insurance policy issued by defendant insurer; summary judgment; whether defendant had duty to defend in action brought by plaintiff against insured and alleging property damage resulting from collapse of house that had been lifted off foundation; whether trial court improperly granted defendant's motion for summary judgment; whether there existed possibility that plaintiff's complaint in action against insured alleged liability for property damage that was not excluded under insurance policy; whether trial court incorrectly determined that certain exclusions in insurance policy relieved defendant of its duty to defend.
Property Tax Management, LLC *v.* Worldwide Properties, LLC (Order) . . . 903
Robinson *v.* Commissioner of Correction (Order) . . . 903
State *v.* Cicarella (Order) . . . 902
State *v.* Luciano (Order) . . . 903

CONNECTICUT APPELLATE REPORTS

Vol. 205

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JUDITH KISSEL *v.* CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

(AC 42469)
(AC 42493)
(AC 42505)

Moll, Alexander and Norcott, Js.

Syllabus

The plaintiff sought to recover damages from the defendant acupuncturist, W, and his employer, C Co., for injuries she suffered when a heat lamp used during an acupuncture treatment burned her left foot and toes due to W's alleged medical malpractice. The plaintiff attached to her complaint a good faith certificate from her attorney but did not attach a written and signed opinion letter from a similar health care provider. C Co. filed a motion to dismiss the action on the ground that the plaintiff failed to attach a written opinion letter from a similar health care provider as required by statute (§ 52-190a). Thereafter, W joined C Co.'s motion to dismiss. Subsequently, the plaintiff filed a request to amend her complaint to attach an opinion letter that she indicated had existed at the time the complaint was originally filed but inadvertently was not attached. The plaintiff also objected to the motions to dismiss and claimed that the trial court had discretion to allow the amendment and to deny the motions to dismiss because the opinion letter existed at the time the action was commenced and was only inadvertently not attached to the original complaint. The trial court denied the motions to dismiss and overruled the objections to the plaintiff's request to amend. Thereafter, the court granted W's motion to implead H Co., the distributor of the heat lamp, as a third-party defendant. Subsequently, the plaintiff filed an amended complaint to allege a product liability claim against H Co. Following a trial, the jury returned a verdict in favor of the plaintiff on the medical malpractice and product liability counts. Thereafter, the court granted W's and C Co.'s motions for permission to file a second motion for reconsideration of the denial of their motions to dismiss but denied the requested relief, denied H Co.'s motions for a directed verdict and to set aside the verdict, and rendered judgment in accordance with the verdict. On separate appeals brought to this court by W, C Co., and H Co., *held*:

1. The trial court improperly denied the motions to dismiss filed by W and C Co., the plaintiff having failed to attach a written opinion letter to her complaint as required by § 52-190a and having failed to cure that defect before the statute of limitations expired: this court's decision in *Peters* v. *United Community & Family Services, Inc.* (182 Conn. App. 688), made clear that a plaintiff's efforts to cure a defective opinion letter must be initiated prior to the expiration of the statute of limitations, and the plaintiff did not seek to remedy her failure to attach the written opinion letter to her original complaint before the two year statute of limitations had expired, and, contrary to the plaintiff's argument, W and C Co. did not waive argument on the statute of limitations because they did not raise it in their 2012 motions to dismiss, as that argument was raised in their motions to reargue based on new, controlling case law; moreover, a jury verdict in a medical malpractice action does not insulate a defect in the required opinion letter from appellate review; furthermore, because the plaintiff had knowledge on the date of the incident of the nature and extent of her injuries, she could not rely on the three year statute (§ 52-584) of repose, and, thus, pursuant to § 52-584, the action was subject to a two year statute of limitations.
2. The trial court properly denied H Co.'s motions for a directed verdict and to set aside the verdict; the plaintiff presented alternative bases of causation for her injuries, and, because there was a lack of jury interrogatories to specify which basis of causation the jury used to reach its verdict, H Co. was required to establish that the evidence was insufficient to support any of the specifications of causation pursued by the plaintiff, however, H Co. argued on appeal only that the plaintiff failed to establish how or why the heat lamp came into contact with her foot and its failure to challenge the alternative bases of causation was fatal to its appeal.

Argued October 5, 2020—officially released June 29, 2021

Procedural History

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, denied the defendants' motions to dismiss; thereafter, the court, *Mottolese, J.*, granted the motion of the defendant Reed Wang to implead Health Body World Supply, Inc., as a third-party defendant; subsequently, the plaintiff filed an amended complaint; thereafter, the matter was tried to the jury before *Hon. Kenneth B. Povodator*, judge trial referee; verdict for the plaintiff; subsequently, the

court, *Hon. Kenneth B. Povodator*, judge trial referee, denied the defendants' postverdict motions and rendered judgment in accordance with the verdict, from which the defendants filed separate appeals to this court; thereafter, this court consolidated the appeals. *Affirmed in part; reversed in part; judgment directed.*

Wesley W. Horton, with whom were *Kenneth J. Bartschi* and, on the brief, *Mary Alice Moore Leonhardt*, for the appellant in Docket No. AC 42469 (defendant Reed Wang).

David J. Robertson, with whom was *Keith M. Blumenstock*, for the appellant in Docket No. AC 42493 (named defendant).

Laura Pascale Zaino, with whom were *Paul D. Meade* and, on the brief, *Logan A. Carducci*, for the appellant in Docket No. AC 42505 (defendant Health Body World Supply, Inc.).

William M. Bloss, with whom, on the brief, were *Alinor C. Sterling*, *Matthew S. Blumenthal*, *Sarah Steinfeld*, and *Sean K. McElligott*, for the appellee (plaintiff).

Opinion

ALEXANDER, J. This trilogy of appeals originated when the plaintiff, Judith Kissel, sustained serious burns to her left foot during the course of an acupuncture treatment. The plaintiff commenced a medical malpractice action against the treating acupuncturist, Reed Wang, and his place of employment, the Center for Women's Health, P.C. (Center). The plaintiff subsequently filed a third-party complaint alleging a product liability claim against Health Body World Supply, Inc., also known as WABBO, the distributor of a device commonly referred to as the Miracle Lamp (heat lamp), which injured her. After a trial on both the medical malpractice and product liability claims, the jury returned a verdict for the plaintiff on all counts, awarding her a total of $1 million

in damages. Following the resolution of various post-verdict motions, the court rendered judgment in accordance with the jury's verdict.

Wang, the Center, and WABBO each filed a separate appeal, docketed as AC 42469, AC 42493, and AC 42505, respectively. In AC 42469 and AC 42493, Wang and the Center claim that (1) the trial court improperly denied their motions to dismiss the medical malpractice action for failing to comply with General Statutes § 52-190a because the plaintiff failed to attach to her initial complaint an opinion letter from a similar health care provider and her efforts to cure this defect occurred outside of the limitation period, (2) the court improperly denied the request for an evidentiary hearing with respect to the jurisdictional facts related to the opinion letter, (3) the plaintiff failed to present sufficient evidence with respect to causation, and (4) the court improperly instructed the jury regarding expert testimony and causation. In AC 42505, WABBO claims that the court improperly denied its motions for a directed verdict and to set aside the verdict because the plaintiff failed to present sufficient evidence as to the element of causation. The plaintiff maintains that the judgment of the trial court should be affirmed.

In AC 42469 and AC 42493, we agree with Wang and the Center that the court improperly denied their motions to dismiss the plaintiff's medical malpractice complaint as a result of her failure to attach the requisite opinion letter to the complaint and to cure this defect by the expiration of the statute of limitations.[1] In AC 42505, we conclude that the plaintiff presented sufficient evidence with respect to her product liability complaint. The court, therefore, properly denied WABBO's motions for a directed verdict and to set aside the verdict. Accordingly, we reverse the judgment with respect to Wang and the Center on the medical malpractice claims, and

[1] As a result of this conclusion, we need not reach the other claims raised by Wang and the Center in AC 42469 and AC 42493.

affirm the judgment with respect to the product liability claims.

The following recitation, as set forth by the court in its postverdict memorandum of decision,[2] summarizes the facts and procedural history and serves as a starting point to address the claims raised in these appeals. The plaintiff, a patient at the Center, went to Wang for her first acupuncture treatment on April 22, 2010. At this visit, Wang inserted needles in the plaintiff's body and placed the heat lamp[3] near her foot as part of the treatment. The surface temperature of this device, which was distributed by WABBO,[4] exceeded 500 degrees. As part of his standard practice, Wang left the plaintiff alone in the treatment room, but remained close by. "When . . . Wang returned to the room several minutes later, the head of the heat lamp was resting against the plaintiff's foot, having caused serious injuries to her foot. He removed the lamp from her foot, and he (and the principal of the Center) transported the plaintiff to a hospital for treatment."[5]

[2] The court, *Hon. Kenneth B. Povodator*, judge trial referee, issued a fifty-two page memorandum of decision on January 3, 2019, addressing various motions, including motions for permission to file a late motion to reargue and motions for reconsideration of the 2012 motions to dismiss, motions for directed verdict, motions to set aside the verdict, a motion for remittitur and a motion for judgment notwithstanding the verdict.

[3] Pursuant to a user brochure introduced into evidence, the heat lamp promoted metabolism, regulated physiological deficiencies, diminished inflammation and eased pain, tissue injuries, arthritis, and various skin conditions. This device contained a round plate coated with thirty-three elements and was activated by a built-in heating element. The mineral plate then emitted "a special band of electromagnetic waves" that were absorbed by the patient's body.

[4] "The action was commenced in April, 2012. In December of that year . . . Wang sought to implead [WABBO] the distributor of the heat lamp that caused the injury to the plaintiff . . . . After the motion was granted, and a third-party complaint served on [WABBO], the plaintiff amended her complaint so as to assert a direct claim against . . . [WABBO]. Early in the trial . . . Wang withdrew his complaint directed to . . . WABBO." See part II of this opinion.

[5] The heat lamp brochure introduced into evidence cautioned that the head of the heat lamp should not be touched during operation. It further instructed that the head of the lamp should be positioned eight to twelve inches away from the patient.

A significant issue at trial was the exact manner in which the head of the heat lamp, which housed the heating element, came into contact with the plaintiff's left foot. No one observed whether the head of the heat lamp had descended or whether the entire lamp assembly had tipped over.[6] The parties presented extensive evidence regarding the propensity of the head of the lamp to lower on its own or whether such movement was the result of some external force.

"The jury awarded the plaintiff $1 million as to each of the claim/theories of liability presented. With respect to the medical malpractice claim, the jury determined that the plaintiff was not comparatively negligent. With respect to the product liability claim, the jury determined that the plaintiff was not comparatively responsible for her injuries, but pursuant to General Statutes § 52-572o, the jury determined that . . . Wang, as a party to this action, had been 20 [percent] responsible. The plaintiff had not made any claim for economic damages, so the full award was for noneconomic damages." With this factual overview in mind, we now proceed to the specific claims raised in each of these appeals.

I

AC 42469 and AC 42493

In AC 42469 and AC 42493, Wang and the Center claim, inter alia, that the court improperly denied their motions to dismiss the plaintiff's medical malpractice complaint.[7] Specifically, Wang and the Center contend

[6] The plaintiff was unaware of how the head of the heat lamp ended up on her foot. When Wang returned to the treatment room, "he did not notice or observe whether the lamp assembly had tipped over or whether the arm supporting the lamp head had descended."

[7] "[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. . . . Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill." (Emphasis

that the court lacked personal jurisdiction on the basis of the plaintiff's failure (1) to attach an opinion letter from a similar health care provider to her medical malpractice complaint and (2) to cure that defect within the applicable two year statutory limitation period. The plaintiff counters that the court properly denied the motions to dismiss the medical malpractice complaint. She argues that Wang and the Center waived their statute of limitations defense and that the purpose of the statute was satisfied, as evidenced by the jury's verdict in the present case. The plaintiff contends that the three year statute of repose contained in General Statutes § 52-584 applied and, therefore, the amendment to the complaint containing the opinion letter was timely and cured the defect. We agree with Wang and the Center that the medical malpractice complaint should have been dismissed pursuant to § 52-190a (c) and that the plaintiff's efforts to cure the defect were not timely.

A detailed recitation of the facts and procedural history is necessary for the resolution of this claim.[8] The

omitted; internal quotation marks omitted.) *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 576, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).

[8] "A motion to dismiss admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. . . . In a medical malpractice action, despite the allegations in the plaintiff's complaint, it is proper to consider undisputed facts contained in affidavits when deciding a motion to dismiss if the affidavits provide independent evidence of the nature of a defendant's medical practice. . . . Where . . . the motion [to dismiss] is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint. . . . Generally, [i]f affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails toundermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . . As a general matter, the burden

plaintiff's complaint was served on the Center on April 4, 2012, and on Wang on April 6, 2012. In her two count complaint, dated March 30, 2012, the plaintiff alleged that Wang, as "a servant, agent, apparent agent and/or employee of [the Center]" held himself out as a licensed acupuncturist in Connecticut.[9] She further alleged that she sustained injuries as a result of Wang's failure to exercise the degree and care of a licensed acupuncturist in the following ways: (1) failing to protect her from contact with the heat lamp during the acupuncture treatment; (2) failing to place the heat lamp at a safe

is placed on the defendant to disprove personal jurisdiction." (Citations omitted; internal quotation marks omitted.) *Carpenter* v. *Daar*, 199 Conn. App. 367, 381–82, 236 A.3d 239, cert. granted, 335 Conn. 962, 239 A.3d 1215 (2020).

In the event, however, that the motion to dismiss raises a factual question that is not determinable from the record, the plaintiff bears the burden of proof to present evidence to establish jurisdiction, and due process may require an evidentiary hearing. *LaPierre* v. *Mandell & Blau, M.D.'s, P.C.*, 202 Conn. App. 44, 49 n.3, 243 A.3d 816 (2020).

[9] General Statutes § 20-206aa (3) provides: " 'The practice of acupuncture' means the system of restoring and maintaining health by the classical and modern Oriental medicine principles and methods of assessment, treatment and prevention of diseases, disorders and dysfunctions of the body, injury, pain and other conditions. 'The practice of acupuncture' includes:

(A) Assessment of body function, development of a comprehensive treatment plan and evaluation of treatment outcomes according to acupuncture and Oriental medicine theory;

(B) Modulation and restoration of normal function in and between the body's energetic and organ systems and biochemical, metabolic and circulation functions using stimulation of selected points by inserting needles, including, trigger point, subcutaneous and dry needling, and other methods consistent with accepted standards within the acupuncture and Oriental medicine profession;

(C) Promotion and maintenance of normal function in the body's energetic and organ systems and biochemical, metabolic and circulation functions by recommendation of Oriental dietary principles, including, use of herbal and other supplements, exercise and other self-treatment techniques according to Oriental medicine theory; and

(D) Other practices that are consistent with the recognized standards of the acupuncture and Oriental medicine profession and accepted by the National Certification Commission for Acupuncture and Oriental Medicine."

See generally General Statutes § 20-206bb (setting forth licensing requirement for persons engaging in practice of acupuncture in Connecticut).

distance during the treatment; (3) leaving her unattended during the acupuncture treatment and failing to respond promptly to the her cries for help while she was being burned; (4) failing to use a safe heating system during the acupuncture treatment; and (5) not caring for, treating, monitoring, diagnosing, and supervising her adequately and properly during the acupuncture treatment. As a result of this professional negligence, the plaintiff alleged a variety of injuries.[10]

The plaintiff's counsel attached a certification to the complaint indicating that he had made a reasonable inquiry that led to a good faith belief that grounds existed for this medical malpractice action against Wang and the Center. See footnote 15 of this opinion. The plaintiff did not, however, include a written and signed opinion letter from a similar health care provider[11] to show the existence of a good faith belief for this action as required by § 52-190a (a).[12]

[10] The plaintiff alleged that she suffered third degree burns to her left foot and toes, a broken toe, an infection of a bone in her toe, permanent deformity and scarring of her left toes, foot and leg, permanent pain in her left foot, loss of sensation and numbness in her left toes and foot, and physiological, psychological, and neurological sequelae and required a five day admission to the burn unit of a New York hospital, multiple skin graft surgeries, and multiple debriding procedures.

[11] General Statutes § 52-184c (b) provides: "If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

[12] General Statutes § 52-190a (a) provides: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for

On May 24, 2012, the Center filed a timely motion to dismiss the plaintiff's complaint for lack of personal jurisdiction.[13] It claimed that the plaintiff failed to attach a written opinion letter from a similar health care pro-

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

[13] Practice Book § 10-30 provides in relevant part: "(a) A motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person . . . .

"(b) Any defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance. . . ." The plaintiff does not dispute that the motion to dismiss filed by the Center and joined by Wang was timely.

vider to the complaint as required by § 52-190a (a). It argued that the plaintiff's action sounded in medical malpractice and that her failure to comply with subsection (a) of § 52-190a required dismissal pursuant to subsection (c) of that statute.[14] On June 8, 2012, Wang joined the Center's motion to dismiss.

On June 28, 2012, the plaintiff requested leave to file a first amended complaint. In this request, the plaintiff indicated that "the similar health care provider opinion existed at the time the complaint was originally filed but was inadvertently not attached to the original complaint." The plaintiff attached exhibit A to the request to file an amended complaint. Exhibit A included a copy of a proposed first amended complaint, the original certificate from the plaintiff's counsel, and an unsigned and undated opinion letter.[15] An affidavit from the plaintiff's

[14] In its memorandum of law in support of the motion to dismiss, the Center argued: "The civil summons signed by [the] plaintiff's counsel contains the case code of T 28 which is the code for Medical Malpractice. Appended to the complaint is a document entitled 'Certificate,' which is signed by the plaintiff's attorney and which states in part, 'I . . . hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the case and treatment of the plaintiff . . . . This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants . . . .' " (Footnote omitted.)

[15] The opinion letter attached to the first amended complaint provided:

"OPINION

PURSUANT TO C.G.S., SECTION 52-190a

"Dear Mr. Lichtenstein:

"Thank you for asking me to review the case of Judith Kissel. As you know, I am a licensed acupuncturist. In my role as a licensed acupuncturist, I am familiar with the standard of care as it relates to the practice of acupuncture in the United States. At your request, I have read and reviewed the following medical records of Judith Kissel:

•Records from the Center for Women's Health

•Records from the Stamford Hospital

"Based upon my review of the medical records, it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang, L.Ac on April 22, 2010 at the Center for Women's Health. The standard of care dictates that patients receiving acupuncture must be positioned a safe distance from any piece of equipment that has the potential to injure the

attorney was attached as exhibit B. In this affidavit, the plaintiff's counsel averred that he represented the plaintiff in this medical malpractice action, had consulted with an expert, a licensed acupuncturist, beginning on November 16, 2011, and provided this expert with the plaintiff's medical records. He further represented that the expert signed the opinion letter on February 19, 2012, and had transmitted it to his representative that same day. The plaintiff's counsel indicated that he inadvertently failed to attach this letter to the complaint on March 30, 2012.

Additionally, the plaintiff also filed a consolidated opposition to the motions to dismiss filed by Wang and the Center on June 28, 2012.[16] Citing to this court's

patient. In addition, the patient needs to be appropriately monitored to ensure that the patient remains safe throughout the acupuncture procedure. In this case, Ms. Kissel's left foot was burned on a heat lamp while she was receiving acupuncture from Reed Wang, L.Ac. Mr. Wang was negligent in his placement and/or monitoring of Ms. Kissel during the acupuncture procedure. Mr. Wang's departure from the standard of care was a substantial factor in causing the thermal burn to Ms. Kissel's left foot.

"My opinion that there was negligence on the part of Mr. Wang is based upon my review of the medical records as well as my education, training, and experience. The opinion stated herein is based upon the information available to me at this time. Should other information and evidence become available, I reserve the right to supplement and/or amend this opinion." (Emphasis omitted.)

[16] The plaintiff attached a copy of a letter requesting the licensed acupuncturist to review the facts of this case. This letter provided in relevant part: "Thank you for agreeing to review this case. It involves a 52 y/o who scheduled her first acupuncture session with Dr. Reed Wang who provides his service at the OB/GYN office of Center for Women's Health in Stamford. During this session on April 22, 2010, a heat lamp was set up and Dr. Wang exited the room. At some point, this heat lamp fell onto Ms. Kissel's left foot. Dr. Wang and obstetrician, Dr. Joel Evans, took Ms. Kissel to Stamford ED where she was diagnosed with 3rd degree and 2nd degree burns to the left great toe as well as the dorsum aspect of the foot and the left second toe. She has had multiple surgeries and skin grafts as a result.

"The medical records are skimpy because Dr. Wang did not write a note in her chart pertaining to this incident. Only Dr. Evans made a notation after the fact. We are looking to you for comment on this incident and Dr. Wang's care and treatment as an acupuncturist.

decision in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009), the plaintiff argued that "where the opinion letter exists at the time of the commencement of the action, but is inadvertently not attached to the complaint, a trial court has discretion to allow the amendment and deny a motion to dismiss." She further claimed that the dismissal of her complaint "would elevate form over substance" and would violate Connecticut's public policy of allowing a trial on the merits. The plaintiff emphasized that "the important dividing line is whether the opinion letter existed at the time the lawsuit was commenced or whether it was created after commencement. . . . Accordingly, the rule in *Votre*, which provides a safe harbor when the opinion letter exists prior to commencement of the lawsuit, comports with the purpose of § 52-190a and common sense." The Center filed a reply to the plaintiff's opposition to its motion to dismiss.[17]

On July 9, 2012, the Center objected to the plaintiff's request for leave to amend her complaint. It argued that the court lacked discretion to permit an amendment to the complaint in order for the plaintiff to attach an opinion letter from a similar health care provider. The Center also argued that a hearing was required to resolve its challenge to certain facts contained in the affidavit of the plaintiff's counsel.

On July 16, 2012, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, heard oral argument on the

"When you have completed your review, please call Attorney Joel Lichtenstein at your earliest convenience to discuss."

[17] The Center disputed, inter alia, that the opinion letter had existed prior to the commencement of the medical malpractice action and that the author of the opinion letter had been sent the plaintiff's medical records. The Center argued additionally that an evidentiary hearing was required to resolve the disputed facts set forth in the affidavit from the plaintiff's counsel and that the plaintiff could not amend her complaint to include the opinion letter.

motions to dismiss. Counsel for the Center argued that the failure to include the opinion letter of a similar health care provider constituted insufficient process and that the plaintiff should not be permitted to amend her complaint. The plaintiff's counsel emphasized that because the opinion letter existed at the time the medical malpractice case had been commenced, the court had discretion to grant the plaintiff's request to amend the complaint so as to include the opinion letter.

On September 6, 2012, the court issued a memorandum of decision denying the motions to dismiss. After summarizing the arguments of the parties and setting forth the relevant law, the court framed the issue as follows: "Although the law is explicit that a written opinion letter complying with § 52-190a (a) must be attached to the complaint in a medical malpractice case in order to subject the defendant to the jurisdiction of the court and to avoid dismissal of the action, the law is less clear as to the legal consequences when a plaintiff obtained a statutorily valid written opinion letter prior to commencing the action but failed to attach it to her original complaint and subsequently seeks to amend her complaint to attach that written opinion letter."

After quoting from our decision in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585,[18] the trial court noted that the discretionary power to permit an amendment to a complaint to include the § 52-190a letter applied only when such a

[18] Specifically, the court quoted the following language from our decision: "Given the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers." (Footnote omitted.) *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585.

letter existed prior to the commencement of the action. The court noted the split of authority among decisions of the Superior Court as to whether the referenced passage from *Votre* constituted dicta and concluded that it had the discretion to allow the plaintiff to amend her complaint. "Without taking a position on the viability of the language at issue in *Votre*, this court holds, in the absence of any appellate authority to the contrary, that to the extent that the written opinion letter existed prior to the commencement of this action, then the court, in the exercise of its discretion, may deny the . . . motions to dismiss and consider the written opinion letter that is attached to the amended complaint."

The court next addressed whether the opinion letter had existed prior to the commencement of the plaintiff's medical malpractice action. The court recognized that the plaintiff claimed that the undated letter had been written prior to the lawsuit, while Wang and the Center disputed this fact. Nevertheless, it determined that an evidentiary hearing was not required. The court explained: "Turning, then, to the attestations made in the affidavit, the attorney claims that he signed the complaint in this action on March 30, 2012, and that at that time he filed the complaint, the signed, written opinion letter of the similar health care provider existed and was retained in the plaintiff's file. He further attests that his failure to attach the written opinion letter was inadvertent and an oversight. Such attestations are based on the attorney's personal knowledge, and constitute facts that would be admissible at trial and indicate that the attorney is competent to testify to the matters stated in the affidavit. [Wang and the Center did] not submit any evidence to rebut the attorney's attestations, but rather make conclusory statements challenging the evidence. . . . Therefore, in the absence of counterevidence by [Wang and the Center], the court finds that the written opinion letter existed prior to the commencement of

this action and that the attorney's failure to attach it to the original complaint was inadvertence or an oversight." (Citations omitted.)

In summary, the court found that the opinion letter had been authored prior to the commencement of the action and that the failure to attach it to the original complaint resulted from inadvertence or oversight. It permitted the plaintiff to amend her complaint to include the opinion letter. On September 21, 2012, the court denied the motions to reargue and for reconsideration filed by Wang and the Center.

A number of pretrial filings, motions and hearings ensued and the trial did not commence until November 16, 2017. The jury returned its verdict in favor of the plaintiff on both the malpractice and product liability counts on December 21, 2017. Approximately six months later, Wang filed a motion for permission to file a second motion for reconsideration of the denial of his motion to dismiss.[19] Wang argued that this court's recently released decision in *Peters* v. *United Community & Family Services, Inc.*, 182 Conn. App. 688, 191 A.3d 195 (2018), was "directly on point factually, [was] controlling legally, and [served] as additional grounds for the dismissal of [the plaintiff's] claims in the instant action." On September 6, 2018, the court, *Hon. Kenneth B. Povodator*, judge trial referee, heard oral argument on both the motion for permission to file a second motion for reconsideration and the substantive merits of the request for reconsideration.

At the hearing, Wang argued that, pursuant to *Peters*, any attempt to cure a defect relating to a § 52-190a opinion letter must have occurred prior to the expiration of the statutory limitation period; otherwise, the only available remedy was to commence a new action

[19] Wang, the Center, and WABBO filed a number of various postverdict motions that extended the appellate process.

pursuant to the accidental failure of suit statute, General Statutes § 52-592.[20] The plaintiff countered that Judge Karazin, in his 2012 decision, properly had relied on *Votre*, and that case remained good law even after *Peters*. Six days later, the Center joined Wang's motion for permission to file a second motion for reconsideration of the denial of the 2012 motion to dismiss.

On January 3, 2019, Judge Povodator issued a memorandum of decision addressing the postverdict motions that had been filed, including the motions for reconsideration of the 2012 motions to dismiss.[21] The court began by summarizing the issues relating to § 52-190a in this case and the relevant language from our decisions in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585, and *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706. After observing that its decision constituted a "close call," the court focused on the issue of judicial economy and that the purpose underlying § 52-190a had been satisfied, given the jury's verdict in favor of the plaintiff.

The court concluded: "It would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion. Subject matter jurisdictional issues may be raised at any time, but other jurisdictional issues are subject to waiver—and inferentially subject to other equitable considerations. For all these reasons, the motions to reargue are (have been) granted with respect to entertaining reargument and reconsidering the earlier decision, but the equities overwhelmingly dictate against affording any relief."

On appeal, Wang and the Center argue that the court improperly denied their motions to dismiss. Specifically, they contend that the plaintiff's complaint did not

[20] See, e.g., *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 203–21, 180 A.3d 595 (2018) (discussing applicability of § 52-592).

[21] The court granted the motions for permission to file a second motion for reconsideration.

comply with § 52-190a due to the absence of an opinion letter from a similar health care provider. They claim that the plaintiff did not attempt to remedy this defect until after the statute of limitations had expired. Wang and the Center contend that the plaintiff's medical malpractice action should have been dismissed. The plaintiff counters that (1) Wang and the Center waived the argument that the § 52-190a defect was not cured within the statutory limitation period, (2) the purpose underlying § 52-190a was satisfied in this case given the jury's finding of medical malpractice, and (3) her amendment was filed within the three year repose period of § 52-584, which she claims is the limitation period. We agree that the court lacked personal jurisdiction over Wang and the Center as a result of the plaintiff's failure to cure the § 52-190a defect within the statutory limitation period and that the medical malpractice action, therefore, should have been dismissed.

We begin our analysis by setting forth our standard of review and a comprehensive review of the relevant legal principles. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Our Supreme Court has held that the failure of a plaintiff to comply with the statutory requirements of § 52-190a (a) results in a defect in process that implicates the personal jurisdiction of the court. . . .

"When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Citations omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord*

Hospital, *Inc.*, 199 Conn. App. 265, 278–79, 235 A.3d 589, cert. denied, 335 Conn. 968, 240 A.3d 284 (2020), and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020); see also *Bennett* v. *New Milford Hospital*, *Inc.*, 300 Conn. 1, 10–11, 12 A.3d 865 (2011). We employ a de novo standard of review with respect to a challenge to the trial court's ultimate legal conclusion and resulting denial of a motion to dismiss. *Perrone* v. *Buttonwood Farm Ice Cream*, *Inc.*, 158 Conn. App. 550, 554, 119 A.3d 659 (2015); see also *Bennett* v. *New Milford Hospital*, *Inc.*, supra, 10; *Labissoniere* v. *Gaylord Hospital*, *Inc.*, 182 Conn. App. 445, 451, 185 A.3d 680 (2018); *Lohnes* v. *Hospital of St. Raphael*, 132 Conn. App. 68, 76, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).[22]

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

[22] Citing *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 705, Wang argues that this court should apply the plenary standard of review when considering a trial court's decision regarding a motion to dismiss. We note that our Supreme Court has stated that there is no meaningful distinction between plenary and de novo review and that it has used those terms interchangeably. *Ammirata* v. *Zoning Board of Appeals*, 264 Conn. 737, 746 n.13, 826 A.2d 170 (2003); see also *Sherman* v. *Ronco*, 294 Conn. 548, 554 n.10, 985 A.2d 1042 (2010).

the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . ." (Emphasis added.) See also *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014). Simply stated, § 52-190a applies when (1) the defendant is a health care provider and (2) the claim is one of medical malpractice. *LaPierre* v. *Mandell & Blau, M.D.'s, P.C.*, 202 Conn. App. 44, 49, 243 A.3d 816 (2020).

In *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 27, our Supreme Court explained that the purpose of § 52-190a "is to discourage the filing of baseless lawsuits against health care providers . . . ." (Internal quotation marks omitted.) See generally *Wilcox* v. *Schwartz*, 303 Conn. 630, 640–43, 37 A.3d 133 (2012) (setting forth history of § 52-190a); *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 54, 12 A.3d 885 (2011) (legislature established comprehensive prelitigation inquiry, including requirement of opinion letter by objectively qualified health care provider, in attempt to reduce filing of frivolous medical malpractice actions).

The court in *Bennett* also considered § 52-190a (c), which provides that "[t]he *failure to obtain and file the written opinion* required by subsection (a) of this section *shall be grounds for dismissal of the action*." (Emphasis added.) In interpreting subsection (c) of

§ 52-190a, our Supreme Court concluded that a motion to dismiss constitutes the proper procedural vehicle to challenge any deficiencies with the requisite letter. *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 29.

Cognizant of the severity of the dismissal of an action as a result of a noncompliant opinion letter, the court noted that such a dismissal was without prejudice and that, in the event that the statute of limitations had run, the accidental failure of suit statute, § 52-592,[23] may afford relief in certain circumstances. Id., 30–31; see also *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 46–47 (holding that when medical malpractice action has been dismissed pursuant to § 52-190a (c) for failure to supply opinion letter by similar health care provider, plaintiff may commence otherwise time barred action pursuant to matter of form provisions of § 52-592 (a), only if that failure was caused by simple mistake or omission, rather than egregious conduct or gross negligence attributable to plaintiff or plaintiff's attorney). It bears emphasizing, however, that "[d]ismissal is the mandatory remedy when a plaintiff fails to file an opinion letter that complies with § 52-190a (a)." (Internal quotation marks omitted.) *Doyle* v. *Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 492, 179 A.3d 249 (2018); see also *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 701; see

[23] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

generally *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584 (noting that courts are bound to uphold law that legislature adopts and that § 52-190a (c) plainly states that failure to include letter mandated by § 52-190a (a) shall be grounds to dismiss action).

In *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 397, 21 A.3d 451 (2011), our Supreme Court determined "the precise nature of the jurisdiction which is to be challenged pursuant to the dismissal language of § 52-190a (a)." After a review of the relevant case law, it concluded that the failure to comply with the requirements of § 52-190a (a) implicated personal jurisdiction and not the subject matter jurisdiction of the court. Id., 399. It noted that, unlike matters involving subject matter jurisdiction, personal jurisdiction may be obtained via consent or waiver. Id. Additionally, the *Morgan* court noted that a motion to dismiss contesting personal jurisdiction must be filed within thirty days of the filing of an appearance or such a claim would be waived. Id.; see also Practice Book §§ 10-6, 10-7, 10-30, and 10-32. "Accordingly, we conclude that, because the written opinion letter of a similar health care provider must be attached to the complaint in proper form, the failure to attach a proper written opinion letter pursuant to § 52-190a constitutes insufficient service of process and, therefore, Practice Book § 10-32 and its corresponding time and waiver rule applies by its very terms. Because we conclude that the absence of a proper written opinion letter is a matter of form, it implicates personal jurisdiction. It is in the nature of a pleading that must be attached to the complaint." (Footnote omitted.) *Morgan* v. *Hartford Hospital*, supra, 402; see also *Ugalde* v. *Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, 7, 188 A.3d 787, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); *Gonzales* v. *Langdon*, 161 Conn. App. 497, 513–14, 128 A.3d 562 (2015).

Thus, in a medical malpractice action, a plaintiff must comply with § 52-190a by including an opinion letter from a similar health care provider with the complaint to establish personal jurisdiction, and a timely challenge to the failure to include a legally sufficient opinion letter will result in a dismissal. In a series of decisions, all of which were issued after the 2012 motions to dismiss and during the pendency of these proceedings before the trial court, our court addressed how a plaintiff, whose opinion letter to the medical malpractice complaint was defective, could avoid dismissal or otherwise pursue his or her claim.

In *Gonzales* v. *Langdon*, supra, 161 Conn. App. 508, we considered "whether a complaint alleging medical malpractice that does not include a legally sufficient opinion letter may be amended to avoid dismissal, and under what circumstances an amendment is permitted." In that case, the plaintiff alleged that the defendant, a dermatologist who held himself out as a specialist in cosmetic surgery, negligently performed a neck and jowl face-lift procedure. Id., 500–501. The plaintiff attached an opinion letter from a board certified dermatologist. Id., 501. The defendant moved to dismiss the complaint on the basis that the opinion letter contained insufficient details regarding the qualifications of the author of the opinion letter. Id. In addition to her contention that the original opinion letter was, in fact, legally sufficient, the plaintiff filed a request for leave to amend her complaint more than thirty days from the return date, thus past the time to amend it as of right,[24] but within the applicable statutory limitation period. Id., 501–502. Specifically, she sought to include an amended version of the original opinion letter and a new opinion letter authored by a board certified plastic surgeon. Id., 501. The trial court granted the defendant's motion to dismiss on the basis that the original opinion letter was not legally sufficient. Id., 502–503.

[24] See General Statutes § 52-128 and Practice Book § 10-59.

On appeal, we agreed that the original opinion letter was insufficient because the author was not a similar health care provider as defined by § 52-184c (c).[25] Id., 507. We then considered whether the plaintiff's complaint could be amended and the circumstances under which such an amendment would be permitted. Id., 508. We reasoned that the general applicability of General Statutes § 52-128 and Practice Book §§ 10-59 and 10-60, the policies underlying § 52-190a (a), and judicial economy all favored permitting an amendment filed after the thirty days to amend as of right but *before* the statute of limitations had expired. Id., 517–20. We concluded, therefore, that the trial court had abused its discretion by not granting the plaintiff leave to amend the complaint with the amended original opinion letter and the new opinion letter. Id., 521. We further determined, however, that the amended original opinion letter did not meet the requirements of §§ 52-190a and 52-184c, and that the record was insufficient to determine whether the new opinion letter satisfied § 52-184c (c). Id., 523.

Next, in *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 3, the plaintiff alleged that the defendant, a general surgeon, negligently performed a robot-assisted gastrectomy. The opinion letter attached to the complaint failed to identify the medical qualifications of its author. Id., 5. The defendant, therefore, moved to dismiss the complaint on the basis of a deficient opinion

[25] Specifically, we stated: "The original opinion letter was authored by a board certified dermatologist, who did not claim to have any training or experience in cosmetic surgery, let alone a certification in plastic surgery or cosmetic surgery. Although the board certified dermatologist claimed to know the relevant standard of care and that [the defendant] breached that standard, this is not sufficient to meet the requirements of § 52-184c (c). . . . The plaintiff was required to obtain an opinion letter authored by a health care provider with experience and training in cosmetic surgery, and with board certification in cosmetic surgery or in a specialty requiring greater training and experience. Both of these requirements are missing from the original opinion letter." (Citation omitted.) *Gonzales* v. *Langdon*, supra, 161 Conn. App. 507.

letter. Id. The plaintiff filed a request for leave to amend the complaint by adding details to the opinion letter regarding the author's medical qualifications. Id. The trial court granted the defendant's motion, reasoning that a request for leave to amend the complaint had been filed outside of the applicable limitation period. Id., 6.

On appeal, the plaintiff argued only that she should have been permitted to amend the complaint with a more detailed opinion letter. Id., 8. In rejecting this argument, we first noted: "In *Gonzales* v. *Langdon*, [supra, 161 Conn. App. 510], this court held, as a matter of first impression, that a legally insufficient opinion letter may be cured by amendment under two circumstances. The court held: [I]f a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter for the original opinion letter, *the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day and the action was brought within the statute of limitations, and (2) has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day*. The court may abuse its discretion if it denies the plaintiff's request to amend despite the fact that the amendment would cure any and all defects in the original opinion letter and there is an absence of other independent reasons to deny permission for leave to amend." (Emphasis added; internal quotation marks omitted.) *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 8.

The plaintiff conceded that she had failed to file her request for leave to amend the complaint within thirty days of the return date. Id., 8–9. We then rejected the plaintiff's reliance on *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, explaining: "The holding in *Gonzales* permits amendment to legally insufficient opinion letters *only if they are sought prior to the expiration of*

the statute of limitations." (Emphasis added.) *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 12.

Finally, in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 691, the plaintiff sued the defendant dentist, who held himself out as a specialist in oral and maxillofacial surgery, for malpractice. The opinion letter attached to the complaint did not indicate if its author was certified as a specialist. Id., 692. The defendant moved to dismiss the complaint, arguing that the opinion letter needed to be authored by an individual trained in the same medical specialty and certified by an American board in the same medical specialty. Id., 693. In response, the plaintiff contended that the author had "inadvertently left out the fact that he was board certified" and sought to cure this defect by submitting an affidavit attesting that the author had been board certified at all relevant times. Id., 694–95. The plaintiff, however, did not seek permission to amend the complaint or to file an amended opinion letter. Id., 695.

At oral argument on the motion to dismiss, the defendant argued that the court lacked discretion to consider the affidavit because the efforts to cure the opinion letter had occurred more than thirty days after the return date of the complaint and *after the statute of limitations had expired*. Id., 695. The court subsequently granted the defendant's motion to dismiss. Id., 696–97. It agreed that the letter was deficient because it had failed to state whether the author was board certified, and concluded that it was not necessary to determine whether this deficiency could be remedied by the filing of an affidavit rather than an amended pleading because neither option remained viable due to the expiration of the statute of limitations. Id., 697–98.

On appeal, the sole issue before this court was "whether the trial court, in ruling on the motion to dismiss, correctly determined that our decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497 . . . barred it from

considering the affidavit that [the plaintiff] had attached to his opposition to the motion to dismiss in an effort to cure the defect in the opinion letter attached to the complaint." *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 699.[26] We concluded that the plaintiff's efforts to correct the deficient opinion letter had occurred after the expiration of the statute of limitations and, therefore, the court properly granted the defendant's motion and dismissed the action. Id.

In our analysis, we noted that, prior to our decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, our Supreme Court had recognized that a plaintiff whose medical malpractice action that had been dismissed for failing to comply with the opinion letter requirements of § 52-190a (a), could either refile the action or attempt to seek redress via § 52-592. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 701. We also recognized that, in *Gonzales* v. *Langdon*, supra, 510, this court had held, for the first time, that "a plaintiff who files a legally insufficient opinion letter may, in certain instances, cure the defective opinion letter through amendment of the pleadings, thereby avoiding the need to file a new action." *Peters* v. *United Community & Family Services*, *Inc.*, supra, 701.

Turning to the facts and circumstances in *Peters*, this court acknowledged that certain decisions of the Superior Court had permitted a plaintiff to cure a defective opinion letter via a supplemental affidavit rather than by seeking leave to file an amended pleading. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 703–704. We ultimately declined

[26] The plaintiff conceded that, based on the allegations set forth in his complaint, he was required to provide an opinion letter from a doctor trained and board certified in oral and maxillofacial surgery, and that the opinion letter attached to the complaint did not set forth these required details. *Peters* v. *United Community & Family Services*, *Inc.*, supra, 182 Conn. App. 699.

to address that issue[27] and concluded that, because the plaintiff had failed to undertake any attempt to remedy the defective opinion letter until *after* the statute of limitations had expired, the trial court properly had granted the motion to dismiss. Id., 705–706. "Regardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52-190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to § 52-592." Id., 706.

Guided by these precedents, we return to the facts of the present case. The plaintiff commenced her action against Wang and the Center on April 6, 2012, and April 4, 2012, respectively. In her pleadings, she consistently alleged that, on April 22, 2010, she suffered injuries, namely, the burning of her toes and foot, as a result of Wang's professional negligence. The plaintiff's counsel attached a signed, good faith certificate that he had conducted a reasonable inquiry into the circumstances of the plaintiff's claims and that, on the basis of that inquiry, he believed in good faith that Wang and the Center had been negligent in the treatment of the plaintiff. The plaintiff's counsel, however, failed to attach a

[27] Specifically, we stated: "Although at this juncture it would seem prudent for a plaintiff to follow the corrective measures approved in *Gonzales*, we do not decide at this time whether a trial court has the authority to permit alternative procedures, such as the use of a clarifying affidavit, to remedy a defective opinion letter." *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 705 n.10.

In *Carpenter* v. *Daar*, 199 Conn. App. 367, 389–90, 236 A.3d 239, cert. granted, 335 Conn. 962, 239 A.3d 1215 (2020), we subsequently held that in the case of a defective opinion letter, a plaintiff must amend the complaint and not use a subsequently filed supplemental affidavit from the author of the opinion letter to cure said defect. Our Supreme Court granted certification in that case, limited to the following issue: "Did the Appellate Court properly uphold the trial court's dismissal of the plaintiff's medical malpractice action for failure to comply with . . . § 52-190a?" *Carpenter* v. *Daar*, 335 Conn. 962, 239 A.3d 1215 (2020).

signed opinion letter from a similar health care provider as required by § 52-190a. Accordingly, Wang and the Center timely moved to dismiss the plaintiff's action pursuant to § 52-190a (c).

On June 28, 2012, the plaintiff filed a request for leave to file an amended complaint and a memorandum in opposition to the 2012 motions to dismiss. In the former, the plaintiff indicated that the purpose of the requested amended complaint was to include a written, signed opinion letter from a similar health care provider that had existed at the time the complaint had been filed, but inadvertently was not attached to the original complaint. The plaintiff's counsel also included an affidavit setting forth the details regarding when he had received the opinion letter and the inadvertent failure to attach the signed opinion letter to the complaint.

After hearing oral argument, the court issued a memorandum of decision on September 6, 2012, denying the motions to dismiss and overruling the objection to the plaintiff's request for leave to amend her complaint. The court reasoned that the plaintiff had obtained the opinion letter prior to the commencement of her medical malpractice action, but failed to include it with her original complaint due to inadvertence and oversight. It further concluded that to dismiss the action would elevate form over substance and violate the public policy of permitting a trial on the merits. On September 21, 2012, the court denied the motions to reargue and for reconsideration filed by the Center and Wang.

Pretrial proceedings ensued over the course of several years. During the time period between the denial of the 2012 motions and the second motion for reconsideration filed in 2018, the law concerning § 52-190a developed in our appellate courts. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 63 A.3d 940 (2013) (released on April 23, 2013); *Torres* v. *Carrese*, supra, 149 Conn.

App. 596 (released on April 22, 2014); *Gonzalez* v. *Langdon*, supra, 161 Conn. App. 497 (released on December 1, 2015); *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 1 (released on May 15, 2018); *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688 (released on June 19, 2018). Significantly, our jurisprudence shifted from consideration of whether the opinion letter had existed at the time the plaintiff commenced the malpractice action to a focus on whether the elected procedure to remedy a defective opinion letter had begun prior to the expiration of the statute of limitations.

The trial occurred in November and December, 2017. On December 21, 2017, the jury returned a verdict for the plaintiff. Wang, the Center, and WABBO each filed various postverdict motions, seeking, inter alia, to set aside the verdict, judgment notwithstanding the verdict, and for remittitur. On June 26, 2018, Wang filed a motion for permission to file a second motion to reconsider the 2012 denial of the motion to dismiss. In that motion, Wang directed the trial court to our decision in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and described that opinion as legally controlling and supporting the dismissal of the medical malpractice action. The court heard oral argument on September 6, 2018.[28] During this proceeding, Wang's counsel argued that any remedy to correct a defect in the opinion letter must have been commenced within the applicable statute of limitations, pursuant to our then relatively recently released decision in *Peters*.

[28] Six days later, the Center joined Wang's June 26, 2018 motion. In this motion, the Center argued that "[t]he issues as to the Center and . . . Wang are identical as to the same motion to dismiss and ruling applied to the Center. . . . The undersigned defendant does not seek to further brief or argue any of the issues and relies upon the motion that was filed by . . . Wang . . . and the oral argument that took place on the motion on September 6, 2018. To avoid inconsistent rulings between [Wang and the Center] who filed identical motions to dismiss and received the same ruling, the [Center] seeks to join this motion for reconsideration."

On January 3, 2019, the court issued its memorandum of decision addressing the various postverdict motions that had been filed. At the outset of its analysis relating to the motion for reconsideration of the 2012 motions to dismiss, the court recognized that, at the time of the 2012 decision denying the motions to dismiss, "the sole relevant appellate authority was *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, [supra, 113 Conn. App. 585], which contained language—disputed as to whetherit was dictum or controlling—relating to the propriety of a belated filing of an already-existing opinion letter, and it was the significance of that language that was subject to disagreement by trial courts." The court noted that in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, our court "held that corrective action relating to an opinion letter from a similar health care provider *had to be undertaken within the applicable statute of limitations*." (Emphasis added.) Thus, the court had to consider whether our 2018 opinion in *Peters* necessitated a contrary decision from the 2012 denial of the motions to dismiss.

The court began its consideration of this statute of limitations issue by noting that the request to amend the complaint had been filed "substantially" more than two years after the date of the plaintiff's injury and that there had been no claim that the plaintiff took any ameliorative action prior to the expiration of the statute of limitations. It then identified two related concerns regarding the timing and nature of the 2018 requests for reconsideration of the 2012 denial of the motions to dismiss. First, it stated that a motion for reconsideration generally is filed not years after the underlying decision, but rather within days. Thus, as a general matter, only a minimal chance exists that controlling precedent materially will alter the relevant legal landscape. Second, the court posited whether the motions to dismiss could be revisited six years after their initial denial and

after an intervening trial on the merits, particularly at the trial court level.[29] The court granted the motions for reconsideration "to reconcile, or determine the interplay between, two Appellate Court decisions, *Peters* and *Votre*."

With respect to the substantive merits regarding whether the motions to dismiss should be granted, albeit belatedly, the court recognized that, subsequent to the 2012 memorandum of decision, which had focused on whether a valid opinion letter existed at the time the medical malpractice action had been commenced, our appellate courts determined that a plaintiff must take corrective action with respect to a defective opinion letter within the applicable statute of limitations. Nevertheless, the court ultimately concluded that the prior denials of the motions to dismiss should stand for several reasons.

First, the court noted that both *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, concerned the correction of attached, but defective opinion letters, whereas the plaintiff in the present case had failed to attach the opinion letter to her complaint.[30] Second, it observed that *Gonzales* v. *Langdon*, supra, 497, and *Torres* v. *Carrese*, supra, 149 Conn. App. 596, mentioned the statute of limitations as the benchmark for when correction of a defective opinion letter must

[29] Perhaps presciently, the court aptly noted: "There seems to be no identified impediment to the [Center and Wang] raising the issue on appeal—notwithstanding the earlier denial of the motions to dismiss, *Peters* is claimed to represent the current accurate state of the law, and no reason had been identified why it would not be applicable prior to final judgment in this case, if in fact that decision controls the jurisdictional issue first raised more than six years ago."

[30] For the purposes of our analysis, whether the opinion letter was missing from the complaint or was deficient in some other manner appears to constitute a distinction without a difference. Under both scenarios, the result is a defective letter pursuant to § 52-190a.

occur and that both of these cases had been issued prior to the commencement of the present trial. The court noted that neither the goal of judicial economy nor the purpose of § 52-190a would be advanced if it nullified the trial and the jury's verdict based on the statute of limitations argument advanced by Wang and the Center. Ultimately, the court concluded: "It would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion. Subject matter jurisdictional issues may be raised at any time, but other jurisdictional issues are subject to waiver—and inferentially subject to other equitable considerations."

Given our decision in *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706, it cannot be disputed that regardless of the method employed to cure a defect in an opinion letter filed pursuant to § 52-190a, such correction must be initiated prior to the expiration of the statute of limitations. Wang and the Center argue that the *Peters* holding applies in the present case and the denials of the 2012 motions to dismiss must be reversed. The plaintiff counters that Wang and the Center waived this statute of limitations argument, the purpose of § 52-190a was satisfied as a result of the jury's verdict, and the amendment to the medical malpractice complaint was filed timely within the three year statute of repose contained in § 52-584, and, therefore, the judgment of the court must stand.[31]

We first consider the plaintiff's argument that Wang and the Center waived their statute of limitations claim as it related to § 52-190a and *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688. In her brief, the plaintiff notes that, as a general

[31] The plaintiff does not argue that the judgment should be affirmed based on the reasoning utilized in the court's 2012 memorandum of decision—that is, the court had discretion to permit the plaintiff to amend the medical malpractice complaint to include the opinion letter because the opinion letter had been in existence at the time that the action was commenced.

matter, our courts have "made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." (Internal quotation marks omitted.) *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 87, 919 A.2d 1002 (2007). She then contends that the statute of limitations argument related to § 52-190a could have been made in the 2012 motions to dismiss; see, e.g., *Bennett* v. *New Milford Hospital*, supra, 300 Conn. 30–31; or raised in 2014 and 2015, or when this court released its decision in *Torres* v. *Carrese*, supra, 149 Conn. App. 596, and *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, respectively. We are not persuaded that Wang and the Center waived their statute of limitations argument.

A discussion of *Torres* v. *Carrese*, supra, 149 Conn. App. 596, is instructive. In that case, the plaintiff commenced a medical malpractice action against her obstetricians in September, 2006. Id., 601–602. She attached to her complaint an opinion letter from a board certified urologist. Id., 603. In November, 2006, the obstetricians moved to dismiss the complaint on the ground that the opinion letter had not been written by a similar health care provider. Id., 604. The trial court ultimately denied the motions to dismiss, reasoning that an insufficient letter, as opposed to the absence of such a letter, was not a sufficient ground for dismissal. Id., 605.

"On January 19, 2011, the case was called for trial. On January 31, 2011, and February 10, 2011, after our Supreme Court released its opinion in *Bennett* v. *New Milford Hospital, Inc.*, [supra, 300 Conn. 21] (holding in cases against specialists, author of written opinion letter pursuant to § 52-190a (a) must be similar health care provider as defined in § 52-184c (c), regardless of author's potential qualifications to testify at trial, and insufficient written opinion letter, while not impairing

subject matter jurisdiction, requires dismissal of action under § 52-190a (c)), the [obstetricians] each filed new motions to dismiss the plaintiff's complaint. On March 7, 2011, the court granted the [obstetricians'] motions to dismiss the plaintiff's complaint because the plaintiff failed to attach an opinion letter from a similar health care provider to the complaint as required by § 52-190a." (Footnotes omitted; internal quotation marks omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 605–606.

On appeal, the plaintiff argued, inter alia, that the obstetricians' 2011 motions to dismiss had been filed outside of the time period set forth by Practice Book § 10-30 and the trial court erred by considering and granting them. Id., 607. The obstetricians countered that their "2011 motions to dismiss were functionally motions to reargue their timely filed 2006 motions to dismiss the plaintiff's complaint." Id., 612. Due to the unique circumstances of that case, we agreed with the obstetricians. Id. First, we concluded that, despite their title, the 2011 motions "essentially sought to reverse or to modify the denials of their earlier 2006 motions to dismiss" and therefore the trial court properly had concluded that, in reality, these were motions to reargue. Id., 614.

Next, we determined that the court had not abused its discretion by considering the 2011 motions to reargue, despite the twenty day time period set forth in Practice Book § 11-12 (a). Id., 614–15. We explained: "[T]he [obstetricians], in filing their 2011 motions to dismiss, *sought reconsideration because of a newly articulated controlling principle of law set forth by our Supreme Court* in *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1. . . . See *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001) ([T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension

of facts. . . . [A] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument. . . .). *Thus, it was reasonable for the* [*obstetricians*] *to file what amounts to a late motion to reargue before a second judge in light of the Supreme Court's decision in Bennett, issued almost four years after* [*the trial court*] *issued* [*its*] *ruling on the* [*obstetricians'*] *2006 motions to dismiss.*" (Emphasis added; internal quotation marks omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 616–17.

We further noted the particular circumstances of *Torres* with respect the trial court's consideration of the obstetricians' motions to reconsider after an extended time period. "The trial court correctly determined that *Bennett* [v. *New Milford Hospital, Inc.*, supra, 300 Conn. 1] was to have retroactive effect. See, e.g., *Marone* v. *Waterbury*, 244 Conn. 1, 10, 707 A.2d 725 (1998) ('judgments that are not by their terms limited to prospective application are presumed to apply retroactively'). In light of *Bennett*, the court was faced with a situation in which any judgment rendered on the professional negligence issues in favor of the plaintiff would likely be reversed in any event. By dealing with the issue, the court avoided the time and expense, to the state and to the parties, of a perhaps pointless trial." *Torres* v. *Carrese*, supra, 149 Conn. App. 617 n.23.

Similar circumstances exist in the present case that warrant and justify consideration of the argument regarding the statute of limitations and § 52-190a, even though it was raised approximately six years after the initial 2012 motions to dismiss. First, Wang and the Center, in their 2012 motions to dismiss, claimed that the plaintiff had failed to comply with the requirements of § 52-190a due to her counsel's failure to include an opinion letter, raising a challenge pertaining to personal

jurisdiction. Second, during the pendency of the proceedings, new appellate authority was released in 2018, namely, *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 688, and that opinion presumptively applied retroactively. The decision in *Peters*, which related to the claim set forth in the 2012 motions to dismiss, expressly held that efforts to remedy a defective opinion letter must be initiated prior to the running of the statute of limitations.[32] Id., 706. Wang and the Center *may have raised* this argument during the pretrial proceedings, but we are not aware of, nor has the plaintiff directed us to any controlling case, statute, or rule of practice that would require them to do so or face the consequences of waiver. For these reasons, we are not persuaded by the plaintiff's contention that Wang and the Center waived the argument relating to the statute of limitations and § 52-190a.

Next, we consider the plaintiff's contention that, as a result of the jury's verdict, the purpose of § 52-190a, preventing frivolous medical malpractice actions, was served in the present case, and, therefore, to dismiss the medical malpractice action at this juncture would elevate form over substance to an unreasonable degree. We are not persuaded.

Indisputably, the purpose of § 52-190a is to prevent frivolous medical malpractice actions, and the requirement of a letter from a similar health care provider "was intended to address the problem that some attorneys, either intentionally or innocently, were misrepresenting in the certificate of good faith the information that they

[32] In *Torres* v. *Carrese*, supra, 149 Conn. App. 611 n.14, we mentioned that the court could not consider an opinion letter that had been obtained after the action had been commenced, after the motions to dismiss had been filed, and after the statute of limitations had expired. This reference to the statute of limitations is not the equivalent of the specific holding of *Peters* v. *United Community & Family Services, Inc.*, supra, 182 Conn. App. 706, that efforts to cure a defect in an opinion letter must be initiated prior to the expiration of the statute of limitations.

obtained from the experts." (Internal quotation marks omitted.) *Shortell* v. *Cavanagh*, 300 Conn. 383, 388, 15 A.3d 1042 (2011); see also *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 55; *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 12; *Barrett* v. *Montesano*, 269 Conn. 787, 796, 849 A.2d 839 (2004); *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584.

The plaintiff argues that, because the jury found in her favor with respect to the medical malpractice action, it could not constitute a frivolous action. We acknowledge the pragmatic nature of this contention. Our legislature, however, specifically authorized the dismissal of a medical malpractice action for the failure to attach an opinion letter to the complaint. General Statutes § 52-190a (c); *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 822, 943 A.2d 544 (2008); see also *Santorso* v. *Bristol Hospital*, supra, 308 Conn. 349 (noting *mandatory* dismissal where plaintiff fails to comply with § 52-190a (c)); *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 398 (Supreme Court recognized that opinion letter was akin to pleading that *must* be attached to complaint in order to commence medical malpractice action); *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 6 (trial court was *required* to dismiss action as consequence of failure to provide opinion letter); *Wood* v. *Rutherford*, 187 Conn. App. 61, 73, 201 A.3d 1025 (2019) (failure to attach proper written opinion letter mandates dismissal of action); *Ugalde* v. *Saint Mary's Hospital, Inc.*, supra, 182 Conn. App. 12 (if amendment to legally insufficient opinion letter is not sought prior to expiration of statute of limitations, dismissal is required by § 52-190a); *Doyle* v. *Aspen Dental of Southern CT, PC*, supra, 179 Conn. App. 492 (dismissal is mandatory remedy when plaintiff fails to file opinion letter in compliance with § 52-190a). As we noted in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 584–85: "We are

bound to uphold the laws the legislature adopts. . . . Legislative power under article third [of our state constitution] reposes in the Senate and the House of Representatives, not in the Judiciary."

The argument advanced by the plaintiff would effectively deprive medical providers of the ability to appeal from an adverse ruling with respect to the existence and sufficiency of an opinion letter following a trial on the merits. Although we understand the practical aspect of the plaintiff's argument with respect to judicial economy and the fact that these proceedings occurred over several years and culminated in a five week trial, we decline to foreclose the ability of litigants to seek appellate review with respect to § 52-190a. Consistent with established precedent, an appellate determination that the trial court improperly concluded that personal jurisdiction existed has resulted in the dismissal or vacatur of the subsequent proceedings before the trial court. See *Green* v. *Simmons*, 100 Conn. App. 600, 606–609, 919 A.2d 482 (2007) (judgment in favor of plaintiff reversed and remanded with direction to dismiss action where Appellate Court determined plaintiff failed to establish that requirements of long arm statute had been satisfied and therefore court had improperly exercised personal jurisdiction over defendants); see, e.g., *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 535, 923 A.2d 638 (2007); *Narayan* v. *Narayan*, 122 Conn. App. 206, 216, 3 A.3d 75 (2010), rev'd on other grounds, 305 Conn. 394, 46 A.3d 90 (2012). For these reasons, we are not persuaded by the plaintiff's argument that a jury verdict in a medical malpractice action would insulate a defect in the required opinion letter from appellate review.

Finally, the plaintiff argues, for the first time on appeal and as an alternative ground for affirming the verdict, that, pursuant to the repose section of § 52-584, she timely amended her complaint to include the opinion letter before the expiration of the three year

statute of repose.[33] Under these facts and circumstances, we conclude that the two year statute of limitations applied in the present case.

We begin with language of the applicable statute of limitations for medical malpractice actions. Section 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, advanced practice registered nurse, hospital or sanatorium, *shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . .*" (Emphasis added.)

In *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013), we distinguished the different time periods identified in § 52-584. "[T]his statute imposes two specific time requirements on plaintiffs. The first requirement, referred to as the discovery portion . . . requires a plaintiff to bring an action within two years from the date when the injury is first sustained or *discovered* or in the exercise of reasonable care should have been discovered . . . . The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred,

[33] In the January 3, 2019 postverdict memorandum of decision, the court did not address the three year repose section of § 52-584. It did note, however, that the plaintiff's request to amend her complaint "was filed substantially more than two years after the date of the occurrence . . . [and that] [t]here is no claim that the corrective action taken by the plaintiff occurred prior to the expiration of the statute of limitations."

and the three year period is, therefore, a statute of repose." (Emphasis in original; internal quotation marks omitted.) Id., 286–87; *Rosato* v. *Mascardo*, 82 Conn. App. 396, 401–402, 844 A.2d 893 (2004); see also *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 200–201, 905 A.2d 1135 (2006).

In *Lagassey* v. *State*, 268 Conn. 723, 846 A.2d 831 (2004), our Supreme Court stated: "The limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. . . . In this regard, the term injury is synonymous with legal injury or actionable harm. Actionable harm occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action. . . . A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence; they are therefore necessary ingredients for actionable harm. . . . Furthermore, actionable harm may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another. . . . In this regard, the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run; a party need only have suffered some form of actionable harm." (Citations omitted; internal quotation marks omitted.) Id., 748–49; see also *Barrett* v. *Montesano*, 269 Conn. 787, 793, 849 A.2d 839 (2004); *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 168, 204 A.3d 717 (2019). The focus, however, is on the plaintiff's knowledge of the facts, rather than the discovery of applicable legal theories. *Catz* v. *Rubenstein*, 201 Conn. 39, 47, 513 A.2d 98 (1986).

As a general matter, the determination of whether a plaintiff, in the exercise of reasonable care, should have discovered actionable harm for purposes of § 52-584 is for the trier of fact. *Lagassey* v. *State*, supra, 268 Conn. 749. Under some circumstances, however, the start of the two year statute of limitations in a medical malpractice action may be decided as a matter of law. For example, in *Burns* v. *Hartford Hospital*, 192 Conn. 451, 472 A.2d 1257 (1984), our Supreme Court considered whether summary judgment properly had been rendered in favor of the defendant physician and hospital. In that case, the two year old plaintiff had been treated following an automobile accident. Id., 452. This medical treatment included the insertion of intravenous tubes into the plaintiff's legs. Id. Approximately one week later, the child's left leg became swollen and red. The physician initially diagnosed the condition as a hematoma, but after further procedures and testing, discovered an infection, likely from contaminated intravenous tubes. Id., 452–53.

The plaintiff filed an action more than two years from the date on which the infection in his leg was first discovered. Id., 453. The physician and the hospital moved for summary judgment based on the statute of limitations. Id., 453–54. The trial court granted the motions for summary judgment. Id., 454. Our Supreme Court held that that the two year statute of limitations commenced on the date the child's mother was aware he had an infection and not a hematoma. Id., 459–60. "Because the plaintiff did not bring suit within two years of discovering the injury, the trial court correctly ruled that the action was barred by the statute of limitations." Id., 460.

Although the procedural posture of *Burns* v. *Hartford Hospital*, supra, 192 Conn. 451, differs from the present case, its reasoning guides us to reject the plaintiff's reliance on the repose section of § 52-584. In the

present case, the allegations in the complaint conclusively establish that the plaintiff had knowledge, on the date of the incident, of the nature and extent of the injuries to her foot. The knowledge of these facts would put a reasonable person on notice that those injuries were the result of Wang's alleged negligent conduct. To conclude otherwise would eviscerate the policies underlying the statute of limitations. See *Lindsay* v. *Pierre*, 90 Conn. App. 696, 701, 879 A.2d 482 (2005). For these reasons, we reject the plaintiff's reliance on the repose section of § 52-584 and her claim that the efforts to cure the opinion letter were timely.

In sum, the plaintiff failed to attach an opinion letter as required by § 52-190a to her complaint. None of the arguments advanced by the plaintiff disputes this fact. Wang and the Center demonstrated that her efforts to cure this defect were not commenced within the statutory limitation period. We are not persuaded by the plaintiff's additional arguments regarding § 52-190a. We conclude that the court did not have personal jurisdiction as to Wang and the Center and that the medical malpractice action should have been dismissed.

II

AC 42505

In AC 42505, WABBO claims that the court improperly denied its motions for a directed verdict and to set aside the verdict because the plaintiff did not establish the element of causation. Specifically, WABBO argues that it was entitled to judgment in the product liability action because the plaintiff failed to prove how the heat lamp came into contact with her foot. The plaintiff responds that she satisfied her burden with respect to the element of causation, including by means not challenged by WABBO on appeal. We agree with the plaintiff.

In her third amended third-party complaint (operative third-party complaint) against WABBO,[34] the plaintiff alleged a violation of the Connecticut Product Liability Act, General Statutes § 52-572m et seq.[35] In this pleading, the plaintiff alleged that WABBO was a foreign corporation authorized to do business in Connecticut and that it sold the heat lamp to Wang for use in Connecticut. She further alleged that WABBO placed the heat lamp into the stream of commerce with the expectation that it would reach consumers without a substantial change in condition. On April 22, 2010, Wang used the heat lamp, which had not been substantially changed, during the plaintiff's acupuncture treatment. The plaintiff claimed that the stabilizing hardware and hydraulic mechanisms for the head and arm of the heat lamp were deficient and resulted in the heating element coming into contact with her foot and injuring her.

The plaintiff alleged that WABBO was negligent and strictly liable in distributing, selling, and/or otherwise placing the heat lamp into the stream of commerce by failing (1) to affix a warning on the heat lamp regarding the propensity of its arm to lower, (2) to include any

[34] On February 6, 2013, Wang filed a third-party complaint against WABBO. Approximately one month later, the plaintiff filed a third-party complaint against WABBO. At the start of the trial, Wang withdrew his action against WABBO.

[35] General Statutes § 52-572m (b) provides in relevant part: " 'Product liability claim' includes all claims or actions brought for personal injury . . . caused by the manufacture, construction, design . . . warnings, instructions, marketing, packaging or labeling of any product. 'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent." See generally *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 799–800, 756 A.2d 237 (2000) (complaint set forth "classic allegations of product liability"); *Gajewski* v. *Pavelo*, 36 Conn. App. 601, 611, 652 A.2d 509 (1994) (noting that current statutory scheme intended to merge various common-law theories of product liability into one cause of action), aff'd, 236 Conn. 27, 670 A.2d 318 (1996).

locking devices on the hydraulic mechanisms and joints of the heat lamp, (3) to include a safety guard over the face of the heating element, and/or (4) to provide a user manual or instructions with the heat lamp or on its website.[36] She further alleged that "[*o*]*ne or more of these defects and acts of negligence described herein was a substantial factor in causing the injuries to the plaintiff*." (Emphasis added.)

Wang testified that the heat lamp he had purchased from WABBO did not come with a manual or warnings about the propensity of the head of the heat lamp to fall down. He also stated that the absence of a locking mechanism, a safety guard, a manual, or warnings made the heat lamp unreasonably dangerous.

Sami Kuang Wu, the owner of WABBO, testified that Wang had purchased the heat lamp in March, 2008. She also stated that the heat lamp was shipped without locking devices on the joints of its arms or a "safety shield" between the heating element plate and the patient. Wu further testified that the spring pistons that provided the upward force needed to hold the heat lamp in place would lose their function as the device was used and eventually would no longer maintain the placement of the heat lamp. She explained that as the spring pistons became worn, the heat lamp had a tendency to lower inadvertently and spontaneously on its own, and that WABBO was aware of this tendency in 2008. Wu also indicated that Wang should have received a manual and that a warning sticker should have been affixed to the heat lamp.

The plaintiff presented testimony from Victor A. Popp, a registered professional engineer. Popp testified about various locking mechanisms that could have been

[36] See, e.g., *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 174–75, 700 A.2d 38 (1997) (plaintiff filed product liability action alleging theories of strict liability for defective design, strict liability for failure to warn or instruct, negligent design, and negligent failure to warn or instruct).

used to prevent the inadvertent downward movement of the head of the heat lamp, where the heating element was located. He indicated that the use of a safety guard would have prevented the heating element from coming into contact with the skin of a patient if the arm lowered. He opined that in 2008, both a locking mechanism and a safety guard would have been economically and technologically feasible.

The plaintiff's counsel asked a lengthy hypothetical question in which Popp was to assume as true various facts regarding the heat lamp and the April 22, 2010 incident. Popp concluded that the defective condition of the heat lamp was a substantial factor contributing to the plaintiff's injuries and opined, to a reasonable degree of engineering certainty, that the heat lamp was in a defective condition in March, 2008, when it was sold without a locking mechanism for the arm and without a safety guard over the heating element and that the inclusion of these devices on the heat lamp would have prevented the plaintiff from being burned.

The parties presented their closing arguments on December 19, 2017. The plaintiff's counsel argued that there was evidence that the heat lamp was unreasonably dangerous due to (1) the propensity of the arm to lower, (2) the lack of a locking mechanism on the arm, (3) the lack of a safety guard over the heating element, (4) the lack of a warning sticker on the heat lamp, and/or (5) the lack of a user's manual. The plaintiff's counsel specifically argued that if there had been a safety guard over the heating element, then the plaintiff would not have been injured. During his rebuttal argument, counsel again emphasized that the lack of a safety guard caused the plaintiff's injuries.

The court charged the jury on December 19 and 20, 2017. At the outset, the court instructed the jury that the plaintiff had asserted a claim against WABBO that

the heat lamp used by Wang was unreasonably dangerous and defective. The court stated: "The plaintiff's specific allegations of defects and *inadequate preventative measures* include claims that WABBO placed the lamp into commerce, namely, sold it to . . . Wang, despite the absence of any warning affixed to the lamp concerning the heat plate's potential to cause harm and/or injury; the negligently-designed and/or manufactured condition of the lamp due to the failure to include adequate locking devices to prevent unintended lowering; the failure to provide a user manual or instructions for use with the lamp or on its website; and/or the failure to place a heating shield of some sort in front of the heating plate." (Emphasis added.)

The court then instructed the jury as to the elements of a claim under the Connecticut Product Liability Act. It informed the jury that the plaintiff only needed to prove one such deficiency or hazard in order to satisfy the necessary elements for this cause of action. With respect to the element of causation, the court defined "cause in fact" and proximate cause.

WABBO challenged the absence of proof regarding the causation element during the evidentiary phase of the trial and in a postverdict motion. On December 13, 2017, WABBO moved for a directed verdict, claiming that the plaintiff failed "to remove her claims that her injuries were caused by a defect in [WABBO's] product from the realm of speculation and conjecture." The court deferred its ruling on WABBO's motion pursuant to Practice Book § 16-37.[37]

[37] Practice Book § 16-37 provides: "Whenever a motion for a directed verdict made at any time after the close of the plaintiff's case-in-chief is denied or for any reason is not granted, the judicial authority is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. After the acceptance of a verdict and within the time stated in Section 16-35 for filing a motion to set a verdict aside, a party who has moved for a directed

On December 29, 2017, WABBO filed a motion to set aside the jury's verdict and incorporated the arguments it previously had set forth in its motion for a directed verdict. Specifically, WABBO again claimed that "the evidence presented by the plaintiff has failed to remove the issue of causation of her injuries from the realm of speculation and conjecture and the plaintiff has failed to sustain her burden of proof as to her claims of the Connecticut [Product] Liability Act . . . ."

In its January 3, 2019 memorandum of decision, the trial court addressed WABBO's causation arguments. The court noted that the plaintiff "need not prevail on more than one specification of negligence or product defect, in order to sustain the verdict." The court observed that "*the claimed lack of any specific mechanism for the lamp head to come into contact with the plaintiff's foot would not undermine the causative link between failing to protect against a hot surface coming into contact with the skin of a user or a user's client/patient. . . . [H]ow the lamp came into contact with the plaintiff's foot is not the issue when there is a claim that there should have been a protective feature or device which would have prevented an injury* however the lamp might have come into contact with an individual such as the plaintiff." (Emphasis added.)

Continuing its analysis, the court stated that Wu had acknowledged that, in 2008, it was technologically feasible and would have involved a minimal cost to add

verdict may move to have the verdict and any judgment rendered thereon set aside and have judgment rendered in accordance with his or her motion for a directed verdict; or if a verdict was not returned such party may move for judgment in accordance with his or her motion for a directed verdict within the aforesaid time after the jury has been discharged from consideration of the case. If a verdict was returned, the judicial authority may allow the judgment to stand or may set the verdict aside and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the judicial authority may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

protection over the face of the heat lamp. Wu also had indicated that locking mechanisms for the movable arm of the heat lamp were in use in similar products in 2008. The court found that "WABBO, as distributor of the product, was aware of the propensity for such lamps, over time to lose tension such that the lamp head could spontaneously lower. (A spring piston mechanism holds the arm and lamp head in position, but over time and with usage, the spring loses some of its ability to maintain the position of the lamp as originally set.) As a progression of loss of ability to hold its position, there would be an intermediate loss of tension, whereby some (decreasing over time) disturbance would be sufficient to cause a lowering, which technically would not be 'spontaneous.' " (Footnote omitted.)

The court then determined that there was "ample" evidence that there was no guard or safety mechanism to protect against contact with the head of the heat lamp. The court concluded: "With respect to the product liability claim . . . the jury was presented with sufficient evidence (lay and expert) that, combined with its own common sense and experience, was sufficient to support a finding that the [heat] lamp was defective, and that the defect caused the injuries to the plaintiff."

We begin by setting forth our standard of review and the relevant legal principles. Initially, we note that a "defendant must overcome a high threshold to prevail on either a motion for a directed verdict or a motion to set aside a judgment." (Internal quotation marks omitted.) *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 775, 83 A.3d 576 (2014). "A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts

proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 833, 208 A.3d 626 (2019); see also *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017). The question of whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, subject to plenary review by this court. *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 50, 172 A.3d 283 (2017); see also *Theodore* v. *Lifeline Systems Co.*, 173 Conn. App. 291, 307, 163 A.3d 654 (2017).[38]

Regarding a motion to set aside the verdict, the standard for appellate review is the abuse of discretion standard. "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached

[38] In *Pellet* v. *Keller Williams Realty Corp.*, supra, 177 Conn. App. 42, we noted that some of our decisions had applied the abuse of discretion standard when reviewing the granting of a motion for a directed verdict. "[A] line of cases out of this court has stated that we review a trial court's granting of a motion for a directed verdict for an abuse of discretion. . . . In tracing the origins of this assertion, it is clear that this standard improperly became conflated at one point with the standard of review for challenges to the grant or denial of motions to set aside a verdict. . . . In any event, because we are bound by the precedent of our Supreme Court as the ultimate arbiter of state law; see *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010); we apply the standard of review that it has held proper for a challenge to a trial court's granting of a motion for a directed verdict. That standard is plenary. See, e.g., *Curran* v. *Kroll*, [303 Conn. 845, 855, 37 A.3d 700 (2012)]." (Citations omitted.) *Pellet* v. *Keller Williams Realty Corp.*, supra, 50 n.9.

the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion . . . ." (Internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 94–95, 162 A.3d 1 (2017); see also *Viking Construction, Inc.* v. *TMP Construction Group, LLC*, Conn. , , A.3d (2021).

We are mindful that "[t]his court has emphasized two additional points with respect to motions to set aside a verdict that are equally applicable to motions for a directed verdict: *First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury.* . . . This standard also requires the trial court to consider the evidence, including reasonable inferences, in the light most favorable to the plaintiff." (Citation omitted; emphasis added; internal quotation marks omitted.) *Pellet* v. *Keller Williams Realty Corp.*, supra, 177 Conn. App. 48–49.

The elements of a product liability action are well established. "In a products liability action, the plaintiff must plead and prove that the product was defective and that the defect was the proximate cause of the plaintiff's injuries. . . . A product is defective when it is unreasonably dangerous to the consumer or user. . . . The established rule in Connecticut is that [a] product may be defective because a manufacturer or seller failed to warn of the product's unreasonably dangerous propensities. . . . Under such circumstances, the failure to warn, by itself, constitutes a defect." (Citations omitted; internal quotation marks omitted.) *Battistoni* v. *Weatherking Products, Inc.*, 41 Conn. App. 555, 562, 676 A.2d 890 (1996); see also *Haesche* v. *Kissner*, 229 Conn. 213, 218, 640 A.2d 89 (1994).

WABBO has challenged only the causation element in its appeal. We note that "[*p*]*roof that a defect in the product caused the injury in controversy is a prerequisite to recovery for product-caused injury in every products liability case*, whether the action is grounded on negligence, breach of warranty, strict liability in tort . . . or a combination of such theories. . . . *Theodore* v. *Lifeline Systems Co.*, supra, 173 Conn. App. 308. When the causation issue involved goes beyond the field of ordinary knowledge and experience of judges and jurors, expert testimony is required." (Emphasis added; internal quotation marks omitted.) *Ferrari* v. *Johnson & Johnson, Inc.*, 190 Conn. App. 152, 162, 210 A.3d 115 (2019); see also *Sharp* v. *Wyatt, Inc.*, 31 Conn. App. 824, 833, 627 A.2d 1347 (1993) (plaintiff must plead and prove that defendant's product was defective and proximately caused injuries), aff'd, 230 Conn. 12, 644 A.2d 871 (1994); *Wierzbicki* v. *W.W. Grainger, Inc.*, 20 Conn. App. 332, 334, 566 A.2d 1369 (1989) (same).

Our courts have applied the following test for causation in cases involving a claim under our Product Liability Act. "The causation inquiry has two facets: (1) cause-in-fact; and (2) legal or proximate cause. These two components ask the following questions respectively: (1) whether the defendant's conduct was the cause-in-fact of the injury; and, if so; (2) whether as a matter of social policy the defendant should be held legally responsible for the injury. Proof of proximate cause requires proof of both cause-in-fact and legal cause. . . . 63 Am. Jur. 2d 55–58, Products Liability § 21 (2010). Cause-in-fact, also referred to as actual cause, asks whether there was a sufficiently close, actual, causal connection between the defendant's conduct and the actual damage suffered by the plaintiff. It requires that there be a direct causal connection between the negligence or product defect and the injury. That is, it refers to the physical connection between an act and an

injury. . . . 63 Am. Jur. 2d, supra, § 24, p. 60." (Internal quotation marks omitted.) *Theodore* v. *Lifeline Systems Co.*, supra, 173 Conn. App. 308–309. "[*T*]*he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the* [*victim's*] *injuries*." (Emphasis added; internal quotation marks omitted.) *DeOliveira* v. *PMG Land Associates, L.P.*, 105 Conn. App. 369, 378, 939 A.2d 2 (2008); see also *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 433, 820 A.2d 258 (2003) (test for proximate cause is whether defendant's conduct is substantial factor in bringing about plaintiff's injuries); *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 178, 700 A.2d 38 (1997) (same).

A thorough review of the pleadings, evidence, closing arguments, and jury charge establish that the plaintiff alleged and presented evidence of various means in which WABBO's defective product, the heat lamp, caused her injuries. In addition to the lowering of the arm holding the heat lamp, the plaintiff maintained that the lack of (1) a locking mechanism, (2) a safety guard, (3) a user manual, or (4) a warning regarding the propensity of the arm to lower each constituted a substantial factor, and thus proximately caused her injuries on April 22, 2010. In its appellate brief, WABBO focuses primarily on the question of how the heat lamp lowered onto the plaintiff's foot and whether there was evidence that this lowering occurred spontaneously or due to some outside force. WABBO summarily contends that the absence of a locking mechanism and the guard went to the issue of a defect and not causation.

Contrary to the bald assertion made by WABBO, we conclude, on the basis of our comprehensive review of the pleadings and evidence in this case, that the plaintiff presented to the jury alternative methods of causation and did not limit consideration of the causation element to how or why the arm of the heat lamp lowered. There was sufficient evidence in the court record for the jury to find that the lack of a safety guard over the heating

element was a substantial factor, and thus a proximate cause, of the plaintiff's injuries to her left foot. WABBO did not submit jury interrogatories to specify which of the alternative bases of causation the jury used to reach its verdict.

In the present case, due to the lack of jury interrogatories, the only manner in which WABBO can prevail would be to establish that the evidence was insufficient to support any of the specifications of causation pursued by the plaintiff. See *Seven Oaks Enterprises, L.P.* v. *Devito*, 185 Conn. App. 534, 558–59, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018); *Jackson* v. *H.N.S. Management Co.*, 109 Conn. App. 371, 372–73, 951 A.2d 701 (2008). It failed, however, to challenge the claims that the lack of a locking mechanism, safety guard, user manual or warning regarding the propensity of the arm of the heat lamp to lower was a substantial factor, and thus the proximate cause, of the burns suffered by the plaintiff. The failure to challenge these matters is fatal to WABBO's appeal. Accordingly, we conclude that the court properly denied WABBO's motions for a directed verdict and to set aside the verdict.

The judgment is reversed with respect to the medical malpractice claims against Wang and the Center for Women's Health, P.C., and the case is remanded with direction to render judgment dismissing those claims against them; the judgment with respect to the product liability claim is affirmed.

In this opinion the other judges concurred.

KENNETH S. KEMON *v.* KENNETH BOUDREAU, EXECUTOR (ESTATE OF ELIZABETH LEE KEMON BOUDREAU), ET AL.
(AC 42918)

KENNETH KEMON *v.* KENNETH BOUDREAU, EXECUTOR (ESTATE OF ELIZABETH LEE KEMON BOUDREAU), ET AL.
(AC 42919)

Alvord, Moll and Alexander, Js.

Syllabus

The plaintiff, S, and his sister, E, were beneficiaries of a trust, executed by their father. E was the original trustee until her death in 2016, when the defendant K became the successor trustee. Upon E's death, K represented to S that the trust's assets had been fully disbursed to S and E, but for $50,000 that had been set aside in a lawyers' trust account as a litigation reserve. Thereafter, the Probate Court approved an accounting submitted by K in 2016. Subsequently, S appealed to the Superior Court in 2017 from the probate order approving the 2016 accounting, claiming that the 2016 accounting was incomplete. In addition, S commenced a separate action in 2018 in the Superior Court, with similar claims to the probate appeal, but he also included claims asserting breach of trust, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and tortious interference with an expectation of inheritance in counts two, three, four and six against K for his actions involving the payment of various fees and the $50,000 litigation reserve. The cases were consolidated for trial, and the trial court rendered judgment for the defendants in each case. *Held*:

1. The trial court erred in determining that S had abandoned counts two, three, four, and six at trial in the Superior Court action on the basis of statements by S's counsel made during closing argument, as S adequately advanced counts two, three, four, and six at trial for the court's consideration: during closing argument, S's counsel identified punitive damages in the form of attorney's fees as one of S's requests for relief predicated on K's alleged "wilful, wanton conduct," counts two, three, four, and six were supported by allegations that K had engaged in "wilful, wanton" conduct, and, collectively, counsel's statements implicated the allegations pleaded by S in support of those counts concerning K's conduct; moreover, the trial court's articulation addressing counts two, three, four, and six must be disregarded, as the articulation was inconsistent with the memorandum of decision in which the trial court originally disposed of those counts only on the ground that S had abandoned them, and the articulation instead improperly addressed the merits of all or some of S's claims.

2. The trial court erred in rendering judgment in favor of K in the probate appeal, as S's receipt of an accounting in 2018 satisfied the relief he was pursuing in his probate appeal during its pendency; because there was no practical relief that the court could have granted him, the court was deprived of subject matter jurisdiction over the probate appeal, and, accordingly, the court's lack of subject matter jurisdiction necessitated a judgment of dismissal rather than a judgment for the defendants on the merits and, therefore, the form of the judgment was improper.

Argued February 11—officially released June 29, 2021

Procedural History

Action, in the first case, for an order to compel an accounting of a trust, and for other relief, brought to the Superior Court in the judicial district of Hartford, and an appeal, in the second case, from an order of the Probate Court approving an accounting, brought to the Superior Court in the judicial district of Hartford, where the cases were consolidated and transferred to the Complex Litigation Docket and tried to the court, *Moukawsher, J.*; judgments for the named defendant et al., from which the plaintiff filed separate appeals to this court. *Reversed in part*; *new trial in Docket No. AC 42918*; *improper form of judgment*; *reversed*; *judgment directed in Docket No. AC 42919*.

E. James Loughlin, for the appellant in each case (plaintiff).

Charles D. Ray, with whom, on the brief, were *James E. Regan* and *Angela M. Healey*, for the appellees in each case (named defendant et al.).

Opinion

MOLL, J. These consolidated appeals arise from a dispute between the plaintiff, Kenneth S. Kemon, who is a trust beneficiary, and the defendant Kenneth Boudreau, who is, among other things, the executor of the estate of the deceased trustee, Elizabeth Lee Kemon Boudreau (trustee). With respect to Docket No. AC 42918, the plaintiff appeals from the judgment of the

trial court rendered in favor of the defendant[1] on the plaintiff's amended complaint. On appeal, the plaintiff claims that the court improperly concluded that (1) he had abandoned at trial counts two, three, four, and six of his amended complaint, and (2) to the extent that the court addressed, in a postappeal articulation, the merits of his breach of fiduciary duty claim set forth in count four of his amended complaint, the court improperly determined that there was no evidence in the record demonstrating that the defendant breached any duty owed to the plaintiff. We agree with the plaintiff that the court committed error in concluding that he had abandoned the aforementioned counts of his amended complaint. Accordingly, we reverse in part the judgment rendered in AC 42918. With respect to Docket No. AC 42919, the plaintiff appeals from the judgment of the court rendered for the defendant in the plaintiff's appeal from a probate order approving an accounting. On appeal, the plaintiff claims that the court incorrectly rendered judgment in the defendant's favor notwithstanding that the probate appeal had been rendered moot. We conclude that the probate appeal became moot during its pendency, at which point the court was divested of subject matter jurisdiction over it. We further conclude that the form of the judgment is improper because the court's lack of subject matter jurisdiction necessitated a judgment dismissing the probate appeal, rather than a judgment for the defendant on the merits. Accordingly, we reverse the judgment rendered in AC 42919.

[1] In the two matters underlying these consolidated appeals, Kenneth Boudreau was named as a defendant (1) in his capacity as the executor of the trustee's estate, (2) in his capacity as the legal representative of the trustee, and/or (3) in his personal capacity. See footnotes 4 and 5 of this opinion. Several other individuals were named as defendants in one or both of the underlying matters, but none of those other defendants is participating in these consolidated appeals as the plaintiff did not pursue any claims against them. For the sake of simplicity, we will refer in this opinion to Kenneth Boudreau in his collective capacities as the defendant.

The following facts and procedural history are relevant to our resolution of these consolidated appeals. On December 21, 2009, Solon B. Kemon, the plaintiff's father (grantor), executed an inter vivos trust (trust). The trust named Elizabeth Lee Kemon Boudreau, the plaintiff's sister, as the trustee. The plaintiff and the trustee were the primary beneficiaries of the trust.

Section 5.5 of the trust provided in relevant part that, upon request, the trustee "shall render an account of the administration of the trust to the then living adult income beneficiaries and adult remainderman . . . and the approval thereof by the living adult beneficiaries and living adult remainderman shall be conclusively binding upon all parties in interest under this [a]greement. . . ."

On August 8, 2012, the grantor died. On May 1, 2016, the trustee died. Thereafter, the defendant was appointed as the executor of the trustee's estate.

On August 11, 2016, in order to "resolve the issues" raised in a civil action filed in July, 2016, by the plaintiff against the trustee,[2] the defendant filed with the Probate Court for the district of Simsbury a petition to approve an appended accounting reflecting the trust's transactions from August 8, 2012, to April 30, 2016 (2016 accounting). The defendant represented that, at the time of the trustee's death on May 1, 2016, the trust's assets had been fully disbursed to the plaintiff and the trustee with the exception of $50,000 that had been set aside in a lawyers' trust account by Attorney John F. Kearns III, who was the defendant's attorney at the time and who had represented the trustee prior to her death,

[2] In July, 2016, the plaintiff filed an action in the Superior Court demanding that the trustee provide him with an accounting of the trust. See *Kemon* v. *Boudreau*, Superior Court, judicial district of Hartford, Docket No. CV-16-6069772-S. On October 7, 2016, the plaintiff withdrew that action after having learned that the trustee had died prior to service of process.

"for litigation and probate accounting fees due to the acrimony between the parties" ($50,000 litigation reserve).[3] On January 18, 2017, the Probate Court, *Becker*, *J.*, approved the 2016 accounting, but ordered the defendant to amend it to include a certain condominium unit in Simsbury (Simsbury condominium unit) and its fair market value. On January 20, 2017, the defendant filed an informational schedule to the 2016 accounting, which listed the Simsbury condominium unit as having no value.

Soon thereafter, the plaintiff appealed to the Superior Court from the probate order approving the 2016 accounting (2017 probate appeal). In a revised complaint filed on May 18, 2017, which became the plaintiff's operative pleading in the 2017 probate appeal, the plaintiff alleged, inter alia, that the 2016 accounting was incomplete. The defendant[4] subsequently filed an answer denying the material allegations set forth in the revised complaint.

On February 5, 2018, during the pendency of the 2017 probate appeal, the plaintiff commenced a separate civil action in the Superior Court against the defendant (2018 action).[5] The plaintiff's original one count complaint filed in the 2018 action was substantively similar to his revised complaint filed in the 2017 probate appeal—that is, the crux of the allegations in those pleadings was that the 2016 accounting was incomplete.

On March 31, 2018, the 2017 probate appeal and the 2018 action were consolidated for trial, and they subse-

[3] During trial, Attorney Kearns testified that, upon his recommendation, the trustee decided to set aside the $50,000 litigation reserve.

[4] In the 2017 probate appeal, the defendant was named as a party only in his capacity as the executor of the trustee's estate.

[5] In the plaintiff's original complaint filed in the 2018 action, the defendant was named as a party only in his capacity as the executor of the trustee's estate. The plaintiff subsequently moved to cite in the defendant, both in his personal capacity and in his capacity as legal representative of the trustee, which the court, *Budzik*, *J.*, granted on October 3, 2018.

quently were transferred to the Complex Litigation Docket. In August, 2018, while the 2017 probate appeal and the 2018 action were pending, the defendant delivered to the plaintiff an updated accounting for the trust (2018 accounting).

On October 26, 2018, the plaintiff filed an amended six count complaint in the 2018 action, which became his operative complaint therein. In count one, titled "Action to Compel Accounting," the plaintiff alleged only that the defendant had delivered to him the 2018 accounting. The remaining counts included an objection to the 2018 accounting, as well as claims asserting breach of trust, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and tortious interference with an expectation of inheritance. On January 31, 2019, the defendant filed a revised answer denying the material allegations of the amended complaint, except for his admission to the allegation in count one that he had delivered the 2018 accounting to the plaintiff. The defendant also asserted various special defenses and claimed two setoffs. On February 19, 2019, the plaintiff filed a reply denying the special defenses and the setoffs.

The 2017 probate appeal and the 2018 action were tried to the trial court, *Moukawsher*, *J.*, on March 26, 27, and 28, 2019.[6] On March 29, 2019, the court issued a memorandum of decision rendering judgment in the defendant's favor in each of the matters. On April 17,

[6] With respect to the 2017 probate appeal, we observe that "[a]n appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court. . . . When, as here, no record was made of the Probate Court proceedings, the absence of a record requires a trial de novo." (Citation omitted; internal quotation marks omitted.) *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009).

2019, the plaintiff filed a combined motion seeking to open the judgments and to reargue, which the court denied on April 23, 2019. These consolidated appeals followed.[7] Additional facts will be set forth as necessary.

I

AC 42918

In AC 42918, the plaintiff appeals from the judgment rendered by the trial court in the defendant's favor in the 2018 action. The plaintiff claims that (1) the court improperly concluded that he had abandoned counts two, three, four, and six of his amended complaint at trial, and (2) to the extent that the court adjudicated count four of his amended complaint, asserting breach of fiduciary duty, in a postappeal articulation, the court improperly determined that there was no evidence demonstrating that the defendant breached a legally recognized duty owed to the plaintiff. We agree with the plaintiff's first claim of error.[8]

The following additional facts are relevant to our resolution of this appeal. The plaintiff's amended complaint contained the following six counts: (1) demand to compel an accounting (count one); (2) breach of trust (count two); (3) breach of the implied covenant of good faith and fair dealing (count three); (4) breach of fiduciary duty (count four); (5) objection to the 2018 accounting (count five);[9] and (6) tortious interference

[7] On May 9, 2019, the plaintiff filed separate appeals from the respective judgments rendered in the 2017 probate appeal and in the 2018 action. These appeals were consolidated on June 25, 2019.

[8] As we explain later in part I of this opinion, the court could not use its articulation to address the merits of the plaintiff's claims that the court, in its memorandum of decision, had deemed to have been abandoned. Thus, our conclusion that the court improperly concluded that the plaintiff had abandoned counts two, three, four, and six of his amended complaint at trial is dispositive of the plaintiff's appeal in AC 42918.

[9] Because count five is not at issue on appeal, we limit our discussion of the allegations in support of that count. See footnote 16 of this opinion.

with an expectation of inheritance (count six). Count one did not assert a claim actually seeking relief; rather, the plaintiff alleged only that the defendant had delivered the 2018 accounting to him.[10] In support of counts two, three, four, and six, the plaintiff alleged, inter alia, that he had suffered harm as a result of the defendant's failure to provide him with the 2018 accounting until more than two years following the trustee's death. Counts three, four, and six also alleged certain "aggravating circumstances," including that the defendant refused to provide the plaintiff with access to trust records. To further support counts two, three, four, and six, the plaintiff alleged, either directly or by incorporation, that the defendant's conduct had been "wilful, wanton and carried out with the reckless disregard for the interests and rights of the plaintiff, causing damages for which the defendant is liable." In count five, the plaintiff alleged that the 2018 accounting was "unsatisfactory" in a number of ways.

At the end of the first day of evidence, the trial court notified the parties that, as a matter of procedure, the court preferred that they "get done with the evidence and then we have what argument we need to have. In other words, I don't ask the parties to make one hour presentations followed by half an hour followed by twenty minutes or anything like that. What I prefer is a lively exchange, which, in other words, I'll give the parties some idea of what I'm thinking about, and then we can have an exchange in which I ask questions and make notes and do that to the extent we have to. If there are any questions of law that are in dispute, which I'm not sure there will be, then that would be the time to bring them to my attention. In other words, I don't need posttrial briefs. What I need is a thorough closing—closing argument exchange. And if there's something that comes up during closing argument that you

[10] In his principal appellate brief, the plaintiff states that his receipt of the 2018 accounting "dispensed with count [one]."

need more time about or you want to submit something about, we just discuss it at the time. I'm not going to cut anybody off or prevent them from providing me with things that are needed, but I'd much prefer a vigorous closing argument to a period of thirty days going by where everyone forgets about the case and then we try to brief it and then, you know, several months later we have argument or something like that. So my intention is we go right into argument once—once evidence is over. And I don't mean that entirely literally. Sometimes people say, 'Well, can't we come back tomorrow or something?' I'm not going to press you instantly to go into closing argument. But don't be thinking so much about speech making for closing arguments as an exchange. I'm going to give you some ideas of what I'm thinking about, and then you can answer my questions and tell me where I've got it wrong and where you think I've got it right. And we can go back and forth as long as we need to make it productive. So any questions on that?" Neither party objected to that proposed procedure.

On the final day of trial, after the close of evidence, the following colloquy occurred:

"The Court: Now we have closing arguments to discuss. So what I'd suggest is that if the parties want the time we can do closing arguments at 2 p.m. If you are urgently wishing to end this whole thing by 1 [p.m.] we could start closing arguments at 12:30 [p.m.] and get them over with. I'll leave it up to the parties.

"[The Plaintiff's Counsel]: My understanding was there was going to be a lively exchange, you were going to give us some issues to think about and then—

"The Court: Yeah, I'm going to ask questions and we'll be back and forth.

"[The Plaintiff's Counsel]: And I'm looking forward to that to bring more issues that I can understand and look into and then I got the impression that we were going to come back a day or two later after that?

"The Court: Well, what I indicated about that—no, no, no, what I indicated about that is if you wanted to come back a day or two from now to do closing arguments, which would be the lively exchange I described we can do that. I don't see any reason why we shouldn't do them while you're here. And I think probably to give you enough time you might want to wait until 2 [p.m.], but if you don't want to we can take a break . . . and pick it up at 12:30 [p.m.], but I wouldn't want to go less than a half an hour. But I'm going to ask questions, such as, I want to make sure I understand the universe of things that you're claiming in the case. What is the relief that you're after and then the evidence that supports these things and then that tends to lead to the back and forth. [The defendant's counsel] will comment on those things and we'll go back and forth about it. So the question is do you want to do [it] at 12:30 [p.m.] or 2 [p.m.]?

"[The Plaintiff's Counsel]: I'm sort of feeling like doing it right now.

"The Court: Oh.

"[The Plaintiff's Counsel]: But what happens if in the middle of it there's a question of law that I hadn't thought of?

"The Court: Well, then you'd indicate that to me and I can give you time or we'll do whatever it is.

"[The Plaintiff's Counsel]: Okay.

"The Court: Sometimes what happens is something comes up and I can get a quick answer to it, sometimes I can't. But I'm not going to just say times up you don't get to look up this case or something like that. I won't do that to you. But you want to start right now?

"[The Plaintiff's Counsel]: I'm ready right now.

"[The Defendant's Counsel]: Your Honor, that's certainly fine with the defendant to start now."

After a brief discussion regarding the status of an exhibit, counsel for both parties reaffirmed that they were prepared to proceed with argument. The court then asked the plaintiff's counsel to specify "each thing that [the plaintiff is] asking for in terms of relief." The plaintiff's counsel identified four items. First, he requested that the $50,000 litigation reserve be returned to the trust. He argued that, under the common law, the defendant was not entitled to those funds unless the defendant prevailed in the litigation.[11]

Second, the plaintiff's counsel requested $9225 as reimbursement for legal fees that the plaintiff had incurred with respect to his portion of certain real property in Vermont that had been left to the plaintiff and the trustee by their deceased mother's trust (Vermont property). He argued that the trustee had used funds from the trust (that is, the inter vivos trust executed by the grantor) to pay fees in developing her portion of the Vermont property, such that he was entitled to reimbursement for fees that he had expended in relation to his portion of the Vermont property.

Third, the plaintiff's counsel requested $11,907, which represented condominium fees for the Simsbury condominium unit that the trustee had paid using trust funds. He argued that those fees could have been avoided.

Last, the plaintiff's counsel requested common-law punitive damages in the form of attorney's fees for "wilful, wanton conduct." In support thereof, the plaintiff's counsel referenced the portion of count six alleging that the defendant had engaged in tortious conduct

[11] Initially, as an alternative argument, the plaintiff's counsel argued that the terms of the trust barred the expenditure of the $50,000 litigation reserve. Subsequently, the plaintiff's counsel appeared to abandon that alternative argument. The court then asked the plaintiff's counsel to confirm that he had "one argument here. . . . [T]he claim here is not that the [trust] instru-

interfering with the plaintiff's expectation of an inheritance, which, the plaintiff further alleged, was "wilful, wanton and carried out with the reckless disregard for the interests and rights of the plaintiff . . . ." The court asked the plaintiff's counsel to confirm that he was requesting that the court "make a finding [awarding attorney's fees as punitive damages] and then hold a hearing later on [regarding] the amount if [the court made] such a finding," to which counsel replied in the affirmative.

At the close of argument, the plaintiff's counsel stated the following: "We have spoken about please give us an inventory and all the receipts and all the distributions [with respect to the trust] for the period from inception until . . . death. That's what we have said. All along the way counsel has addressed other issues that we may have brought up during the litigation that were not presented here at trial. But when we came here to trial all we talked about was we needed information about [the trust from] inception to death and we didn't get those until about a month ago [in February, 2019],[12] notwithstanding all the demands that we had made. And [the defendant] acknowledge[s] that [the] $50,000 [litigation reserve] was held back. [The trustee] told [the defendant] 'don't tell [the plaintiff] that I've died.'[13] It's almost like a movie. Those were [the trustee's] last words. And so [the plaintiff] didn't know that the money

ment wouldn't allow it. The claim is that the trustee must prevail in order to get fees; is that correct?" The plaintiff's counsel responded in the affirmative.

[12] During trial, the plaintiff testified that, in February, 2019, in response to discovery requests, the defendant delivered to the plaintiff an electronic disc with thousands of "trust documents." The electronic disc was entered into the record as a full exhibit.

[13] During trial, the defendant testified that, shortly before the trustee's death on May 1, 2016, the trustee instructed him not to inform the plaintiff of her death. The plaintiff testified that he did not learn of the trustee's death until August, 2016, in connection with the civil action that he had filed against the trustee in July, 2016. See footnote 2 of this opinion.

was there. He didn't know that he was supposed to be the trustee until the money was already gone.[14] And then after that they refused the records. They refused the accountings. We asked for checks. We asked for the invoices. There were 4000 pages on [an] . . . electronic disc and that's when all the answers were provided and that's when we pared down our argument to the few that we've made right now.

"Had we received that [electronic] disc, had we received those materials back in April, [2016], when I initially demanded them, nicely demanded them, none of my fees would have been incurred. We would have had some of that [$50,000 litigation reserve] sent back. None of this would have happened." (Footnotes added.)

In its memorandum of decision, the court stated that the 2017 probate appeal and the 2018 action "reflect [the plaintiff's] complaints against [the trustee's] handling of the trust. Lest there be confusion, the plaintiff . . . asks for four things and four things only: [1] $50,000 [that] the trust put aside anticipating litigation and has fully spent; [2] $9225 in legal fees [the plaintiff] spent developing his half of the [Vermont property] . . . left to [the plaintiff and the trustee] equally; [3] $11,907 in condo fees [the plaintiff] says should have been avoided; [and (4) the plaintiff's] attorney's fees in this litigation." As to the plaintiff's claim concerning the $50,000 litigation reserve, the court concluded that the claim failed because the defendant was the prevailing party. With respect to the plaintiff's claim seeking $9225 as reimbursement for his legal fees in relation to the Vermont property, the court concluded, inter alia, that the plaintiff's request for reimbursement was untimely.

[14] Section 4.1 of the trust provided in relevant part that, if the trustee failed "to qualify, [was] unable to act or cease[d] to serve for any reason," then the plaintiff would be appointed as the successor trustee. During trial, the plaintiff testified that he had filed an application with the Probate Court to be appointed as the successor trustee, but he elected not to pursue the application.

As to the plaintiff's claim seeking $11,907 in fees relating to the Simsbury condominium unit, the court concluded that (1) the terms of the trust limited the trustee's liability to wilful misconduct and (2) the trustee made an unassailable "judgment call" to attempt diligently to sell the Simsbury condominium unit, but ultimately was unsuccessful.[15] With respect to the plaintiff's final claim seeking punitive damages, the court concluded that "[the plaintiff] made clear on the record that his only claim for attorney's fees was based upon a claim that they should be awarded as punitive damages. [The trustee] did nothing wrong. There is no basis for [the plaintiff] to recover his [attorney's] fees." The court then rendered judgment for the defendant without reference to any specific counts of the plaintiff's amended complaint.

In his ensuing combined motion to open the judgments and to reargue, the plaintiff contended in relevant part that the court's memorandum of decision disposed of count five, asserting an objection to the 2018 accounting, but failed to address counts two, three, four, or six, which, according to the plaintiff, contained allegations that the defendant "wilfully, wantonly and recklessly withheld trust information from the plaintiff that, had it been presented when originally requested, would have avoided litigation altogether." The plaintiff further asserted that the court focused its analysis on the trustee's conduct while ignoring the plaintiff's allegations against the defendant, notwithstanding that "this action is against the defendant . . . and the causes of action against him . . . should be adjudicated . . . ." In denying the plaintiff's motion, the court stated in relevant part that "the court was not required to make fact findings with respect to matters immaterial to the relief

[15] As the court found, "[a]fter eighteen months of trying [the trustee] gave up and turned the [Simsbury condominium unit] in for nothing to the condo association."

sought. The other matters raised in the motion were immaterial in that regard."

Following the filing of these consolidated appeals, pursuant to Practice Book § 66-5, the plaintiff filed a motion seeking an articulation of the court's disposition of counts two, three, four, and six. The plaintiff contended that the memorandum of decision did not address any of the alleged actions committed by the defendant following the trustee's death, which formed the crux of counts two, three, four, and six.

On August 23, 2019, the court issued an articulation stating that the memorandum of decision "does not address the conduct of the defendant . . . because at trial the plaintiff . . . chose to limit the relief he claimed to matters that turned only on alleged wrongdoing by [the trustee]. The only relief item that affected [the defendant] at all was a claim that [the defendant] shouldn't have used [the $50,000 litigation reserve] for fees in this litigation. About this, [the plaintiff] conceded that he would have to win his claims of wrongdoing by [the trustee] to win his claim that this money shouldn't have been used. And [the plaintiff] didn't win. So by [the plaintiff's] own admission, he couldn't win his claim about the fees either."

The court further stated that, "[e]ven if findings should be made regarding conduct not at issue in this case, having considered all of the evidence, it is plain that [the defendant] committed no breach of any duty as [the plaintiff] may have alleged it. The evidence as it relates to [the defendant] revealed in substance only quibbles over the timing and the completeness of documents provided during the course of the dispute. No evidence supported claims concerning [the defendant] breaching a legally recognized duty. Instead, the evidence at trial focused on the matters related to the [trustee's] decisions and actions before [the defendant] assumed her duties upon her death. [The plaintiff's]

only other complaint about [the defendant] appeared to be his failure promptly to inform [the plaintiff] that [the trustee] had died. But [the plaintiff] never connected this claim to a duty owed that was breached, and which, by virtue of being breached, merited any of the relief [the plaintiff] chose to seek at trial."

In summary, the court stated that "[the defendant's] actions were not in issue at the trial because they were unrelated to the claims [the plaintiff] chose to press. But even if they were, [the defendant] breached no duty, and his actions were disconnected to the actual wrongs and relief [the plaintiff] claimed."

The dispositive claim raised by the plaintiff is that the court improperly concluded that, on the basis of his counsel's statements during closing argument, he had abandoned counts two, three, four, and six at trial. The plaintiff maintains that the record reflects that he preserved those counts for adjudication by the court.[16] The defendant argues that the court correctly concluded that the plaintiff had abandoned counts two, three, four, and six. We agree with the plaintiff.

The following standard of review and legal principles are applicable here. "Because . . . the idea of abandonment involves both a factual finding by the trial court and a legal determination that an issue is no longer before the court, we will treat this claim as one of both law and fact. Accordingly, we will accord it plenary review." *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 479, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

Pursuant to Practice Book § 5-2, "[a]ny party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief under

[16] The plaintiff is not appealing from the portion of the judgment disposing of count five in the defendant's favor.

Section 5-1 or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question. If the party fails to do this, the judicial authority will be under no obligation to decide the question." Additionally, Practice Book § 64-1 (a) provides in relevant part that "[t]he trial court shall state its decision either orally or in writing . . . in rendering judgments in trials to the court in civil and criminal matters . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . ." "The responsibility of a court is to respond to those claims fairly advanced." (Internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 334, 966 A.2d 292, cert. denied, 292 Conn. 902, 971 A.2d 40 (2009). "The mere recital of . . . claims in a [complaint], without supporting oral or written argument, does not adequately place those claims before the court for its consideration. This is particularly true when counsel has been warned by the court . . . that it would consider abandoned any claims not advanced by counsel in closing argument." *Solek* v. *Commissioner of Correction*, supra, 107 Conn. App. 480–81.

After a careful review of the record, we conclude that the plaintiff adequately advanced counts two, three, four, and six at trial for the court's consideration. During closing argument, the plaintiff's counsel identified punitive damages in the form of attorney's fees as one of the plaintiff's requests for relief predicated on the defendant's alleged "wilful, wanton conduct . . . ." Counts two, three, four, and six were supported by allegations that the defendant had engaged in "wilful, wanton" conduct. Additionally, at the end of his closing argument, the plaintiff's counsel argued in relevant part that (1) at trial "all we talked about was we needed information about [the trust from] inception to death," (2) despite

the plaintiff's demands, the defendant refused to supply trust records and accountings, (3) the defendant delivered to the plaintiff the electronic disc containing trust documents in February, 2019; see footnote 12 of this opinion; and (4) had the plaintiff been provided with the information contained on the electronic disc sooner, "none of [counsel's] fees would have been incurred, [w]e would have had some of the [$50,000 litigation reserve] sent back, [and] [n]one of this would have happened." Collectively, counsel's statements implicate the allegations pleaded by the plaintiff in support of counts two, three, four, and six concerning conduct by the defendant.[17] Accordingly, we conclude that the court incorrectly concluded that the plaintiff had abandoned counts two, three, four, and six at trial.

At this juncture, we must address briefly the court's August 23, 2019 articulation. In the articulation, the court (1) reiterated that conduct by the defendant, which comprised the core of the allegations in counts two, three, four, and six, was not at issue at trial because it was "unrelated to the claims [the plaintiff] chose to press," and (2) "even if" the defendant's actions were at issue, the plaintiff failed to demonstrate that the defendant had breached any duty owed to the plaintiff. The court's memorandum of decision, its denial of the plaintiff's combined motion to open the judgments and to reargue, and its articulation, make apparent that the court originally disposed of counts two, three, four, and six *only* on the ground that the plaintiff had abandoned them. To the extent that the court, in its articulation, addressed the merits of any or all of counts two, three, four, and six, the articulation is inconsistent with the memorandum of decision and must be disregarded

[17] Additionally, we note that the evidence produced at trial was not limited to actions taken by the trustee prior to her death, but included the defendant's conduct following the trustee's death.

because "[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989); see also *Sosin* v. *Sosin*, 300 Conn. 205, 240, 14 A.3d 307 (2011) (disregarding trial court's articulation and order that were inconsistent with court's original order, as subsequently clarified, regarding interest award); *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 785 n.13, 241 A.3d 717 (2020) (trial court could not use articulation to set forth findings concerning plaintiff's ability to pay and status of his payment obligations regarding former marital home when court admitted that it did not make such findings in court's original contempt decision); *Pecan* v. *Madigan*, 97 Conn. App. 617, 623, 905 A.2d 710 (2006) (trial court could not use articulation to state that it had stricken counts as legally insufficient when court's original decision reflected that court had stricken counts on basis of prior pending action doctrine), cert. denied, 281 Conn. 919, 918 A.2d 271 (2007); *Kelly* v. *Kelly*, 54 Conn. App. 50, 54 n.3, 732 A.2d 808 (1999) (this court was "constrained to follow" trial court's original decision granting motions rather than court's inconsistent articulation denying motions).

In sum, we conclude that the court committed error in concluding that the plaintiff had abandoned counts two, three, four, and six at trial. Accordingly, we reverse the portion of the court's judgment rendered on those counts and remand the case for a new trial on those counts.

II

AC 42919

In AC 42919, the plaintiff appeals from the judgment rendered in the defendant's favor in the 2017 probate appeal. The plaintiff claims that the court improperly rendered judgment for the defendant notwithstanding

that the 2017 probate appeal became moot following (1) the plaintiff's receipt of the 2018 accounting and (2) the court's rejection of count five of his amended complaint filed in the 2018 action, in which he asserted an objection to the 2018 accounting. For the reasons that follow, we conclude that the 2017 probate appeal was rendered moot during its pendency in the trial court, thereby depriving the court of subject matter jurisdiction over it and necessitating its dismissal.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant . . . any practical relief through its disposition of the merits . . . . [I]t is not the province of [the] courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . When . . . events have occurred that preclude [the] court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review is plenary." (Citations omitted; internal quotation marks omitted.) *Abel* v. *Johnson*, 194 Conn. App. 120, 149–50, 220 A.3d 843 (2019), cert. granted, 334 Conn. 917, 222 A.3d 104 (2020).

The following additional facts are relevant to our disposition of this appeal. In his revised complaint, the plaintiff alleged in relevant part that the 2016 accounting was incomplete, and, therefore, he was aggrieved by the Probate Court's order approving the 2016 accounting.[18] In August, 2018, while the 2017 probate appeal and the 2018 action were pending, the defendant delivered the 2018 accounting to the plaintiff. Subsequently, the question of whether the defendant's delivery of the 2018 accounting to the plaintiff rendered the 2017 probate appeal moot was raised before the trial court. In his answer to the plaintiff's revised complaint filed on February 25, 2019, in an introductory paragraph, the defendant represented that the "[p]laintiff's counsel has acknowledged that [the 2017 probate appeal] was moot in a prior status conference . . . and suggested that the plaintiff would be withdrawing the appeal. As such, the defendant asserts that the revised complaint . . . can and should be withdrawn."

Additionally, during closing argument, the following colloquy occurred:

"[The Plaintiff's Counsel]: So, when the 2018 account-[ing] was submitted you may recall that [the defendant's] counsel has throughout said the 2017 [probate] appeal is mooted by the 2018 account[ing] and I agree. But during the pendency of these proceedings I didn't know because you can't just say, yes, it's moot and then dismiss the case or withdraw the case. There has to be

[18] As relief, the plaintiff sought (1) "such relief as is proper," (2) "[a]n accounting of [t]rust activity, from its inception to date," (3) "[j]udgment for amounts found due under such accounting," (4) damages, (5) prejudgment and postjudgment interest, and (6) any other legal or equitable relief available. On August 2, 2017, the defendant filed a motion to strike the claims for relief numbered two through five, which the court, *Shapiro*, *J.*, granted on April 3, 2018. The granting of the defendant's motion to strike is not at issue on appeal.

some sort of pleading and then some sort of resolution from the court.

"The Court: Okay. But are you telling me now that you consider the [2017] probate appeal, there's [the 2017] probate appeal and [the 2018 action] here; are you saying now that that should be dismissed as moot?

"[The Plaintiff's Counsel]: I would rather have it remanded back to the [Probate Court] saying because the 2018 account[ing] was submitted that 2018 account[-ing] is controlling and as a result the [Probate] Court should enter as an order provisions in the 2018 account[-ing] as that will be handed down after this hearing.

"The Court: You're telling me though that you're not asking me to overturn the 2016 accounting; is that fair, because you consider it moot?

"[The Plaintiff's Counsel]: I just get nervous.

"The Court: Well, I'm not sure what you want me to do, so at the very least you should tell me, make it clear what you're asking the court to do.

"[The Plaintiff's Counsel]: I think the effect of these proceedings should serve to sustain the [2017 probate] appeal so that absolutely [the 2017 probate] appeal, the decree of the [Probate] Court is to no effect.

"The Court: And is that because you're asking me to find the 2018 accounting is improper?

"[The Plaintiff's Counsel]: It's supplanted.

"The Court: Because [the 2018 accounting] supplants the 2016 [accounting]?

"[The Plaintiff's Counsel]: Yes.

"The Court: And you're saying that by virtue of the—if I find that the 2018 accounting is wrong, then that

would automatically mean I should overturn the probate decision on the 2016 accounting; is that what you're saying and then send the whole thing back? . . .

"[The Plaintiff's Counsel]: I don't think the 2018 accounting is wrong. I think that there are a few things that need to be tweaked. There need to be things that are surcharged, but it complies with statutory requirements. . . . On the other hand, my appeal from the [Probate Court order] was [that] it was statutorily insufficient . . . ."

Following the statements made by the plaintiff's counsel, the defendant's counsel inquired whether the 2017 probate appeal had been withdrawn. The court responded that the 2017 probate appeal had not been withdrawn and that, "[d]epending on what [the court rules], it will have implications and [the court is] going to have to sort those out."

In the memorandum of decision, the court first rejected the plaintiff's claim raised in the 2018 action challenging the 2018 accounting. The court then stated that it was rendering judgment "for the defendant in both cases." The mootness issue was not addressed by the court in the memorandum of decision or in the court's postjudgment decisions.

The plaintiff claims that the court improperly rendered judgment in the defendant's favor because the 2017 probate appeal became moot following (1) the plaintiff's receipt of the 2018 accounting in August, 2018, and (2) the court's disposition of his objection to the 2018 accounting, as asserted in count five of his amended complaint filed in the 2018 action, on March 29, 2019. We agree with the plaintiff that the 2017 probate appeal was moot at the time of judgment; however, we disagree with the plaintiff insofar as he contends that the 2017 probate appeal was not moot until the resolution of the 2018 action on March 29, 2019. We

conclude, instead, that the 2017 probate appeal became moot during its pendency in August, 2018,[19] when the plaintiff received the 2018 accounting.[20]

During closing argument before the trial court, the plaintiff's counsel expressly represented that the plaintiff's receipt of the 2018 accounting mooted the 2017 probate appeal. The plaintiff repeated that representation in his combined motion to open the judgments and to reargue by asserting that, "[u]ltimately, [he] prevailed on appeal, when the full-term accounting was presented by the defendant . . . *in August, 2018*. . . . [The court's judgment in the 2017 probate appeal] overlooks that *midlitigation the plaintiff received what he'd sought on appeal*." (Emphasis added.) Moreover, in his principal appellate brief, the plaintiff acknowledges that the 2018 accounting satisfied the relief that he sought in the 2017 probate appeal, and in his reply brief, he represents that "the 2017 probate appeal was [filed] *for the sole purpose of compelling a full-term accounting* . . . ." (Emphasis added.)

In addition, during closing argument, the plaintiff requested that the trial court sustain the 2017 probate appeal and remand the matter to the Probate Court for additional proceedings. In his principal appellate brief, however, the plaintiff requests as relief that we reverse the judgment rendered in the 2017 probate appeal and remand the case to the trial court "with instruction that

[19] The 2018 accounting is dated August 6, 2018. An e-mail admitted into evidence at trial in conjunction with the 2018 accounting reflects that the 2018 accounting was delivered to the plaintiff's counsel via e-mail on August 9, 2018. During trial, the plaintiff testified that he received the 2018 accounting in August, 2018, without specifying a date. The precise date in August, 2018, on which the plaintiff received the 2018 accounting is not relevant to our analysis.

[20] The plaintiff also claims that, in rendering judgment for the defendant in the 2017 probate appeal, the court applied the wrong reasoning because it relied exclusively on its rationale disposing of the 2018 action in adjudicating the 2017 probate appeal. We need not address this additional claim in light of our conclusion that the 2017 probate appeal was rendered moot during its pendency.

the [2017 probate] appeal is no longer justiciable and is to be withdrawn or dismissed . . . .'' We construe the plaintiff's statements as abandoning any claim that the trial court could afford him practical relief in the form of sustaining the 2017 probate appeal in his favor and taking any additional action in conjunction therewith.

In light of the plaintiff's representations before the trial court, as maintained on appeal, we conclude that the plaintiff's receipt of the 2018 accounting in August, 2018, satisfied the relief that he was pursuing in the 2017 probate appeal. Following the plaintiff's receipt of the 2018 accounting, there was no practical relief that the court could have granted him, thereby depriving the court of subject matter jurisdiction over the 2017 probate appeal. We further conclude that the court's lack of subject matter jurisdiction necessitated a judgment of dismissal rather than a judgment on the merits for the defendant, and, therefore, the form of the judgment is improper.[21] See *Gershon* v. *Back*, 201 Conn. App. 225, 244, 242 A.3d 481 (2020) (''[w]henever a court finds that it has no jurisdiction, it must dismiss the case'' (internal quotation marks omitted)).

The judgment in Docket No. AC 42918 is reversed only as to counts two, three, four, and six of the plaintiff's amended complaint in the 2018 action and the case is remanded for a new trial on those counts; the judgment is affirmed in all other respects; the form of the judgment in Docket No. AC 42919 is improper, the judgment is reversed and the case is remanded with direction to render judgment dismissing the 2017 probate appeal for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

[21] In his appellate brief, the defendant argues that the court properly rendered judgment in his favor in the 2017 probate appeal; however, the defendant does not address the effect of the plaintiff's receipt of the 2018 accounting during the pendency of the 2017 probate appeal on the justiciability of that appeal.

MONTAVIOUS FINLEY *v.* WESTERN EXPRESS, INC., ET AL.
(AC 43361)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff, who suffered injuries when the tractor trailer he was operating was struck by an unavoidable object, sought to recover uninsured motorist benefits allegedly due under a policy of insurance issued by the defendant C Co. to the defendant W Co. At the time of the accident, the plaintiff was an agent or employee of W Co. and was operating a tractor trailer maintained by W Co. and covered by a fleet insurance policy issued by C Co. The trial court granted the defendants' motion for summary judgment on the ground that there was no genuine issue of material fact that the tractor trailer was not covered by uninsured motorist insurance. Specifically, the court concluded that Tennessee law governed the parties' dispute, that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law because it did not require the defendants to provide such coverage, and that certain Connecticut statutes requiring uninsured motorist coverage did not apply because the tractor trailer was not registered or principally garaged in Connecticut. From the judgment rendered thereon, the plaintiff appealed to this court. On appeal, the plaintiff claimed that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the insurance policy did not provide uninsured motorist coverage and relied solely on Connecticut law in arguing that uninsured motorist coverage was required. *Held* that the plaintiff's appeal was dismissed as moot, the plaintiff having failed to challenge all of the bases for the trial court's summary judgment ruling; the principal basis for the court's ruling was that Tennessee law applied to the action and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law, and, as the plaintiff failed to challenge this independent basis for the court's summary judgment ruling, this court could not afford any practical relief.

Argued March 9—officially released June 29, 2021

Procedural History

Acton to recover uninsured motorist benefits allegedly due under a policy of automobile insurance issued by the defendant National Casualty Company, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee,

granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Keith Currier, for the appellant (plaintiff).

Richard W. Bowerman, with whom was *Michael G. Caldwell*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Montavious Finley, brought the underlying action against the defendants, Western Express, Inc. (Western Express), and National Casualty Company (National Casualty), seeking to recover uninsured motorist benefits. The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendants. The plaintiff claims that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the automobile insurance policy under which he sought to recover did not provide uninsured motorist coverage to him. Because the plaintiff has failed to challenge an independent basis for the court's ruling, we conclude that the appeal is moot. Accordingly, we dismiss the appeal.

In his complaint, the plaintiff alleged in relevant part that, prior to October 17, 2017, the defendants were in the business of writing automobile liability insurance policies and had "issued" an automobile insurance policy to him and that it included coverage for uninsured motorist benefits.[1] The premiums on the policy had been paid by Western Express. On or about October 17, 2017, the plaintiff, while operating a tractor trailer maintained by Western Express on Interstate 84 in West

[1] At the outset, we note that the undisputed evidence presented to the court by the defendants reflects that Western Express is not an insurer, but that it maintains a fleet of tractor trailers, and National Casualty had issued a commercial fleet insurance policy to Western Express.

Hartford, sustained various physical injuries when the tractor trailer was struck by an unavoidable object. He alleged that his resulting injuries were caused by the negligence of an unidentified and uninsured tortfeasor and that "[t]he injuries and losses sustained by [him] are the legal responsibility of the [defendants] pursuant to the terms of its contract of insurance with [him] and in accordance with [General Statutes] § 38a-336[2] . . . ." (Footnote added.) The plaintiff alleged that he had satisfied all of the conditions required under the policy, which he maintained entitled him to uninsured and underinsured motorist coverage.

In their answer, the defendants, with respect to most of the allegations of the complaint, either denied the allegations or left the plaintiff to his proof. The defendants, however, alleged in relevant part that, although the policy on which the plaintiff relied, which had been issued to Western Express by National Casualty, was "in full force and effect" at the time of the accident, the policy did not obligate them to pay uninsured motorist benefits to a covered person under the policy.

The defendants raised five special defenses. In relevant part, they alleged that at the time of the alleged accident the plaintiff was operating the tractor trailer at issue as an agent or employee of Western Express, and the tractor trailer was "covered under a fleet insurance policy with National Casualty . . . that covered a fleet of commercial tractor trailers maintained by

[2] General Statutes § 38a-336 provides in relevant part: "(a) (1) (A) Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334 . . . ."

General Statutes § 38a-334 provides in relevant part: "(a) The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies . . . covering private passenger motor vehicles . . . motor vehicles with a commercial registration . . . and vanpool vehicles . . . registered or principally garaged in this state."

Western Express . . . .'' The defendants alleged that the insurance policy at issue expressly stated that it did not provide uninsured motorist coverage, and Connecticut law requiring such coverage did not apply to the policy at issue because the policy insured a tractor trailer that was not registered or principally garaged in Connecticut.

The defendants moved for summary judgment on the grounds that the policy at issue did not contain a provision for uninsured motorist benefits, the tractor trailer that the plaintiff allegedly was operating at the time of the accident was not registered or principally garaged in Connecticut, and Connecticut law requiring uninsured motorist coverage did not apply to the tractor trailer. In support of the motion for summary judgment, the defendants filed a memorandum of law and an affidavit of Ron Lowell, General Counsel to Western Express, in which he averred that the subject tractor trailer was not registered in Connecticut, the tractor trailer was principally garaged in Tennessee, and the policy under which the tractor trailer was insured did not provide for uninsured motorist benefits.[3]

On February 11, 2019, the plaintiff filed an objection to the motion for summary judgment. The plaintiff did not attempt to contradict the material facts for which proof was submitted by the defendants, but argued that the defendants' motion for summary judgment should be denied. The plaintiff stated that ''[t]he tractor trailer the plaintiff was driving was owned and self-insured by the defendant Western Express.'' The plaintiff did not state that the policy on which he relied contained a provision for uninsured motorist benefits, but argued

[3] Attached to Lowell's affidavit were copies of the Connecticut Uniform Police Crash Report for the October 17, 2017 accident, the subject tractor trailer's registration, and the tractor trailer's insurance policy issued by National Casualty.

that, pursuant to General Statutes §§ 38a-371 (a) (2)[4] and 38a-336 (a) (1), "[t]he defendant was required to maintain uninsured motorist coverage while operating in Connecticut." On February 22, 2019, the defendants filed a reply to the plaintiff's objection.

On May 6, 2019, the court heard oral argument from the parties on the motion and objection. On August 30, 2019, the court issued a memorandum of decision rendering summary judgment in favor of the defendants. The court engaged in a choice of law analysis and concluded that, in light of the undisputed facts before it, Tennessee law governed the parties' dispute and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law, which did not require the defendants to provide such coverage. The court noted that, "[a]lthough public policy in Connecticut favors uninsured motorist coverage . . . it cannot be said that it would violate a fundamental public policy or be offensive to our sense of justice to apply Tennessee law and thereby allow an out of state vehicle to operate without such coverage." (Emphasis omitted.)

The court also addressed the plaintiff's argument that, under Connecticut law, §§ 38a-371 and 38a-336 (a) (1) required the defendants to carry uninsured motorist coverage. The court concluded that "[a]pplying these statutes . . . would not change the outcome" it had reached in applying Tennessee law because "it ha[d] been established that the defendants' vehicle was neither registered nor principally garaged in [Connecticut] . . . ."

[4] General Statutes § 38a-371 provides in relevant part: "(a) (2) The owner of a private passenger motor vehicle not required to be registered in this state shall maintain security in accordance with this section . . . .

"(b) The security required by this section, may be provided by a policy of insurance complying with this section issued by or on behalf of an insurer licensed to transact business in this state or, if the vehicle is registered in another state, by a policy of insurance issued by or on behalf of an insurer licensed to transact business in either this state or the state in which the vehicle is registered. . . ."

Ultimately, the court concluded that "[t]he defendants were not required to purchase uninsured motorist coverage for their vehicle, and the uncontested sworn copy of the defendants' insurance policy indicates that their vehicle did not carry such coverage. . . . Therefore, there is no genuine issue of material fact that the defendants' vehicle was not covered by uninsured motorist insurance." From that judgment, the plaintiff now appeals. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff claims that the court misinterpreted applicable Connecticut law and disregarded public policy in concluding as a matter of law that the automobile insurance policy under which the plaintiff sought to recover did not provide uninsured motorist coverage to him. The plaintiff, relying solely on Connecticut law, reiterates in substance the arguments advanced before the trial court, arguing that the court erred in its determination that the defendants were entitled to judgment as a matter of law. The plaintiff argues that the court erred because Connecticut law "mandates that all vehicles operating on Connecticut roadways maintain uninsured motorist coverage" and that Connecticut "has consistently maintained a strong public policy favoring uninsured motorist coverage." The plaintiff does not, however, challenge the principal basis for the court's summary judgment ruling, that Tennessee law applies to the action and that he was not entitled to uninsured motorist benefits under Tennessee law.[5] Because the plaintiff has failed to challenge that

[5] We note that, during oral argument before this court, the plaintiff's appellate counsel agreed that the principal basis for the court's ruling resulted from its reliance on and application of Tennessee law, and he acknowledged that, in his appellate brief, he did not challenge this aspect of the court's ruling. Following oral argument before this court, we ordered the parties "to file simultaneous supplemental briefs addressing the issue of why the appeal should not be dismissed as moot in light of the fact that the [plaintiff] has failed to raise a claim of error with respect to one of the independent bases upon which the trial court's summary judgment may be sustained, namely, the trial court's determination that Tennessee law governs

independent basis for the court's ruling, his appeal is moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018). "Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Internal quotation marks omitted.) *Jacques* v. *Jacques*, 195 Conn. App. 59, 61–62, 223 A.3d 90 (2019); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 379 n.23, 119 A.3d 462 (2015) ("where alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant" (internal quotation marks omitted)); see also *Hartford* v. *CBV Parking Hartford, LLC*, supra, 210.

As we have explained, in the present case, the court engaged in a choice of law analysis. It then concluded that Tennessee law applied to the plaintiff's cause of action and that the plaintiff was not entitled to uninsured motorist benefits under Tennessee law. This conclusion was the principal basis for the court's ruling.

the parties' dispute and that as a matter of law the [plaintiff] is not entitled to judgment in his favor under Tennessee law." The parties have filed supplemental briefs, and we have reviewed them in our consideration of the appeal.

As an alternative basis for its ruling, the court concluded that, even if Connecticut law applied, the plaintiff still could not prevail. Thus, even if we agreed with the plaintiff's argument under Connecticut law, we would be unable to provide him any relief in connection with this appeal because he failed to challenge both independent bases for the court's summary judgment ruling. Relying on the authorities set forth previously, we conclude that the appeal is moot.

The appeal is dismissed.

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION
(AC 43188)

Cradle, Alexander and Suarez, Js.

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit robbery in the first degree, burglary in the first degree, sexual assault in the first degree and robbery in the first degree, sought a third petition for a writ of habeas corpus. The respondent Commissioner of Correction filed a request for an order to show cause why the petition should be permitted to proceed. Following an evidentiary hearing, at which the petitioner declined the opportunity to present evidence, the habeas court dismissed the petition as untimely pursuant to the applicable statute (§ 52-470 (d) and (e)), concluding that the petitioner failed to establish good cause for the delay in filing the petition nearly three years after the deadline for filing a subsequent petition challenging his conviction. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held* that this court declined to review the petitioner's unpreserved claims that the habeas court abused its discretion in denying his petition for certification to appeal because his habeas counsel provided ineffective assistance and he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition; contrary to the petitioner's contention, the petitioner was not entitled to appellate review of his claims under *State* v. *Golding* (213 Conn. 233) or for plain error, the petitioner having failed to raise them as grounds for appeal in his petition for certification to appeal as required by § 52-470 (g).

Argued March 15—officially released June 29, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Benjamin Bosque, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e).[1] The petitioner claims that the habeas court abused

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in

its discretion in denying his petition for certification to appeal because (1) it should have been obvious to the court that his habeas counsel had provided constitutionally ineffective assistance and (2) he was denied his constitutional right to counsel because the court had failed to intervene when his counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition. We dismiss the appeal.

The following facts and procedural history, as set forth by the habeas court, are relevant to the petitioner's claims on appeal. "The petitioner was convicted of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4), burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and four counts of robbery in the first degree in violation of . . . § 53a-134 (a) (4). After unsuccessfully appealing his conviction . . . the petitioner filed his first habeas . . . petition, which was denied following a trial. . . . The petitioner did take an appeal from [the] habeas court's decision, but . . . the appeal was dismissed on February 20, 2013." (Citations omitted.)

On November 3, 2014, the petitioner filed a second habeas petition, which was subsequently withdrawn on

this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

January 29, 2018. On February 26, 2018, the petitioner initiated the underlying action by filing a third habeas petition. "The respondent, [the Commissioner of Correction] filed [a] request for an order to show cause [why the petition should be permitted to proceed] on December 6, 2018, asserting that the petitioner had failed to file the present petition within two years of when the [judgment] on his prior habeas [petition] became final. An evidentiary hearing was held on March 8, 2019. Although present, the petitioner declined the opportunity to present testimony or evidence." (Footnote omitted).

In a memorandum of decision dated May 21, 2019, the court, *Newson*, *J.*, dismissed the habeas petition as untimely under § 52-470 (d) and (e), concluding that the petitioner failed to establish good cause for the delay in filing the petition beyond the statutory deadline. The court found that the petitioner had until March 12, 2015, to file a subsequent habeas petition challenging his conviction and that the petitioner did not present any evidence explaining why his petition was not filed until nearly three years after the deadline. The court denied the petition, noting that "[o]nce the rebuttable presumption [that no good cause existed for the delay] arose, the petitioner was obligated to provide *some* evidence of the reason for the delay in filing this petition, which he declined to do." (Emphasis in original.) The court thereafter denied the petition for certification to appeal, and this appeal followed.

Section 52-470 (g) provides in relevant part: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried . . . to certify that a question is involved in the decision which ought

to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and [to] hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals." (Internal quotation marks omitted.) *Stephenson* v. *Commissioner of Correction*, 203 Conn. App. 314, 322, 248 A.3d 34, cert. denied, 336 Conn. 944, A.3d (2021).

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for [a writ of] habeas corpus only 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, [the petitioner] must demonstrate that the denial of his petition for certification [to appeal] constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted 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. . . .

"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.) *Haywood* v. *Commissioner of Correction*, 194 Conn. App. 757, 763–64, 222 A.3d 545 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020). "In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition or certification [to appeal]." (Internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 573, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

On appeal, the petitioner does not challenge the habeas court's decision on the merits—he does not claim that the court erred in dismissing his habeas petition as untimely. Rather, he claims that the habeas court abused its discretion in denying his petition for certification to appeal because (1) his habeas counsel obviously provided constitutionally ineffective assistance and (2) he was denied his constitutional right to counsel because the court failed to intervene when his counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition. The respondent argues, inter alia, that, because the petitioner failed to raise these issues as grounds for appeal in his petition for certification to appeal, he is unable to claim on appeal that the court abused its discretion in denying his petition for certification to appeal on these grounds. We agree with the respondent.

It is well established that a petitioner cannot demonstrate that a habeas court abused its discretion in denying a petition for certification to appeal on the basis of claims that were not raised distinctly before the habeas court at the time that it considered the petition for certification to appeal. See *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216–17, 72 A.3d 1162,

cert. denied, 310 Conn. 928, 78 A.3d 145 (2013), and cases cited therein.

In the present case, the petitioner's petition for certification to appeal stated only the following ground for appeal: "Whether the habeas court erred in finding that there was not good cause to allow the petitioner's petition for [a writ of] habeas corpus to proceed on the grounds that he filed [it] outside the applicable time limits." The petition for certification to appeal did not include grounds related to any claims regarding ineffective assistance of habeas counsel or the habeas court's alleged duty to intervene in the face of the alleged ineffective assistance. In fact, the petitioner concedes that he failed to preserve those claims by stating them in his petition for certification to appeal.

Notwithstanding these failings, the petitioner argues that his failure to list the aforementioned grounds in his petition for certification to appeal, as required by § 52-470 (g), does not preclude this court from reviewing his claims under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or for plain error. This court previously has addressed and rejected similar requests for extraordinary review, such as *Golding* and plain error review, of claims not raised in petitions for certification to appeal.

With respect to the petitioner's argument that he is entitled to *Golding* review of his claims, this court has stated: "Section 52-470 (g) conscribes our appellate review to the issues presented in the petition for certification to appeal . . . . Permitting a habeas petitioner, in an appeal from a habeas judgment following the denial of a petition for certification to appeal, to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to

achieve in enacting § 52-470 (g)." (Internal quotation marks omitted.) *Solek* v. *Commissioner of Correction*, 203 Conn. App. 289, 299, 248 A.3d 69, cert. denied, 336 Conn. 935, 248 A.3d 709 (2021); see also *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 418–19, 236 A.3d 276 (noting that review pursuant to *Golding* was not available for claim raised for first time on appeal and not raised in or incorporated into petition for certification to appeal), cert. denied, 335 Conn. 969, 240 A.3d 286 (2020). Accordingly, the petitioner is not entitled to *Golding* review of his claims.

This court likewise has rejected the argument that claims not set forth in a petition for certification to appeal may be reviewed for plain error.[2] See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 577–78; *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 818 n.2, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017). In declining to afford plain error review to a claim not set forth in a petition for certification to appeal, this court has reasoned that "[t]he [habeas] court could not abuse its discretion in denying the petition for certification about matters that the petitioner never raised." *Mercado* v. *Commissioner of Correction*, 85 Conn. App. 869, 872, 860 A.2d 270 (2004), cert. denied, 273 Conn. 908, 870 A.2d 1079 (2005).

In support of his argument that he is entitled to plain error review, the petitioner relies on this court's opinion in *Foote* v. *Commissioner of Correction*, 151 Conn. App. 559, 96 A.3d 587, cert. denied, 314 Conn. 929, 102 A.3d

[2] The plain error doctrine, codified in Practice Book § 60-5, "is not . . . a rule of reviewability . . . [but] a rule of reversibility. That is, it is a doctrine that [appellate courts invoke] in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy." *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

709 (2014), and cert. dismissed, 314 Conn. 929, 206 A.3d 764 (2014), in which this court afforded the petitioner plain error review of a claim not listed in his petition for certification to appeal without articulating its reason for doing so. The majority in *Foote* cited, without analysis, to our Supreme Court's decision in *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 526, 911 A.2d 712 (2006).[3] *Foote* v. *Commissioner of Correction*, supra, 566–67. *Ajadi* involved a claim of plain error that called into question the fairness and impartiality of the entire habeas trial.[4] *Ajadi* v. *Commissioner of Correction*, supra, 525. In *Ajadi*, the petitioner did not become aware of the issue underlying the claim of plain error until after the habeas proceedings had concluded. Id., 522. In other words, because this issue did not come to the attention of the parties, counsel for the parties, or the habeas court until sometime after the petitioner brought the appeal in that case, he could not have included it in his petition for certification to appeal. The petitioner in *Ajadi*, therefore, sought, and was afforded, plain error review of his claim.[5] Id., 525–30.

In the present case, the claim of plain error is based on events that occurred during the petitioner's habeas trial and, therefore, could have been raised in his petition for certification to appeal. The scope of appellate review is restricted to an examination of the court's

[3] The majority in *Foote* also cited, without analysis, to *Melendez* v. *Commissioner of Correction*, 141 Conn. App. 836, 62 A.3d 629, cert. denied, 310 Conn. 921, 77 A.3d 143 (2013). *Foote* v. *Commissioner of Correction*, supra, 151 Conn. App. 567. In *Melendez*, the court afforded plain error review of the petitioner's unpreserved claim with no discussion as to why it was doing so. *Melendez* v. *Commissioner of Correction*, supra, 841.

[4] In *Ajadi*, the petitioner argued that the habeas judge who presided over his habeas trial and denied his petition for certification to appeal should have disqualified himself based on the judge's prior representation of the petitioner. *Ajadi* v. *Commissioner of Correction*, 280 Conn. 525–29.

[5] The holding in *Ajadi*, in our view, is best limited to the unique facts of that case. Because the majority in *Foote* did not provide a reason for departing from the settled jurisprudence, we likewise limit the holding in *Foote* to its facts.

denial of the petition for certification to appeal. A plain error analysis of claims never raised in connection with a petition for certification to appeal expands the scope of review and undermines the goals that the legislature sought to achieve by enacting § 52-470 (g). If this court were to engage in plain error review, it would invite petitioners, who have been denied certification to appeal, to circumvent the bounds of limited review simply by couching wholly unpreserved claims in terms of plain error.

On the basis of the foregoing, we conclude that, if the petitioner desired appellate review of his claims of ineffective assistance of habeas counsel and/or whether the habeas court had a duty to address counsel's deficient performance to prevent prejudice to the petitioner, he was required to include those issues as grounds for appeal in his petition for certification to appeal. See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 577–78. Because he failed to do so, we decline to review the petitioner's claims.

The appeal is dismissed.

In this opinion the other judges concurred.

MARIA MOULTHROP *v.* CONNECTICUT STATE BOARD OF EDUCATION
(AC 43781)

Suarez, Clark and DiPentima, Js.

Syllabus

The plaintiff, a former elementary school principal, appealed to the trial court from the decision by the defendant, pursuant to statute (§ 10-145b (i) (2)), revoking her initial educator and professional educator certificates after an investigation determined that she was involved in and responsible for cheating that occurred on a schoolwide basis during the administration of the Connecticut Mastery Test. The trial court found that the record contained substantial evidence that the plaintiff directly participated in a portion of the cheating, and knew that cheating was taking place during the administration of the test and did not stop it.

The court rendered judgment dismissing the appeal, and the plaintiff appealed to this court, claiming, inter alia, that there was no substantial evidence to support the finding that she was directly involved in or was responsible for the cheating. *Held* that, upon this court's plenary review of the record, the briefs and the arguments of the parties, the judgment of the trial court was affirmed, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued May 19—officially released June 29, 2021

Procedural History

Appeal from the decision by the defendant revoking the plaintiff's initial educator and professional educator certificates, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

John M. Gesmonde, for the appellant (plaintiff).

Kerry Anne Colson, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Maria Moulthrop, appeals from the judgment of the trial court dismissing her administrative appeal from the decision of the defendant, the Connecticut State Board of Education (board), revoking her initial educator and professional educator certificates.[1] On appeal, the plaintiff claims that the court erred by concluding that she failed to establish that the board's decision (1) was predicated on constitutional and statutory violations, and (2) was clearly erroneous

[1] The plaintiff held an initial educator certificate that permitted her to teach prekindergarten through twelfth grade. She also held a professional educator certificate that permitted her to be an administrator in a school. See General Statutes § 10-145b (governing issuance and revocation of teaching certificates).

in view of the reliable, probative and substantial evidence in the whole record. We affirm the judgment of the trial court.

The record discloses the following relevant facts. The plaintiff was employed by the Waterbury Board of Education as the principal of Hopeville Elementary School (Hopeville) from 1996 until she resigned in December, 2011. The issues in the present appeal center on the Connecticut Mastery Test[2] (mastery test) that was administered at Hopeville in the spring of 2011. The performance of the Hopeville students on the mastery test prior to 2011 could best be characterized as struggling, with fluctuating failing and nonfailing results. The test scores for the Hopeville students in the spring of 2011, however, were higher than those of any other public school in Waterbury, higher than the statewide averages for all students, and substantially higher than the scores for Hopeville students in prior years. The unusual change in the test scores of Hopeville students prompted an investigation by the state Department of Education (department) that led to the determination that cheating had occurred in the administration of the mastery test at Hopeville in the spring of 2011. Data analysis revealed that the 2011 test scores were the result of adult interference with the test on a schoolwide scale. Evidence that cheating occurred during the administration of the spring, 2011 mastery test at Hopeville is overwhelming; the plaintiff does not challenge that determination. The plaintiff, however, challenges the board's determination that she was involved in, and was responsible for, the cheating that occurred.

On the basis of the department's investigation and pursuant to General Statutes § 10-145b (i) (2), the board issued an administrative complaint seeking to revoke

[2] The Connecticut Mastery Test is a statutorily mandated, statewide, standardized test used for the purpose of measuring student achievement in reading, language arts, and mathematics. See General Statutes § 10-14n.

the plaintiff's initial educator certificate and professional educator certificate. A hearing officer conducted an evidentiary hearing over nine days from 2016 through 2018 and issued a proposed decision in October, 2018. The hearing officer found that the plaintiff was responsible for personally committing sundry breaches of security in connection with the administration of the 2011 mastery test at Hopeville or knowingly allowing others in her school to do so. The hearing officer submitted a report to the board recommending that the plaintiff's professional educator's certificate be revoked and that her initial educator's certificate be placed on probation with special conditions. On February 6, 2019, the board adopted the decision of the hearing officer in all respects, except that it revoked both of the plaintiff's educator certificates.

The plaintiff appealed to the Superior Court, claiming that there was no substantial evidence to support the finding that she was directly involved in the cheating on the spring, 2011 mastery test or that she was responsible for the schoolwide cheating on that test. She also claimed that she was denied her constitutional and statutory rights during the investigation and hearing. The court found that the record contains substantial evidence that the plaintiff directly participated in a portion of the cheating and that she knew that cheating was taking place during the administration of the mastery test and did not stop it. The court also concluded that the plaintiff failed to establish that the board's decision (1) violated any constitutional or statutory provision, (2) was in excess of its statutory authority, (3) was made upon unlawful procedure, (4) was affected by other error of law, (5) was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record, or (6) was arbitrary or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise

of discretion. See General Statutes § 4-183 (j). The court dismissed the plaintiff's appeal.

Our plenary review of the record and the proceedings in the trial court, as well as the briefs and arguments of the parties on appeal, persuades us that the judgment of the trial court should be affirmed. We, therefore, adopt the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues. See *Moulthrop* v. *Connecticut State Board of Education*, Superior Court, judicial district of New Britain, Docket No. CV-19-6051413-S (December 18, 2019) (reprinted at 205 Conn. App. 493, A.3d). Any further discussion of the issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Pellecchia* v. *Killingly*, 147 Conn. App. 299, 302, 80 A.3d 931 (2013).

The judgment is affirmed.

APPENDIX

MARIA MOULTHROP *v.* CONNECTICUT STATE BOARD OF EDUCATION*

Superior Court, Judicial District of New Britain
File No. CV-19-6051413-S

Memorandum filed December 18, 2019

Proceedings

Memorandum of decision in appeal from revocation of plaintiff's professional educator and initial educator certificates. *Appeal dismissed.*

John M. Gesmonde and *Nancy E. Valentino*, for the plaintiff.

Kerry Anne Colson, assistant attorney general, and *William Tong*, attorney general, for the defendant.

* Affirmed. *Moulthrop* v. *Connecticut State Board of Education*, 205 Conn. App. 489, A.3d (2021).

Opinion

CORDANI, J.

INTRODUCTION

The plaintiff, Maria Moulthrop (plaintiff), appeals from a final decision by the defendant, the Connecticut State Board of Education (board), revoking her initial educator and professional educator certificates. This appeal is taken pursuant to General Statutes § 4-183. The board issued a complaint seeking revocation of the plaintiff's certifications as provided for in General Statutes § 10-145b. A hearing officer held a hearing over the course of nine days from 2016 through 2018. The hearing officer issued his proposed decision on October 9, 2018, recommending that the plaintiff's professional educator's certificate be revoked and that her initial educator's certificate be put on probation with specified conditions. The board issued its final decision on February 6, 2019, adopting the proposed decision of the hearing officer as the board's final decision, with only one change —revoking both of the plaintiff's certifications. The plaintiff has appealed the board's final decision to this court.

FACTS

The plaintiff was the principal of Hopeville Elementary School in Waterbury (Hopeville) from 1996 until she resigned in December, 2011. The issues in this matter revolve around the administration of the Connecticut Mastery Test (CMT) in the spring of 2011 at Hopeville. The plaintiff was the principal of Hopeville during the administration of the 2011 CMT. The CMT is a statutorily mandated, statewide, standardized test used for the purpose of measuring achievement in reading, language arts, and mathematics. Hopeville students' performance on the CMT prior to 2011 could best be characterized as struggling, with fluctuating failing and nonfailing results. The spring 2011 CMT scores for Hopeville, however, were higher than those of any other public school

in Waterbury, higher than the statewide averages for all students, and substantially higher than Hopeville's previous year's scores. This unusual change in Hopeville's CMT scores prompted an investigation. That investigation determined that cheating occurred in the administration of the spring 2011 CMT at Hopeville.

There is no dispute that cheating did indeed occur with respect to the spring 2011 CMT at Hopeville. Even the plaintiff admits that cheating appears to have occurred; she does, however, dispute her involvement in and responsibility for the cheating. The investigation relied on various evidence to conclude that cheating occurred. First, the CMT was readministered at Hopeville in September, 2011, and the results were much lower than the spring 2011 results. On the basis of an analysis of the results data, Stephen Martin determined, and testified as an expert, that the spring 2011 CMT results at Hopeville were the result of adult interference with the test on a schoolwide scale. Second, a company called Measurement Incorporated conducted an erasure analysis to determine statistical anomalies in the erasure data for the spring 2011 CMT at Hopeville. The average number of erasures and the number of answers changed from "wrong" to "right" at Hopeville significantly exceeded the statewide results. Gilbert Andrada, a psychometrician, testified as an expert on this issue. Dr. Andrada testified that the difference between the erasures at Hopeville and the statewide results was highly unlikely to have occurred naturally. Even the plaintiff's expert testified that the answer changes at Hopeville did not occur naturally but were the product of cheating by adults. Finally, Frederick L. Dorsey, an attorney, conducted an investigation at Hopeville, primarily interviewing teachers and students as well as collecting evidence, which produced direct evidence of cheating on a schoolwide scale. Thus, the evidence that cheating occurred on a schoolwide scale at Hopeville in the administration of the spring 2011 CMT is over-

whelming, and the plaintiff does not challenge the determination that cheating occurred.

The plaintiff's challenge in this appeal is directed at the board's determination that she was involved in, and responsible for, the cheating that occurred. The hearing officer made 179 specific findings of fact. The hearing officer found that the plaintiff was personally involved in and responsible for the cheating based in part on, inter alia, the following findings of fact:

1. As principal, the plaintiff was responsible for the overall operation of Hopeville,[1] including having the ultimate responsibility for the administration of the CMT in the spring of 2011. The plaintiff was a hands-on principal who was directly involved in most of what went on at Hopeville.

2. The Waterbury school district had assigned the ultimate responsibility for the proper administration of the CMT to the principal in each school.[2]

3. During the administration of the CMT, the test booklets were stored in the plaintiff's locked office.

4. The plaintiff was trained in the proper administration of the CMT.[3]

5. Margaret Perugini, a Hopeville teacher and friend of the plaintiff, had the office next door to the plaintiff and had access to the plaintiff's office.

[1] See testimony of plaintiff, administrative hearing transcript, dated January 16, 2018, pp. 84–89 (record, vol. IV, item 12).

[2] See board's exhibit 34, letter, dated April 10, 2012, from Tara Battistoni to Steve Martin (record, vol. V, item 34, p. 1069) (describing the policy of the Waterbury school district on this point); see also testimony of Battistoni, administrative hearing transcript, dated November 4, 2016, pp. 605–606 (record, vol. IV, item 6); testimony of Dr. Ronald K. Hambleton, the plaintiff's expert, administrative hearing transcript, dated December 1, 2016 (record, vol. IV, item 10).

[3] Prior to the administration of the CMT, the plaintiff attended training sessions for the administration of the CMT. The training included a review of test security, including the relevant instructions in the Test Coordinator's Manual and Examiner's Manual. The foregoing manuals contain specific

6. At a meeting at which the plaintiff was present, Mrs. Perugini passed out a list of questions derived from the 2011 CMT and requested that teachers review them with their classes.[4]

7. At a meeting at which the plaintiff was present, Mrs. Perugini distributed a list of vocabulary words that were derived from the 2011 CMT test and requested that teachers review them with their classes.[5]

8. The plaintiff instructed teachers to assist students by changing words used on the CMT to synonyms that the students could more easily understand.[6]

9. The plaintiff instructed teachers to review the test in advance and to advise students to "check your work" while pointing to specific answers that the teachers knew were incorrect.[7] The students understood this to be an instruction to change an incorrect answer.

instructions concerning test security and validity. The manuals specify that breaches in test security include copying of test materials, failing to return test materials, coaching students, giving students answers, and/or changing students' answers.

[4] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Cara Munro, Mark Esposito, Yenny Villar and Amanda Koestner (record, vol. VI, item PP), and board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23); see also board's exhibits 15 and 19 (record, vol. V, items 15, 19); testimony of Stephen Martin, administrative hearing transcript, dated October 25, 2016, pp. 180–81 (record, vol. IV, item 3); testimony of Deirdre Ducharme, administrative hearing transcript, dated October 27, 2016, pp. 389–94 (record, vol. IV, item 4). It should be noted that, at the time that these questions and vocabulary words, which were derived from the 2011 CMT, were distributed, the 2011 CMT tests were secured in the plaintiff's office.

[5] See footnote 4 of this opinion.

[6] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Amanda Koestner and Stacey Tomasko (record, vol. VI, item PP); see also board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23).

[7] See respondent's exhibit PP, Attorney Dorsey's interview transcripts of Cara Munro, Stacey Tomasko, Mark Esposito and Kelley Brooks (record, vol. VI, item PP); see also board's exhibit 23, Attorney Dorsey's investigative report (record, vol. V, item 23, p. 962) (on the two students he interviewed).

10. There was evidence that the improper changing of answers from incorrect to correct by adults occurred while the test booklets were stored in the plaintiff's office.

The findings of fact include direct evidence of the plaintiff's direct involvement in the cheating, indirect and circumstantial evidence of the plaintiff's direct involvement in the cheating, from which the hearing officer drew inferences, and direct evidence that the plaintiff was generally responsible for the cheating as a result of her position as principal, her responsibility for test security, and her failure to maintain proper test security.

The CMT is a standardized mastery test that is federally mandated and serves several purposes. First, the CMT measures the proficiency of students' understanding and skills in the areas tested. Second, it provides data to the school district to assist in refining areas of teaching in general and in focusing on areas of need for particular students and/or schools. Third, it provides data such that schools and school districts may be evaluated and compared in decisions of resource allocation. Last, it provides some measurement of the effectiveness of teaching. All of the foregoing goals can be undermined if the results are artificially skewed by cheating.

The plaintiff is classically aggrieved by the board's final decision because the board's final decision strips the plaintiff of her certifications as a teacher and as a school administrator.

STANDARD OF REVIEW

This appeal is brought pursuant to § 4-183 of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.[8] Judicial review of an admin-

[8] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing

istrative decision in an appeal under the UAPA is limited. See, e.g., *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [our Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . [The court's] ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

Although the courts ordinarily afford "deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes . . . [c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

ANALYSIS

The plaintiff challenges the board's final decision on several grounds, both factually and procedurally.[9] The plaintiff also challenges the validity and enforceability of the applicable statute. As this court will soon discuss further, this court finds that the plaintiff has not established that the board's decision was defective in view of the standard of review on appeal.

A

Record Contains Substantial Evidence to Conclude Both That Plaintiff Was Directly Involved In Cheating and Was Responsible For Cheating Schoolwide

The record contains substantial evidence that the plaintiff was directly involved in the cheating. First, the record contains evidence, and the hearing officer found, that the plaintiff personally instructed Hopeville teachers to review the test in advance and to move around the classroom, observe students' answers to various questions, and specifically instruct students to "check your work" in relation to particular questions that teachers observed particular students had answered incorrectly. Students indicated that they understood the "check your work" prompt to be a signal that a particular answer they had was incorrect and that they should go back and correct it. Second, the plaintiff was present at meetings where Mrs. Perugini distributed questions

[9] To the extent that the plaintiff, in her reply brief, attempts to incorporate by reference briefs and other filings which were not filed with this court, the court has not considered such attempted incorporations by reference. The plaintiff's attempt to incorporate by reference briefs and documents not filed with this court is an inappropriate attempt to circumvent the briefing page limits set and to confuse the issues presented to this court for review. The briefs filed with this court must, in accordance with the applicable rules, contain and brief the issues sought to be reviewed by this court. Attempts to circumvent the rules by incorporating arguments by reference is inappropriate and is rejected.

and vocabulary words that were taken from the 2011 CMT[10] and instructed teachers to review them with their classes. Last, the record contains evidence that the plaintiff instructed teachers to provide the students with synonyms for words on the CMT that they might not readily understand. In each of the foregoing three cases, the plaintiff directly participated in, and even instructed, the cheating. As is readily apparent, each of the foregoing issues amounted to an improper breach of security of the CMT. Further, the record contains substantial evidence that the plaintiff understood, as would any reasonable person, that the foregoing activities would be cheating and would amount to a breach of the security of the test.

The record contains substantial indirect and circumstantial evidence that the plaintiff knew of, allowed, and likely encouraged a group of teachers to erase and change answers from incorrect to correct. First, it is undisputed that adults erased answers in the students' test booklets and changed answers from incorrect to correct. While the tests were not actively in use, they were locked up in the plaintiff's office, which was secure except for a door from Mrs. Perugini's office. The record contains evidence indicating that teachers observed the test booklets spread out in the plaintiff's office on a table and chair on at least two occasions and were suspicious about why they were spread out in that fashion instead of boxed up. The hearing officer found that the evidence that adults actively changed the answers on the tests was overwhelming. The hearing officer found it improbable that all of the breaches of security that were found to have occurred could have

[10] As is readily apparent, undermining the confidentiality of the test, as with any test of this type, undermines the accuracy and comparability of the results, and produces results that are not fairly indicative of the proficiency of the students being tested. Further, at the time that these questions and vocabulary words, which were derived from the 2011 CMT, were distributed, the 2011 CMT tests were secured in the plaintiff's office.

been carried out without the plaintiff's knowledge and participation. Further, the hearing officer specifically found that the plaintiff's testimony and explanation for the breaches were not credible. Because it is undisputed that answers were inappropriately changed, because the plaintiff had control of the test booklets when not in use, because of evidence suggesting that operations on the test booklets were occurring in the plaintiff's office, and because the hearing officer specifically found that the plaintiff's explanation was not credible, it was not unreasonable for the hearing officer to conclude that the plaintiff was at least aware that answers were being inappropriately changed.[11]

Last, the plaintiff was the principal of the school. As such, she was in charge of the overall operations of the school, including the administration of tests therein. The hearing officer found that the plaintiff was a hands-on principal and was involved in most of what went on at Hopeville. Further, the record contains substantial evidence that the school district had specifically designated the principal in each school as being ultimately responsible for the administration of the CMT. Given the foregoing, it was not unreasonable for the hearing officer to conclude that the plaintiff failed to maintain appropriate security and was responsible for the CMT security breaches that occurred.

Accordingly, the record contains substantial evidence, direct and circumstantial, that the plaintiff directly participated in a portion of the cheating. The record also contains substantial evidence, direct and circumstantial, that the plaintiff knew the cheating was going on and did not stop it. Last, the record contains substantial evidence, direct and circumstantial, that the plaintiff, as principal, had responsibility for the cheating.

[11] The hearing officer, as the finder of fact, had the ability and responsibility to draw reasonable inferences from the evidence, both direct evidence and circumstantial evidence.

B

Attorney Dorsey's Report and Associated Interview Transcripts Were Properly Admitted into Evidence And Plaintiff Was Not Denied Opportunity To Cross-Examine Witnesses

The board retained Attorney Dorsey to conduct an investigation into the situation. Attorney Dorsey visited Hopeville, interviewed teachers and students, and collected evidence. His interviews were recorded and the recordings were transcribed. Attorney Dorsey wrote a report that summarized his findings. The board introduced Attorney Dorsey's report as evidence at the hearing through the testimony of Attorney Dorsey, who was examined and cross-examined at the hearing.

The plaintiff asserts that it was erroneous to admit the report. Administrative hearings, such as this hearing before the board, are not governed by strict application of the rules of evidence, such as the hearsay rule. See, e.g., *South Windsor* v. *South Windsor Police Union Local 1480, Council 15, AFSCME, AFL-CIO*, 57 Conn. App. 490, 505, 750 A.2d 465 (2000), rev'd on other grounds, 255 Conn. 800, 770 A.2d 14 (2001). In administrative hearings, hearsay evidence may be admitted if it is reasonably found to be reliable and trustworthy. See *Cassella* v. *Civil Service Commission*, 4 Conn. App. 359, 362, 494 A.2d 909 (1985), aff'd, 202 Conn. 28, 519 A.2d 67 (1987); see also *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 712, 692 A.2d 834 (1997). In the present case, a neutral investigator hired by the board prepared the report. The investigator testified at the hearing and was cross-examined. The investigator's interviews with students and teachers were recorded and later transcribed. The plaintiff was provided with the transcriptions and had access to the recordings. Further, the plaintiff was free to subpoena any witness interviewed or referenced in the report.

Although the plaintiff objected to the entry of the report into evidence, the plaintiff did not properly preserve an objection to Attorney Dorsey's testimony at the hearing. The plaintiff further affirmatively introduced the transcripts of Attorney Dorsey's interviews into evidence as the plaintiff's evidentiary exhibits. In view of the foregoing, the court finds that the report had sufficient indicia of reliability and trustworthiness, and its introduction into evidence in the administrative hearing was not error.

In a related objection, the plaintiff asserts that the introduction of the report into evidence deprived the plaintiff of the ability to cross-examine witnesses referenced in the report. The court finds that this objection is misplaced. This administrative proceeding was not a criminal proceeding, and, as such, the constitutional right to confront and cross-examine witnesses does not apply. What does apply is the requirement that the hearing be fair and that appropriate due process be afforded the plaintiff.[12] As noted previously, the hearsay nature of the report did not make it error to admit the report into evidence. The interviews conducted by the investigator were recorded and later transcribed. The transcripts were provided to the plaintiff, and the plaintiff had access to the recordings. The plaintiff was free to independently interview any witness referenced in the report. The plaintiff also had the ability to subpoena any witness referenced in the report to testify at the hearing. Further, the plaintiff herself moved interview transcripts into evidence. Accordingly, to the extent that the plaintiff wished to examine any of the witnesses referenced in the report, or other witnesses, process

[12] The complaint initiating this process was detailed and provided the plaintiff with specific notice of the issues to be adjudicated. The plaintiff answered the complaint without further pleadings requesting revisions to or clarifications of the allegations of the complaint. Further, Attorney Dorsey's report was also detailed and thorough in describing the issues and the expected evidence.

was available to the plaintiff to compel such testimony. The plaintiff did not take advantage of such process available to her. As such, the plaintiff's after-the-fact complaint that she was not able to cross-examine witnesses is unavailing.

Thus, the court finds that admission of the Dorsey report into evidence was not error, and, further, that the plaintiff has not properly preserved her objection to the admission of the report and related testimony. The court also finds that the process provided to the plaintiff was sufficient for the conduct of a fair administrative hearing and that the plaintiff could have resolved her desire to cross-examine witnesses that were not called by the board by issuing subpoenas for such witnesses to testify at the hearing. The plaintiff's failure to do so precludes her ability to complain about a lack of ability to examine such witnesses at the hearing.

C

Section 10-145b (i) (2) is Not Invalid or Unenforceable

The plaintiff challenges the validity and enforceability of § 10-145b (i) (2). This particular statute authorizes the board to revoke certifications previously issued by it under circumstances specified in the statute. Section 10-145b (i) (2) provides in relevant part: "The State Board of Education may take any of the actions described in subparagraphs (A) to (C), inclusive, of subdivision (1) of this subsection with respect to a holder's certificate, permit or authorization issued pursuant to sections 10-144o to 10-149, inclusive, for any of the following reasons . . . (C) the holder is professionally unfit to perform the duties for which the certificate, permit or authorization was granted . . . or (E) *other due and sufficient cause*. The State Board of Education may revoke any certificate, permit or authorization issued pursuant to said sections if the holder is found to have

intentionally disclosed specific questions or answers to students or *otherwise improperly breached the security of any administration of a mastery examination*, pursuant to section 10-14n. . . .'' (Emphasis added.)

The plaintiff challenges the foregoing statute on several fronts. First, the plaintiff asserts that the statute is penal in nature and must be strictly construed. Second, the plaintiff claims that references in the statute to ''other due and sufficient cause'' and ''otherwise improperly breached the security'' are vague, such that the statute is either invalid or not appropriately applied to the plaintiff. Third, the plaintiff asserts that her conduct did not meet the conditions of the statute. Last, the plaintiff contends that the statute is invalid because it does not give necessary guidance to the board as to how to arrive at an appropriate remedy for a violation.

Legislative enactments carry with them a presumption of validity and enforceability. ''[A] party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional . . . .'' (Internal quotation marks omitted.) *State* v. *Wilchinski*, 242 Conn. 211, 217–18, 700 A.2d 1 (1997). If the meaning of a statute can be fairly ascertained, the statute is not void for vagueness. To consider the plaintiff's claim of vagueness, first, the nature of the statute must be ascertained.

The statute is clearly not a penal statute. No imprisonment, fine, or other penal punishment is authorized. Instead, the statute authorizes the board to properly administer the certificates, permits, and authorizations issued by it. Sections of the statute that precede § 10-145b (i) (2) provide the board with authorization to issue such certificates, permits, and authorizations under appropriate conditions. In rounding out the board's authority then, § 10-145b (i) (2) authorizes the board to suspend, place on probation, or revoke such certificates, permits, and authorizations that it had previously

granted. Thus, the statute unsurprisingly allows the board to administer the certificates, permits, and authorizations that it issues. The purpose of the statute is to ensure that only worthy persons have and maintain certifications to teach students in the state's public schools. The statute is clearly a civil statute, not penal in nature, directed to administering certifications issued by the board. As such, the canon of strict construction does not apply.

The reference to "(E) other due and sufficient cause" does not render the statute impermissibly vague. The statute specifies reasons (A) through (E), with (A) through (D) being specific and (E) being more general. The use of the word "other" in "other due and sufficient cause" refers back to (A) through (D) and, thus, requires (E) to be a reason of the type and importance of (A) through (D). Therefore, with the foregoing in mind, "(E) other due and sufficient cause" means a reason, of the type and importance of (A) through (D), judged by the board in good faith and rationality to satisfy the statute. This provision is not impermissibly vague. See *Hanes* v. *Board of Education*, 65 Conn. App. 224, 232, 783 A.2d 1 (2001); see also *diLeo* v. *Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976); *Tucker* v. *Board of Education*, 177 Conn. 572, 578, 418 A.2d 933 (1979).

The reference to "otherwise improperly breached the security of any administration of a mastery examination"[13] also does not render the statute impermissibly vague. The phrase preceding this gives an example of improperly breaching security. The word, "otherwise," indicates that actions, other than intentionally disclosing specific questions or answers to students, taken to improperly breach the security of the test can satisfy

[13] The court finds that the word "intentionally" that appears prior to this phrase in the sentence does not modify this phrase. Thus, this phrase in the statute is satisfied if the security of the administration of a mastery examination is improperly breached.

the statutory requirement. The statutory reference is clearly to the CMT, the Connecticut Mastery Test. The ''security of any administration'' of the test noted therein refers to the propriety of the means by which the test is handled and processed by the teachers and administrators who administer the test. Security, as with any test, includes maintaining the confidentiality of the test and not affirmatively taking steps to undermine the fair and accurate results of the test. "Improperly" means inappropriate action that exceeds mere negligence. Improperly requires some level of fault beyond honest mistake. Thus, the statute has a reasonably ascertainable meaning, and is, therefore, not impermissibly vague.

The plaintiff's conduct meets the requirements of the statute. In its final decision, the board found as follows: "[T]he conduct of [the plaintiff], as found in the proposed decision, is serious and warrants the imposition of such revocation. This conduct constitutes a breach of faith with her students, their parents, her teachers and the [s]tate that renders her unfit to teach." Thus, the board specifically found that the conduct determined by the hearing officer in the proposed decision was such as to convince the board that the plaintiff was professionally unfit to perform the duties of a teacher, as specified in § 10-145b (i) (2) (C). There is substantial evidence in the record to support this determination, and the determination was not unreasonable, given the record. The hearing officer focused more on the "other due and sufficient cause"[14] and "otherwise improperly breached the security of any administration of a mastery examination" aspects of the statute. The record also contains substantial evidence that the plaintiff's conduct satisfied the foregoing prongs of the statute as well. In analyzing any of the three relevant portions of the statute, the plaintiff's conduct, as found by the

[14] Certainly, if the plaintiff has taken actions that cause her to be unfit to teach, due and sufficient cause exists.

hearing officer, would be sufficient to revoke her certificates.

Once again, the record contains substantial evidence that the plaintiff was directly involved in fostering cheating on the CMT. First, the record contains evidence, and the hearing officer found, that the plaintiff personally instructed Hopeville teachers to review the test in advance and to move around the classroom, observe students' answers to various questions, and specifically instruct students to "check your work" in relation to particular questions that teachers observed particular students had answered incorrectly. Students indicated that they understood the "check your work" prompt to be a signal that a particular answer they had was incorrect and that they should go back and correct it. Second, the plaintiff was present at meetings where Mrs. Perugini distributed questions and vocabulary words that were taken from the 2011 CMT and instructed teachers to review them with their classes. Last, the record contains evidence that the plaintiff instructed teachers to provide the students with synonyms for words on the CMT that they might not readily understand. In each of the foregoing three cases, the plaintiff directly participated in, and even instructed, the cheating. Each of the foregoing issues amounted to an improper breach of security of the CMT—the purposeful failure to maintain the confidentiality of the test and purposeful action to undermine the fair and accurate results of the test. Further, the record contains substantial evidence that the plaintiff understood, as would any reasonable person, that the foregoing activities would be cheating and would amount to a breach of the security of the test. Given the fostering of this cheating, on a schoolwide basis, by a principal, the evidence clearly also meets the "other due and sufficient cause" requirement of the statute because the commission of cheating by a

principal clearly undermines the fitness of the plaintiff to teach and to be an appropriate example for the students and teachers under her purview.

The plaintiff takes the board to task for the hearing officer's reference to the Code of Professional Responsibility for School Administrators and the Code of Professional Responsibility for Teachers. Neither of these codes are necessary for the decision that was made in this matter. Both of the codes, however, are appropriate and useful in gauging whether a person is fit to act as a teacher or an administrator, and in determining "other due and sufficient cause." It must be noted that teachers and school administrators are professionals licensed by the state through the board to practice their professions. These codes establish a norm or expectation for the conduct of teachers and school administrators. As such, they are an appropriate yardstick or guide in judging the plaintiff's fitness to practice and maintain her licensure.

As for the penalty, the board determined that the plaintiff was unfit to teach and, thus, revoked the plaintiff's certificates. This determination was not unreasonable. The conduct of the plaintiff, as found by the hearing officer, caused the Waterbury school district to have to expend serious resources in investigating this situation, disregarding the initial results of the test, and readministering the test. This also unnecessarily used time that could have been devoted to teaching. The conduct caused both the board and the Waterbury school district to lose faith in the plaintiff. Most importantly, the plaintiff set a poor example for her students and teachers. The most vital thing, and the very minimum, that we expect from teachers and school administrators is to set a good example for their students. Given the facilitation of schoolwide cheating, the plaintiff's conduct constituted "a breach of faith with her students, their parents, her teachers and the [s]tate that

renders her unfit to teach," as found by the board.[15] The board's decision to revoke the plaintiff's certificates was not unreasonable. The statute, as is not untypical, authorizes remedies up to and including revocation of certificates. The choice on the spectrum is left to the good faith discretion of the board. This does not render the statute impermissibly vague, either generally or as applied to the plaintiff.

CONCLUSION

The plaintiff has appealed in her complaint for each of the statutory reasons specified in § 4-183 (j). This court determines that the plaintiff has failed to establish on appeal that the board's decision was (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. As such, the court dismisses the appeal.

ORDER

The appeal is dismissed.

ALFREDO GONZALEZ *v.* COMMISSIONER OF CORRECTION (AC 43815)

Alvord, Prescott and Suarez, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel rendered ineffective assistance for having followed a strategy that was based on an inaccurate statement

[15] This finding also satisfies the "other due and sufficient cause" specified in the statute. As noted, the record evidence also supports the finding that the plaintiff improperly breached the security of the 2011 CMT.

of the law. The petitioner specifically asserted that his right to due process was violated because the statutory (§§ 53a-8 and 53a-55a) scheme underlying his conviction of manslaughter in the first degree with a firearm as an accessory does not require the state to prove, as an essential element of accessorial liability, that he intended the principal's use of a firearm. The habeas court concluded that the petitioner failed to show how §§ 53a-8 and 53a-55a violated due process by shifting to the defense the burden of proving an essential element of accessorial liability, and, thus, that the petitioner had failed to prove that his counsel rendered ineffective assistance. The court denied the petitioner's habeas petition, and, on the granting of certification, he appealed to this court. On appeal, the respondent Commissioner of Correction contended that the petitioner's claim was procedurally barred pursuant to *Teague* v. *Lane* (489 U.S. 288), which precludes a court on collateral review from declaring a new constitutional rule after a conviction has become final. *Held* that the habeas court properly denied the petitioner's habeas petition, as state and federal precedent at the time his conviction became final made clear that no constitutional rule existed then that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of the firearm; moreover, the rule the petitioner sought to establish was not, as he claimed, an application of existing constitutional principles, as the United States Supreme Court in *Patterson* v. *New York* (432 U.S. 197) had held prior to his conviction that it was constitutionally permissible to require criminal defendants to prove affirmative defenses that relate to culpability, which the legislature has required pursuant to statute (§ 53a-16b); furthermore, the rule the petitioner sought to establish was procedural in nature pursuant to *Teague* because it focused on the manner by which an accessory can be deemed culpable for the use of a firearm by others and, thus, contrary to his assertion, did not place a category of private conduct beyond the power of the state to punish so as to satisfy that exception in *Teague* to the prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings, as the rule the petitioner sought would invalidate the provisions in §§ 53a-16b and 53a-55a that make a criminal defendant's lack of knowledge of the firearm an affirmative defense, rather than an element of the offense.

Argued March 9—officially released June 29, 2021

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, *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (petitioner).

Rocco A. Chiarenza, 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

ALVORD, J. The petitioner, Alfredo Gonzalez, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because General Statutes §§ 53a-8[1] and 53a-55a[2] do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or threatened use of a firearm. We affirm the judgment of the habeas court.

Our Supreme Court on direct appeal summarized the underlying facts as reasonably found by the jury.[3] "The

[1] General Statutes § 53a-8 provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ."

[2] General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information. . . ."

[3] The petitioner appealed from the judgment of the trial court to this court, and the appeal was transferred to our Supreme Court pursuant to General

[petitioner] had engaged in an ongoing feud with the victim, Samuel Tirado.[4] On the evening of May 5, 2006, the [petitioner] and three friends, Anthony Furs, Christian Rodriguez and Melvin Laguna, went out for the evening in Rodriguez' red GMC Yukon. They stopped briefly at one bar, and then decided to go to a bar named Bobby Allen's in Waterbury because they knew that the victim went there frequently, and they wanted to start a fight with him. En route to Bobby Allen's, the [petitioner] observed that there were two guns in the Yukon, in addition to a razor blade that he intended to use in that fight, and remarked that, if he had the money, he would give it to Furs to 'clap,' or shoot, the victim. Rodriguez, who also disliked the victim, then offered to pay Furs $1000 to shoot the victim, which Furs accepted.

"When they arrived at Bobby Allen's, the [petitioner] left the group briefly to urinate behind a nearby funeral home. When he rejoined the group, Furs gave the [petitioner] the keys to the Yukon and told him to go get the truck because the victim was nearby speaking with Rodriguez. The [petitioner] and Furs then drove a short distance toward Bobby Allen's in the Yukon, and Furs, upon spotting the victim and Rodriguez outside the bar, jumped out of the Yukon and shot the victim in the chest with a black handgun, mortally wounding him. Rodriguez and Laguna then fled the scene on foot, while

Statutes § 51-199 (c) and Practice Book § 65-1. *State* v. *Gonzalez*, 300 Conn. 490, 492 n.3, 15 A.3d 1049 (2011).

[4] "The victim was the best friend of Michael Borelli, who was convicted of manslaughter charges after he fatally stabbed Jose Gonzalez, the [petitioner's] brother, during a melee at a Waterbury gas station. At one of the court hearings in that case, the victim chanted, 'free Mike Borelli, fuck Peach,' in reference to the [petitioner], whose nickname is 'Peachy.' Thereafter, the [petitioner] often stated that he blamed the victim for his brother's death and wanted revenge. The victim further antagonized the [petitioner] one night in April, 2006, at [a bar named] Bobby Allen's [in Waterbury], when the victim snubbed the [petitioner's] offer to shake his hand. The [petitioner] then told the victim that he and his friends were 'going down.' " *State* v. *Gonzalez*, 300 Conn. 490, 492 n.4, 15 A.3d 1049 (2011).

Furs and the [petitioner] drove off in the Yukon to a friend's nearby apartment on South Main Street. Thereafter, with the assistance of friends, Furs[5] and the [petitioner] fled separately from the apartment, and the [petitioner] subsequently disposed of the gun, first by hiding it in a woodpile at his mother's home, and later by throwing it into Pritchard's Pond (pond) in Waterbury.

"Thereafter, Waterbury police officers investigating the shooting questioned the [petitioner] after arresting him on an outstanding motor vehicle warrant on May 6, 2006. The [petitioner] initially gave a statement denying any involvement in the incident. Subsequently, on May 15, 2006, the Waterbury police reinterviewed the [petitioner], at which time he admitted disposing of the gun by throwing it into the pond. The [petitioner] then accompanied the officers to the pond and showed them where he had thrown the gun, which enabled a dive team to recover it several days later.[6] After they returned to the police station, the [petitioner] gave the police a second statement admitting that he had lied in his initial

[5] "Prior to trial in this case, Furs pleaded guilty to murder and was sentenced to forty-seven years imprisonment. See *Furs* v. *Superior Court*, 298 Conn. 404, 407, 3 A.3d 912 (2010). As is detailed in the record of the trial in the present case, as well as our [Supreme Court's] opinion in *Furs*, although the state subpoenaed Furs to testify at the [petitioner's] trial, he refused to testify on the ground that to do so would violate his privilege against self-incrimination given a pending habeas corpus proceeding in his case, notwithstanding the state's offer of use immunity. Id., 407–409. The trial court held Furs in summary criminal contempt and sentenced him to six months imprisonment consecutive to his murder sentence as a consequence of his failure to testify, concluding that the prosecutor's offer of use immunity was sufficient to protect Furs' fifth amendment rights. Id., 409–10. [Our Supreme Court] subsequently granted Furs' writ of error from that contempt finding, concluding that he was entitled to full transactional immunity under General Statutes § 54-47a. Id., 406, 411–12." *State* v. *Gonzalez*, 300 Conn. 493 n.5, 15 A.3d 1049 (2011).

[6] "Investigators subsequently determined that this gun had fired the bullet that was recovered from the victim's chest and had ejected a shell casing that was found at the scene." *State* v. *Gonzalez*, 300 Conn. 494 n.6, 15 A.3d 1049 (2011).

statement and explaining his role in the events leading to and following the shooting.

"The state charged the [petitioner] in a six count substitute information with murder as an accessory in violation of § 53a-8 and General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, manslaughter in the first degree with a firearm as an accessory in violation of §§ 53a-8 and 53a-55a, conspiracy to commit assault in the first degree in violation of § 53a-48 and General Statutes § 53a-59 (a) (5), hindering prosecution in the second degree in violation of General Statutes § 53a-166, and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The [petitioner] elected a jury trial. After evidence, the trial court denied the [petitioner's] motion for acquittal. The jury returned a verdict finding him not guilty of accessory to murder and conspiracy to commit murder, but guilty on all other counts. The trial court [*Miano, J.*] rendered a judgment of conviction in accordance with the jury's verdict and sentenced the [petitioner] to a total effective sentence of thirty-eight years imprisonment, with ten years of special parole." (Footnote in original; footnote omitted.) *State* v. *Gonzalez*, 300 Conn. 490, 492–95, 15 A.3d 1049 (2011).

The petitioner's sole claim on direct appeal to our Supreme Court was that "the trial court improperly instructed the jury regarding the elements of the offense of manslaughter in the first degree with a firearm as an accessory.[7] Specifically, the [petitioner] claim[ed]

[7] "After explaining the principles of accessorial liability generally in the context of the murder charge, the trial court instructed the jury in relevant part that, [u]nder the accessorial theory of liability, as I've defined it, in order for the state to prove the offense of accessory to manslaughter in the first degree with a firearm, the following elements each must be proved beyond a reasonable doubt: Number one, that the [petitioner] . . . had the specific intent to cause serious physical injury to [the victim]. Two: That the [petitioner] solicits, requests or intentionally aids the principal, the shooter, who causes the death of such person, [the victim]. And three: In

that accessorial liability under § 53a-8 encompasses both the specific intent to cause a result, in this case, to cause the victim serious physical injury, as well as the general intent to perform the physical acts that constitute the offense of manslaughter in the first degree with a firearm, including the use, carrying or threatened use of a firearm." (Footnote added; internal quotation marks omitted.) Id., 495.

Our Supreme Court rejected the petitioner's claim that the trial court improperly instructed the jury. Specifically, our Supreme Court concluded that the trial court's instruction conformed with *State* v. *Miller*, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006), which "properly articulated the elements of accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in violation of § 53a-55a," and declined the petitioner's "invitation to overrule that decision." *State* v. *Gonzalez*, supra,

the commission of such offense the principal, the shooter, uses a firearm. After explaining each of the three elements individually, including that the jury had to find that the [petitioner] had the specific intent to cause serious physical injury to [the victim], and that the state must prove beyond a reasonable doubt . . . that the [petitioner] did solicit, request or intentionally aid another person, the principal, to engage in conduct which constitutes [the] crime of manslaughter in the first degree, the trial court noted that the third element is that the state must prove beyond a reasonable doubt that in the commission of this offense the principal, [Furs], uses a firearm, defined as any pistol, revolver or other weapon, whether loaded or unloaded, from which a shot may be discharged. You must find that the firearm was operable at the time of the offense.

"The [petitioner] subsequently took an exception to this portion of the charge, seeking reinstruction on this point. The trial court denied that request, rejecting the [petitioner's] argument that the accessory must have the intention that a firearm be used, not only the principal have the intent to use a firearm and use a firearm, but that the accessory must have the intention. That court agreed with the state's position that the firearm element was an aggravant and that the only mental state that the state was required to prove under §§ 53a-8 and 53a-55a was intent to cause serious physical injury." (Footnote omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 496–99.

300 Conn. 509–10. Moreover, our Supreme Court adopted the conclusion set forth in *Miller* that, "[w]hen a defendant is charged with a violation of § 53a-55a as an accessory, the state need not prove that the defendant intended the use, carrying or threatened use of the firearm."[8] Id., 510; *State* v. *Miller*, supra, 362. Accordingly, our Supreme Court affirmed the petitioner's conviction. *State* v. *Gonzalez*, supra, 510.

Thereafter, the self-represented petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 2254. In his one count habeas petition, the petitioner alleged that "Connecticut's statutory scheme of manslaughter in the [first] [d]egree with a [f]irearm violates the [d]ue [p]rocess [c]lause of the [fifth] and [fourteenth] amend[ments] [t]o [the] [United States constitution]. . . . In the facts supporting this ground, the petitioner contend[ed] that . . . § 53a-55a is violative of the United States [c]onstitution in that it does not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm. . . . The respondents move[d] to dismiss the petition on the ground that the petitioner ha[d] not exhausted his state court remedies as to the sole ground in the petition. The respondents argue[d] that the petitioner did not fairly present the federal constitutional challenge raised in ground one of the . . . petition in his direct appeal to [our] Supreme Court. Thus, [the respondents argued that] the claim has not been exhausted." (Citation omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner*, United States

[8] Our Supreme Court concluded that, "to establish accessorial liability under § 53a-8 for manslaughter in the first degree with a firearm in violation of § 53a-55a, the state must prove that the defendant, acting with the intent to cause serious physical injury to another person, intentionally aided a principal offender in causing the death of such person or of a third person, and that the principal, in committing the act, used, carried or threatened to use a firearm." *State* v. *Gonzalez*, supra, 300 Conn. 496.

District Court, Docket No. 3:11cv1012 (VLB) (D. Conn. July 20, 2012). The federal District Court, Bryant, J., dismissed his petition for a writ of habeas corpus without prejudice for failure to exhaust state court remedies. Id.

The petitioner then filed a petition for a writ of habeas corpus in our Superior Court. In his amended habeas petition, the petitioner alleged that his "trial counsel was ineffective for following a strategy that was based on an inaccurate statement of the law, i.e., that the state was required to prove specific intent that a firearm be used." The habeas court, *Cobb*, *J.*, denied his amended petition for a writ of habeas corpus; *Gonzalez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4004210-S (March 17, 2014); and this court dismissed his appeal therefrom. *Gonzalez* v. *Commissioner of Correction*, 160 Conn. App. 902, 125 A.3d 296 (2015).

On February 13, 2015, the petitioner filed the present petition for a writ of habeas corpus. In his third amended habeas petition, the petitioner set forth the following four counts, in which he alleged (1) that "§§ 53a-8 and 53a-55a—accessory to commit manslaughter in the first degree with a firearm—combine in a way that violates the due process clause of the [fifth] and [fourteenth] amend[ments] to the [United States constitution] as well as article first, § [8], of the Connecticut constitution in that they do not require the state to prove an essential element of the substantial crime charged: the intent to use a firearm" (due process claim), (2) ineffective assistance of trial counsel,[9] (3) ineffective assistance of appellate counsel,[10] and (4)

[9] Specifically, the petitioner alleged that the performance of his trial counsel, Attorney Lawrence S. Hopkins, was deficient because "he failed properly to preserve the [due process] claim . . . ."

[10] Specifically, the petitioner alleged that the performance of his appellate counsel, Attorney Raymond L. Durelli, was deficient because "he failed to raise the [due process] issue . . . ."

ineffective assistance of prior state habeas counsel.[11] In his return, with respect to each of the substantive grounds set forth in the third amended habeas petition, the respondent, the Commissioner of Correction, left the petitioner to his proof.

Following a trial, the habeas court, *Bhatt*, *J.*, first determined that the "resolution of the petitioner's claim in count one [is] dispositive of the claims in the remaining counts . . . ." Thus, the court "focuse[d] its discussion on the question of whether there is a . . . due process violation in our statutory scheme for accessory to manslaughter in the first degree with a firearm." Ultimately, the court concluded that "the petitioner has not shown how our statutory scheme violates the due process clause by impermissibly shifting the burden of an essential element to the defense and has failed in his burden of proving ineffective assistance of counsel." Accordingly, the court rendered judgment denying his amended petition for a writ of habeas corpus. Thereafter, the petitioner filed a petition for certification to appeal from the judgment of the habeas court, which was granted. This appeal followed.[12]

On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to due process under the federal and state constitutions was violated because §§ 53a-8 and 53a-55a do not require the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that he intended the principal's use, carrying or

[11] Specifically, the petitioner alleged that the performance of his prior state habeas counsel, Attorney Joseph A. Jaumann, was deficient because he failed to raise (1) the due process claim, (2) "the issue of ineffective assistance of trial counsel," and (3) "the issue of ineffective assistance of appellate counsel . . . ."

[12] The petitioner does not challenge on appeal the habeas court's determination with respect to his claims of ineffective assistance of trial, appellate, and habeas counsel.

threatened use of a firearm. Specifically, the petitioner maintains that, "[t]o convict an individual of the offense of accessory to manslaughter in the first degree with a firearm, in violation of . . . §§ 53a-8 [and] 53a-55a, in accord with due process as guaranteed by the state and federal constitutions, the state must prove that (1) with the intent to cause serious physical injury to another person, the principal causes the death of such person, (2) in the commission of such offense, the principal uses a firearm, and (3) *the accessory intends that the principal use a firearm*." (Emphasis added.)

The respondent contends that the principles enunciated in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), preclude this court from establishing the new constitutional rule of criminal procedure proposed by the petitioner in a collateral habeas action. Specifically, the respondent argues that the petitioner "continues to seek . . . to have a new constitutional right declared that requires, as a matter of due process, the engrafting of a requirement that the state prove that an accessory possess the intent that a firearm be used in order to be convicted of the crime of manslaughter in the first degree with a firearm. While a court may declare new constitutional rules in a direct appeal from a criminal conviction, it lacks such authority to do so once a conviction becomes final." In reply to the respondent's contention, the petitioner maintains that "*Teague* is inapplicable" because "existing precedent dictated the result [he] seeks; therefore, it is not a new rule . . . ." Alternatively, the petitioner argues that the rule he seeks satisfies the first exception to the general prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings as set forth in *Teague* v. *Lane*, supra, 311, because it "places a category of private conduct beyond the power of the state to punish." We agree with the

respondent and conclude that the petitioner's due process claim is procedurally barred by *Teague*.[13]

"When considering the potential retroactive application of a new rule of constitutional criminal procedure, we apply the rule of *Teague* v. *Lane*, supra, 489 U.S. 288. . . . In *Teague*, the United States Supreme Court held that new constitutional rules of criminal procedure should not be established in or applied to collateral proceedings, including habeas corpus proceedings. [Id.], 315–16. A rule is considered to be new when it breaks new ground or imposes a new obligation on the

[13] The petitioner argues that this court "should not undertake the [respondent's] proposed *Teague* analysis now because the [respondent] did not assert it in the habeas court, the habeas court did not employ it, and the petitioner can only respond . . . in [his] limited reply brief." We reject the petitioner's contention that we should not consider this issue because the respondent failed to raise it as a defense before the habeas court. See *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 58 n.5, 115 A.3d 1031 (2015) (exercising discretion to consider issue of retroactivity under *Teague* notwithstanding respondent's failure to raise it as defense before habeas court), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

"[A] reviewing court has discretion to consider an unpreserved claim if exceptional circumstances exist that would justify review of such an issue if raised by a party . . . the parties are given an opportunity to be heard on the issue, and . . . there is no unfair prejudice to the party against whom the issue is to be decided." (Internal quotation marks omitted.) Id. Exceptional circumstances exist that militate in favor of reviewing unpreserved claims, even over the objection of a party, "when review of the claim would obviate the need to address a constitutional question . . . ." (Citations omitted; footnote omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 159, 84 A.3d 840 (2014); see also *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 78, 76 S. Ct. 131, 100 L. Ed. 60 (1955) ("we follow the traditional practice of this [c]ourt of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties"). We are also mindful that "[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Washington*, 39 Conn. App. 175, 176–77 n.3, 664 A.2d 1153 (1995). Furthermore, the petitioner had the opportunity to address the issue of retroactivity under *Teague* in his reply brief and at oral argument before this court, and did so. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 58 n.5.

[s]tates or the [f]ederal [g]overnment. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. . . . Id., 301. Further, a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists. . . . On the other hand, *Teague* also made clear that a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 173–74, 151 A.3d 1247 (2016).

"With two exceptions, a new rule will not apply retroactively to cases on collateral review. *Teague* v. *Lane*, supra, 489 U.S. 311–13. First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. . . .

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

The first step in our *Teague* analysis is to determine whether the habeas court in the present case could have afforded the petitioner relief on the basis of established jurisprudence governing his claim or whether affording such relief would have required the habeas court to establish a new constitutional rule of criminal procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 174–75. An analysis of the precedent existing at the time the petitioner's conviction became final in 2011 makes clear that no constitutional rule existed at that time that required the state to prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

We begin with an analysis of our state precedent existing at the time the petitioner's conviction became final. In the petitioner's direct appeal, our Supreme Court adopted the conclusion initially set forth in *State* v. *Miller*, supra, 95 Conn. App. 362, that "the state need not prove that the [petitioner] intended the [principal's] use, carrying or threatened use of the firearm." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 510. Our Supreme Court noted the affirmative defense provided by General Statutes § 53a-16b, which provides in relevant part that, "[i]n any prosecution for an offense under § 53a-55a . . . in which the defendant was not the only participant, it shall be an affirmative defense that the defendant: (1) Was not armed with a pistol, revolver, machine gun, shotgun, rifle or other firearm, and (2) had no reasonable ground to believe that any other participant was armed with such a weapon. Section 53a-16b is consistent with other areas wherein the legislature has provided that the state must prove the essential elements of the crime, and has left it to the defendant to mitigate[14] his criminal culpability

[14] We note that, in the petitioner's case, in which the state charged him with manslaughter in the first degree with a firearm as an accessory in

or sentencing exposure via an affirmative defense, particularly with respect to areas that uniquely are within the defendant's knowledge." Id., 508. This precedent remains binding on this court today.[15] Accordingly, our review of state precedent existing at the time the petitioner's conviction became final reveals that the constitutional rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74.

We next consider the landscape of federal precedent existing at the time the petitioner's conviction became final. The petitioner maintains that United States Supreme Court precedent existing at the time his conviction became final dictated the result he seeks. Specifically, he argues that his conviction became final "after *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, [44 L. Ed. 2d 508] (1975), and *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, [147 L. Ed. 2d 435] (2000), were well established," and that "[t]he rationale of these two cases alone implores the review that reveals the due process violation." We conclude that the petitioner's reliance on these cases is misplaced.

In *Mullaney*, the United States Supreme Court declared a Maine statutory scheme unconstitutional.[16]

violation of §§ 53a-8 and 53a-55a but not with the lesser included offense of manslaughter in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-55 (a) (1), his proof of the affirmative defense set forth in § 53a-16b would serve to relieve him of any criminal culpability associated with the charge of manslaughter in the first degree with a firearm as an accessory.

[15] In his principal appellate brief, the petitioner acknowledges *State* v. *Miller*, supra, 95 Conn. App. 362, as binding precedent and argues that *Miller* "should be overruled."

[16] "The Maine murder statute, Me. Rev. Stat. Ann., [t]it. 17, § 2651 (1964), provides: 'Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.'

"The manslaughter statute, Me. Rev. Stat. Ann., [t]it. 17, § 2551 (1964), in relevant part provides: 'Whoever unlawfully kills a human being in the

The Maine Supreme Judicial Court had held that, in prosecuting a charge of murder, "the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." *Mullaney* v. *Wilbur*, supra, 421 U.S. 688. The issue before the court was "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." Id., 692. The United States Supreme Court held that this statutory scheme improperly shifted the burden of persuasion from the prosecutor to the defendant and was therefore a violation of the requirement of due process that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, as stated in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Mullaney* v. *Wilbur*, supra, 701.

In *Apprendi*, the United States Supreme Court declared a New Jersey statutory scheme unconstitutional.[17] The New Jersey statutory scheme "allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that

heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . .' " *Mullaney* v. *Wilbur*, supra, 421 U.S. 686 n.3.

[17] The United States Supreme Court articulated the New Jersey statutory scheme as follows: "A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a 'second-degree' offense. N.J. Stat. Ann. § 2C:39-4 (a) (West 1995). Such an offense is punishable by imprisonment for 'between five years and 10 years.' § 2C:43-6 (a) (2). A separate statute, described by [New Jersey's] Supreme Court as a 'hate crime' law, provides for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' N.J. Stat. Ann. § 2C:44-3 (e) (West Supp. 1999–2000). The extended term authorized by the hate crime law for second-degree offenses is imprisonment for 'between 10 and 20 years.' § 2C:43-7 (a) (3)." *Apprendi* v. *New Jersey*, supra, 530 U.S. 468–69.

he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, N.J. Stat. Ann. § 2C:43-6 (a) (1) (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's purpose for unlawfully possessing the weapon was to intimidate his victim on the basis of a particular characteristic the victim possessed." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. The issue before the court was "whether the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from [ten] to [twenty] years be made by a jury on the basis of proof beyond a reasonable doubt." Id., 469. The United States Supreme Court held that, in accordance with due process, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 490. The court reasoned that the New Jersey statutory scheme was unconstitutional because it "runs directly into our warning in *Mullaney* that [*In re*] *Winship* is concerned as much with the category of substantive offense as with the degree of criminal culpability assessed." (Internal quotation marks omitted.) Id., 494–95.

The respondent cites *Patterson* v. *New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) for the proposition that "due process does not mandate that the state prove that an accessory to a crime intend that every aggravating element be committed by the principal." In *Patterson*, the United States Supreme Court declined to declare a New York statute unconstitutional.[18] The New York statute provides that a defendant charged with murder can prove as "an affirmative defense . . . that the defendant acted under the influ-

[18] Section 125.25 of New York's Penal Law (McKinney 1975) provides in relevant part: "A person is guilty of murder in the second degree when:

ence of extreme emotional disturbance for which there was a reasonable explanation—which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter . . . .'' Id., 206. The issue before the court was ''the constitutionality under the [f]ourteenth [a]mendment's [d]ue [p]rocess [c]lause of burdening the defendant in a New York [s]tate murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law.'' Id., 198. The United States Supreme Court recognized that ''the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant''; id., 211; and ''decline[d] to adopt as a constitutional imperative, operative countrywide, that a [s]tate must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.'' Id., 210. The court reasoned that the New York statute was constitutional because it ''does not serve to negat[e] any facts of the crime which the [s]tate is to prove in order to convict [a defendant] of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion.'' Id., 206–207.

The court in *Patterson* distinguished its holding from *Mullaney*, stating that ''[t]here is some language in *Mullaney* that has been understood as perhaps construing the [d]ue [p]rocess [c]lause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . It is said that

''1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

''(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.'' *Patterson* v. *New York*, supra, 432 U.S. 198–99 n.2.

such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof . . . . The [c]ourt did not intend *Mullaney* to have such far-reaching effect." (Citations omitted.) Id., 214–15 n.15. The court clarified that, under *Mullaney*, "a [s]tate must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the [s]tate deems so important that it must be either proved or presumed is impermissible under the [d]ue [p]rocess [c]lause." Id., 215.

Our review of the United States precedent existing at the time the petitioner's conviction became final reveals that the rule the petitioner seeks would not have been apparent to all reasonable jurists and, as such, was not dictated by established precedent. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 173–74. First, the functioning of the statutes at issue in *Mullaney* and *Apprendi* are distinguishable from that of the statutes at issue in the present case. The statutes at issue in the present case function to omit proof of any particular mental state of the principal or accomplice with respect to the use, carrying or threatened use of a firearm. See *State* v. *Miller*, supra, 95 Conn. App. 375 (proof of use, carrying or threatened use of firearm "is not encompassed within the dual intent requirement of § 53a-8, but rather is merely an aggravating circumstance that does not require proof of any particular mental state"). Unlike the statutes at issue in *Mullaney* and *Apprendi*, the statutes at issue here do not provide that "the prosecution could rest on a presumption"; *Mullaney* v. *Wilbur*, supra, 421 U.S. 688; or that "a judge [could] impose [a heightened] punishment . . . based upon the judge's [independent factual] finding . . . ." (Citation omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 491. Second, at the time the

petitioner's conviction became final, the United States Supreme Court in *Patterson* had avowed "the long-accepted rule . . . that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson* v. *New York*, supra, 432 U.S. 211. Our legislature did so in enacting § 53a-16b, which allows an accomplice to offer proof of his or her mental state as an affirmative defense with respect to the aggravating circumstance of using, carrying or threatening the use of a firearm. Given the United States Supreme Court's holding in *Patterson* that the state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"; id., 210; and for the aforementioned reasons, we cannot conclude that the rule the petitioner seeks is merely an application of established constitutional principles.

In light of our thorough review of the relevant federal and state precedent, we conclude that, in the present case, no grounds for relief for the petitioner's due process claim were clearly established at the time his conviction became final in 2011. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 177. Accordingly, we conclude that for the habeas court to afford the petitioner relief on his due process claim, it would have had to establish a new constitutional rule that, to comport with due process, the state must prove, as an essential element of accessorial liability for manslaughter in the first degree with a firearm, that the accessory intended the principal's use of a firearm.

Having concluded that the habeas court would have had to depart from prior constitutional jurisprudence to afford relief to the petitioner, we now address his claim that the new constitutional rule he seeks falls within the first *Teague* exception.[19] The petitioner

[19] The petitioner does not claim that this rule would fall within the second exception in *Teague*, which is for watershed constitutional rules of criminal

claims that "the rule places a category of private conduct beyond the power of the state to punish" and, therefore, satisfies the first *Teague* exception. We disagree.

The first *Teague* exception "permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the [s]tate to proscribe . . . or addresses a substantive categorical guarante[e] accorded by the [c]onstitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." (Citation omitted; internal quotation marks omitted.) *Saffle* v. *Parks*, 494 U.S. 484, 494, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181 n.11.

In *Teague* v. *Lane*, supra, 489 U.S. 288, the United States Supreme Court determined that "[t]he first exception . . . is not relevant . . . [where the new constitutional rule] would not accord constitutional protection to any primary activity . . . ." (Citation omitted.) Id., 311. Rather, "rules that regulate only the manner of determining the defendant's culpability are procedural." (Emphasis omitted.) *Schriro* v. *Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68. "[A] rule that alters the manner of determining culpability merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. . . . Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's

procedure. See *Dyous* v. *Commissioner of Mental Health & Addiction Services*, supra, 324 Conn. 181. As such, our analysis is limited to the first *Teague* exception.

fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 68.

The new constitutional rule that the petitioner seeks in the present case would require the state, in accordance with due process, to prove as an essential element of accessorial liability for manslaughter in the first degree with a firearm that the accessory intended the principal's use of a firearm. The petitioner argues that "the proposed rule broadens protections against punishment by the state" by requiring the state to "prove to a jury that an accessory intended a principal's use of a firearm" before the accessory can "be exposed to the severely increased penalties to which [the] principal (who obviously intended the use of a firearm) is exposed." (Footnote omitted.) In effect, this rule would alter the manner of determining an accessory's culpability for manslaughter in the first degree with a firearm by invalidating the provisions set forth in §§ 53a-55a and 53a-16b, which make a defendant's lack of knowledge of the firearm an affirmative defense rather than make his knowledge of the firearm an element of the offense. Because the petitioner's proposed rule focuses on the manner by which an accessory can be deemed culpable for the use, carrying or threatened use of a firearm by others in the commission of manslaughter in the first degree, we conclude that the new constitutional rule the petitioner seeks is procedural in nature. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 68.

Accordingly, we conclude that the new constitutional rule of criminal procedure that the petitioner seeks does not satisfy the first *Teague* exception. Thus, we conclude that the habeas court properly denied the petitioner relief with respect to his due process claim.

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 205

(Replaces Prior Cumulative Table)

Allco Renewable Energy Ltd. *v.* Freedom of Information Commission 144
Administrative appeal; alleged violation of Freedom of Information Act (§ 1-200 et seq.); claim that trial court erred in concluding that Freedom of Information Commission's determination that answer key used to evaluate bids submitted in response to request for proposals was trade secret within ambit of applicable provision (§ 1-210 (b) (5) (A)) of act; claim that Department of Energy and Environmental Protection was not engaged in trade for purposes of § 1-210 (b) (5) (A); claim that trial court erred in concluding that commission's determination that answer key satisfied secrecy requirements under § 1-210 (b) (5) was supported by substantial evidence; whether department made reasonable efforts to maintain secrecy of information in answer key; whether information in proposals submitted to department was given in confidence.
Antonio A. *v.* Commissioner of Correction. 46
Habeas corpus; request for order to show cause pursuant to statute (§ 52-470 (d) and (e)); claim that habeas court erred in failing to afford petitioner's counsel reasonable opportunity to investigate cause of delay in filing second habeas petition; whether habeas court was obligated to delay its consideration of respondent's request for order to show cause because petitioner's counsel represented to court that it was possible that, in future, petitioner could pursue actual innocence claim in amended petition; whether habeas court abused its discretion in refusing to afford petitioner any additional time prior to acting on respondent's request for order to show cause; whether petitioner's counsel was on notice of purpose of hearing on respondent's request; claim that habeas court erred in denying petitioner's motion for reconsideration; whether habeas court abused its discretion in treating motion for reconsideration as motion to open judgment; claim that habeas court erred in denying petition for certification to appeal; claim that habeas court erred in denying motion for permission to file late amended petition for certification to appeal and for reconsideration of denial of petition for certification to appeal; claim that habeas court erred in dismissing petitioner's third habeas petition; whether habeas court's dismissal of third habeas petition under rule of practice (§ 23-29 (3)) during its preliminary consideration of petition and prior to issuing writ of habeas corpus was procedurally improper; whether proper remedy was for habeas court to issue writ and, following appointment of counsel, petitioner be given opportunity to rectify any pleading deficiencies.
Anderson *v.* Commissioner of Correction 173
Habeas corpus; whether habeas court improperly denied petition for writ of habeas corpus; claim that trial counsel rendered ineffective assistance by failing to pursue defense of lack of capacity due to mental disease or defect; adoption of habeas court's memorandum of decision as proper statement of relevant facts, issues and applicable law on issues.
Bank of New York Mellon *v.* Gilmore (Memorandum Decision) 901
Bank of New York Mellon *v.* Hatheway (Memorandum Decision) 903
Banks *v.* Commissioner of Correction 337
Habeas corpus; dismissal of habeas petition as untimely pursuant to applicable statute (§ 52-470 (c) and (e)); whether habeas court abused its discretion in denying petition for certification to appeal; whether petitioner was entitled to review of his claims on appeal under State *v.* Golding *(213 Conn. 233) or for plain error; failure to raise claims as grounds for appeal in petition for certification to appeal.*
Berka *v.* Middletown 213
Zoning; municipal blight citation; anti-blight ordinance; whether trial court properly granted defendants' motion to strike plaintiff's request for jury trial; whether plaintiff's claim that citation hearing officer had conflict of interest was properly raised on appeal; whether, even if citation hearing officer had conflict of interest, it was cured by de novo proceeding before trial court; whether plaintiff's constitu-

tional claims were properly raised on appeal; whether trial court abused its discretion in refusing to permit plaintiff to amend complaint or to argue constitutional issues; whether trial court's factual findings challenged by plaintiff on appeal were clearly erroneous.

Bosque *v.* Commissioner of Correction 480

Habeas corpus; dismissal of habeas petition as untimely pursuant to applicable statute (§ 52-470 (d) and (e)); whether habeas court abused its discretion in denying petition for certification to appeal; whether petitioner was entitled to review of his unpreserved claims on appeal under State *v.* Golding *(213 Conn. 233) or for plain error; failure to raise claims as grounds for appeal in petition for certification to appeal as required by § 52-470 (g).*

Charles F. *v.* Commissioner of Correction (Memorandum Decision) 903

Collins *v.* Rogers (Memorandum Decision) 902

Conklin *v.* Teachers Ins. Co. (Memorandum Decision) 904

Fair *v.* Commissioner of Correction 282

Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; claim that petitioner was denied constitutional right to effective assistance of counsel; claim that trial counsel failed to produce allegedly exculpatory expert testimony; claim that trial counsel failed to impeach witness for alleged motivation to cooperate with police to avoid criminal liability; claim that trial counsel failed to impeach witness with respect to his inconsistent statements to police regarding identity of shooter.

Fairfield Shores, LLC *v.* DeSalvo 96

Landlord-tenant; alleged damages to rental property in excess of security deposit; whether appeal was moot on basis that defendants did not challenge all independent bases for trial court's judgment; claim that trial court improperly rendered judgment for plaintiff on basis of statutory (§ 47a-2) exemption for certain housing arrangements incidental to educational services from application of title 47a of General Statutes to security deposit; whether judgment correctly was rendered for plaintiff on defendants' second amended counterclaim when defendants made certain judicial admission in joint stipulation of facts concerning security deposit.

Finley *v.* Western Express, Inc. 473

Uninsured motorist benefits; mootness; whether trial court properly rendered summary judgment for defendants; whether trial court properly determined that there was no genuine issue of material fact that vehicle operated by plaintiff was covered by insurance policy that did not contain provision for uninsured motorist coverage because Tennessee law governed parties' dispute and Tennessee law did not require defendants to provide such coverage.

Gonzalez *v.* Commissioner of Correction 511

Habeas corpus; whether trial counsel rendered ineffective assistance; whether petitioner's right to due process was violated because statutory (§§ 53a-8 and 53a-55a) scheme underlying conviction of manslaughter in first degree with firearm as accessory does not require state to prove as essential element of accessorial liability that petitioner intended principal's use of firearm; claim that rule petitioner sought to establish applied existing constitutional principles; whether rule petitioner sought to establish placed category of private conduct beyond power of state to punish and, thus, satisfied exception in Teague *v.* Lane *(489 U.S. 288) to prohibition against establishing new constitutional rules of criminal procedure in collateral proceedings.*

Goshen Mortgage, LLC *v.* Androulidakis 15

Foreclosure; claim that trial court improperly determined that plaintiff had standing to commence foreclosure action; claim that trial court improperly granted motion to substitute plaintiff; claim that trial court improperly denied motions to dismiss; claim that trial court improperly granted motion for summary judgment as to liability; claim that trial court improperly rendered judgment of strict foreclosure; claim that trial court improperly denied motion to open judgment.

Gray *v.* Commissioner of Correction (Memorandum Decision) 901

In re Sequoia G. 222

Termination of parental rights; claim that trial court improperly found that it was in best interests of minor children to terminate respondent mother's parental rights; whether trial court's findings, made pursuant to statute (§ 17a-112 (k)), as to children's best interests were factually supported and legally sound; whether it was inappropriate for trial court to have considered, as to emotional ties factor in § 17a-112 (k) (4), bond between children and foster parents; whether trial

court's factual findings supported its conclusion under § 17a-112 (k) (3) that mother had not complied with court orders; whether trial court had obligation, sua sponte, to consider less onerous means of achieving permanency planning in absence of motion specifically seeking alternative permanency plan.

Jackson *v.* Pennymac Loan Services, LLC 189

Release of mortgage pursuant to statute (§ 49-8); whether trial court improperly dismissed plaintiffs' action for lack of subject matter jurisdiction on basis of plaintiffs' alleged failure to satisfy requirements of § 49-8 (c) regarding statutory demand notice for release of mortgage; claim that trial court deprived plaintiffs of due process by improperly addressing, sua sponte, issue of whether plaintiffs failed to satisfy statutory demand notice requirements without affording them notice or opportunity to be heard; claim that judgment of dismissal could be affirmed on alternative ground that plaintiffs were not aggrieved pursuant to § 49-8 because they did not suffer any harm and, therefore, did not have standing.

Kemon *v.* Boudreau 448

Trusts; probate appeal; whether trial court erred in determining that plaintiff had abandoned various counts at trial on basis of his counsel's statements at closing argument; whether trial court erred in rendering judgment for defendant in probate appeal instead of dismissing appeal for lack of subject matter jurisdiction because appeal became moot during its pendency.

Kissel *v.* Center for Women's Health, P.C. 394

Medical malpractice; product liability; motion to dismiss; motion for directed verdict; motion to set aside verdict; statute of limitations; whether trial court improperly denied motion to dismiss medical malpractice complaint for failure to attach written opinion letter as required by statute (§ 52-190a); whether plaintiff was required to cure defect with medical malpractice complaint within limitation period; whether trial court improperly denied motions for directed verdict and to set aside verdict on ground that plaintiff failed to establish causation element of product liability claim.

Lowthert *v.* Freedom of Information Commission (Memorandum Decision) 904

Marco *v.* Starr Indemnity & Liability Co. 111

Breach of contract; duty to defend; law of case doctrine; claim that trial court erred in ordering court trial on matter of insurer's duty to defend following denial of summary judgment on same issue; claim that trial court improperly deprived plaintiff of right to jury trial on duty to defend issue; claim that trial judge should have recused himself to avoid appearance of impropriety due to his involvement in pretrial settlement negotiations.

Mirlis *v.* Yeshiva of New Haven, Inc. 206

Foreclosure of judgment lien; whether trial court improperly determined fair market value of property as compromise figure between conflicting appraisals from parties.

Moulthrop *v.* State Board of Education. 489

Administrative appeal; appeal from decision by defendant revoking plaintiff's initial educator and professional educator certificates pursuant to statute (§ 10-145b (i) (2)); whether there was substantial evidence to support finding that plaintiff was directly involved in or responsible for schoolwide cheating during administration of Connecticut Mastery Test; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

Ortiz *v.* Torres-Rodriguez. 129

Termination of employment; recklessness; intentional infliction of emotional distress; libel; whether trial court properly granted defendant's motion for summary judgment; adoption of trial court's memorandum of decision as proper statement of relevant facts, issues and applicable law.

Reserve Realty, LLC *v.* BLT Reserve, LLC (See Reserve Realty, LLC *v.* Windemere Reserve, LLC) 299

Reserve Realty, LLC *v.* Windemere Reserve, LLC 299

Breach of contract; anticipatory breach; whether listing agreements complied with provision of commercial real estate statute (§ 20-325a) governing duration of broker's authority to act as exclusive listing agent; whether buyer's agreement or listing agreements were ambiguous as to duration intended by parties; whether trial court erred in concluding that it was not inequitable to deny recovery to plaintiffs.

Schott *v.* Schott 237

Dissolution of marriage; motion to modify alimony; claim that, pursuant to plain language of separation agreement, trial court was obligated to terminate defend-

ant's alimony obligation in light of evidence of plaintiff's cohabitation; whether trial court's application of provision of statute (§ 46b-86 (a)) governing substantial change in circumstances, instead of § 46b-86 (b), governing cohabitation, was error.

Small *v.* Commissioner of Correction (Memorandum Decision) 902

Smith *v.* Commissioner of Correction (Memorandum Decision) 903

State *v.* Coltherst 1

Motion to correct illegal sentence; whether trial court properly dismissed motion to correct illegal sentence; whether defendant was entitled to resentencing because trial court imposed effective life sentence without having first considered defendant's age and hallmark characteristics of youth; claim that sentencing proceeding was merely academic exercise that contravened intent of legislature in eliminating availability of capital felony for juvenile defendants; claim that State *v.* Delgado *(323 Conn. 801) was inapplicable because it could be presumed that sentencing court knew defendant previously had been sentenced to life imprisonment without possibility of release.*

State *v.* Sinchak 346

Murder; kidnapping in first degree; motion to correct illegal sentence; claim that sentence violated defendant's right to due process guaranteed by fourteenth amendment to United States constitution; whether sentence gave rise to inference of vindictiveness that required explicit statement from judge at time of sentencing that sentence was not being imposed as punishment for defendant's refusal to forgo trial and accept plea deal.

Tarasco *v.* Commissioner of Correction (Memorandum Decision) 905

Towing & Recovery Professionals of Connecticut, Inc. *v.* Dept. of Motor Vehicles 368

Administrative appeal; petition pursuant to statute (§ 14-66) for revision of rates for nonconsensual towing and storage services; claim that final decision of Commissioner of Motor Vehicles was not supported by substantial evidence in record; whether commissioner's balancing of relevant statutory and regulatory factors was within commissioner's discretion; whether commissioner's exercise of that discretion was unreasonable, arbitrary or illegal.

Turner *v.* Commissioner of Correction (Memorandum Decision) 902

U.S. Bank National Assn. *v.* Poole (Memorandum Decision) 901

Vere C. v. Commissioner of Correction (Memorandum Decision) 904

Zachs *v.* Commissioner of Correction 243

Habeas corpus; whether habeas court correctly denied claim of ineffective assistance of counsel; whether petitioner established that there was no tactical justification for counsel's defense strategy; claim that it was unreasonable for counsel to present defense that was inconsistent with petitioner's testimony at trial; whether habeas court erred in concluding that petitioner procedurally defaulted on and waived claim that trial counsel had conflict of interest; whether claim that trial counsel had conflict of interest could not be procedurally defaulted because record was inadequate to raise it on direct appeal; claim that petitioner's waiver of counsel's conflict of interest was premised on cross-examination of rebuttal witnesses actually occurring; whether habeas court correctly determined that petitioner procedurally defaulted on conflict of interest claim pursuant to United States *v.* Cronic *(466 U.S. 648); claim that prejudice against petitioner should have been presumed under* Cronic *because of counsel's conflict of interest; whether habeas court improperly declined to consider aggregate effect of trial court's alleged errors.*

Zealand *v.* Balber 376

Partition of real property; whether trial court abused its discretion in determining parties' respective interests in real property; whether trial court abused its discretion in precluding evidence plaintiff sought to offer regarding nonmonetary contributions to defendant and children; claim that trial court exceeded its authority under statute (§ 52-500 (a)) governing partitions of real property by sale; claim that trial court's conclusion that sale of real property was necessary undermined and was inconsistent with its conclusion that sale would not promote parties' interests; whether trial court abused its equitable discretion in awarding plaintiff $25,000 as just compensation pursuant to § 52-500 (a).

SUPREME COURT PENDING CASES

STATE *v.* JUNY OSCAR ABRAHAM, SC 20314
Judicial District of Fairfield

Criminal; Whether Evidence Sufficient to Convict Defendant of Home Invasion, Attempted Assault, Reckless Endangerment, and Risk of Injury; Whether Jury Verdicts of Attempted Assault and Reckless Endangerment Were Legally Inconsistent; Whether Convictions of Home Invasion and Attempted Assault Violate Right Against Double Jeopardy. The victim and his neighbor were sitting outside of their two family home in Bridgeport when they observed a gray truck repeatedly driving around the block and stopping at the corner directly in front of the home. Later that afternoon, a man wearing a black mask and a black hooded sweatshirt approached the porch and pointed a gun at the victim and his neighbor, who both retreated into their respective residences. The man in dark clothing chased the victim into his residence, where the victim's minor children were located. The victim ran back outside, and the intruder followed and stood in the front doorway with his gun pointed at the victim. The victim was equipped with a legal firearm and warned the intruder to drop his weapon. When the intruder fired one shot, the victim fired three shots in return, one of which struck the intruder. The victim followed the intruder to the back of the house and saw a gray truck driving away. Approximately one mile from the scene, police officers located a gray truck containing the defendant, who had been shot and was wearing a white t-shirt and khaki pants. The resulting investigation determined that DNA samples from bloodlike stains found at the scene of the shooting were 100 billion times more likely to have come from the defendant than from an unknown individual. A jury found the defendant guilty of home invasion, attempted assault in the first degree, reckless endangerment in the first degree, and two counts of risk of injury to a child. On direct appeal to the Supreme Court pursuant to General Statutes § 51-199 (b) (3), the defendant claims that the evidence was insufficient to convict him of the charges because the jury would have had to rely on conjecture and speculation to conclude that he was the intruder. He relies in part on testimony from eyewitnesses that the intruder was wearing black clothing and notes that he was found in dissimilar clothes shortly after the shooting. The state argues that the verdict is adequately supported by the presence of the gray truck at the scene, the DNA evidence linking the defendant to the scene, and the victim's testimony that he shot the intruder. The defendant also claims that the jury returned legally inconsistent ver-

dicts with respect to his conviction of reckless endangerment and attempted assault in the first degree because those convictions require two different mental states. The state counters that there was a plausible theory under which the jury could have found, for purposes of the reckless endangerment conviction, that the defendant recklessly created a risk of serious physical injury to the victim by chasing him into his home with a handgun drawn and, for purposes of attempted assault in the first degree, that he intended to cause serious physical injury to the victim by firing shots at him from the front doorway. Finally, the defendant claims that his conviction of home invasion and attempted assault in the first degree violate the prohibition on double jeopardy because the former was predicated on an intent to commit the latter.

STATE *v.* JOVANNE BROWN, SC 20408
Judicial District of Fairfield

Felony Murder; Robbery in Third Degree; Whether Evidence Sufficient to Prove Defendant Committed Robbery in Third Degree for Purposes of Felony Murder Conviction; Whether Evidence Sufficient to Disprove Self-Defense Claim; Whether Self-Defense Claim Regarding Vacated Manslaughter Conviction Justiciable. An individual contacted the defendant and promised to pay him if he accompanied William Hargrove to a drug transaction to "make sure nothing happened." On February 24, 2017, Hargrove picked up the defendant and drove with him to Bridgeport. He showed the defendant a gun on the floor in the backseat of the vehicle and told him that he was there to "make sure the deal went right," advising the defendant to "wipe down the gun after." When the pair arrived at the location of the transaction, Hargrove parked across the street from the victim's car. The victim and Hargrove exited their respective vehicles and, while Hargrove retrieved the drugs from the victim's car, the victim got into the front passenger seat of Hargrove's vehicle. The defendant was seated immediately behind the victim. In an exchange of gunfire, the defendant was shot once and the victim was killed after being shot five times. Hargrove returned to the vehicle, pushed the victim out of the car, and drove the defendant to the hospital. The defendant was arrested and charged with murder, felony murder predicated on the commission of a robbery in the third degree, and carrying a pistol without a permit. At trial, the defendant testified that he did not intend to rob the victim but, instead, had acted in self-defense. The jury found the defendant guilty of the lesser included offense of

manslaughter in the first degree, felony murder, and carrying a pistol without a permit. After the trial court vacated the defendant's manslaughter conviction on the ground of double jeopardy, the defendant appealed directly to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). He claims that the evidence was insufficient to convict him of felony murder because the state failed to prove beyond a reasonable doubt the predicate felony of robbery in the third degree pursuant to General Statutes §§ 53a-133 and 53a-136. He specifically claims that the state failed to adduce sufficient evidence to prove that he intended to wrongfully take the victim's drugs, that he actually took the drugs, and that he used force or threatened the use of force to effectuate the taking. The state argues that, regardless of whether the defendant personally took the drugs, he is liable under § 53a-119 (a) by using force to appropriate the drugs to Hargrove. The defendant also claims on appeal that, for purposes of his vacated manslaughter conviction, the state failed to disprove his claim of self-defense beyond a reasonable doubt. The state argues in response that the Supreme Court does not have jurisdiction over the defendant's self-defense claim because his manslaughter conviction was vacated and, therefore, the claim is not justiciable. Finally, the defendant claims that he was deprived of a fair trial because, during closing argument, the prosecutor engaged in improprieties by arguing facts not in evidence, misstating the evidence, and making inferences that evidence did not support.

STATE *v.* SHOTA MEKOSHVILI, SC 20442
Judicial District of Stamford/Norwalk at Stamford

Criminal; Jury Instructions; Whether Jury Should Have Been Instructed That It Could Not Reach Guilty Verdict on Murder Charge Unless It Unanimously Agreed on Element of Self-Defense Claim That State Disproved. The defendant was charged with the murder of a taxi cab driver in Stamford. At trial, there was evidence that the defendant, after hailing the victim's taxi cab, stabbed the victim 127 times, stole money from the glove compartment and took the victim's credit card. The defendant testified that he stabbed the victim in self-defense. The defendant's account of the events was that the victim made an unwanted sexual advance on him and that he punched the victim in response. The defendant further claimed that the victim grabbed a knife and began stabbing him, that he managed to wrestle the knife away from the victim and that he then stabbed the victim repeatedly. The trial court instructed the jury on the four elements of self-defense: (1) the defendant actually believed that the

victim was using or about to use physical force against him; (2) the defendant's belief was reasonable; (3) the defendant actually believed that the degree of force he used was necessary to repel the attack; and (4) the defendant's belief was reasonable. The trial court also instructed the jury that the state can defeat a claim of self-defense by disproving any one of the four elements beyond a reasonable doubt. The jury found the defendant guilty of murder, and the defendant appealed from the conviction. On appeal, the defendant claimed that the trial court violated his state constitutional right to be convicted by the unanimous verdict of the jury when it failed to instruct the jury that it could not reach a guilty verdict unless it unanimously agreed on the element of the self-defense claim that the state disproved. The Appellate Court (195 Conn. App. 154) affirmed the conviction, holding that the trial court properly instructed the jury with a general unanimity charge and did not err in failing to give a specific unanimity charge as to the defendant's self-defense claim. The Appellate Court noted that the jury instructions, viewed in their totality, were correct in law and fairly presented the case to the jury, as each of the four elements of a claim of self-defense were explained in detail and in accordance with the model jury charge. The Appellate Court also noted that the factual scenario in the present case was not especially complex and that the defendant's course of conduct did not comprise separate incidents. The Appellate Court further found that, because the trial court did not sanction a nonunanimous verdict, a unanimity instruction on the claim of self-defense was not required. The defendant filed a petition for certification to appeal, which the Supreme Court granted as to the question of whether the Appellate Court correctly concluded that the trial court had properly denied the defendant's request for a jury instruction that would require the jury to reach a verdict of not guilty unless it was unanimous in its conclusion that the state disproved each element of the defendant's self-defense claim beyond a reasonable doubt.

LEE WINAKOR *v.* VINCENT SAVALLE, SC 20516
Judicial District of New London

Home Improvement Act; Whether Appellate Court Correctly Concluded That Home Improvement Act Did Not Apply to Defendant Contractor's Work for Plaintiff. The plaintiff entered into a contract with Golden Hammer Builders, LLC (GHB), to construct a new home on his property. That contract permitted the plaintiff to hire another contractor to perform the site work, and the plaintiff

entered into a separate contract with the defendant to perform that work. Subsequently, the plaintiff brought this action against the defendant, alleging breach of contract, violation of the Home Improvement Act (HIA), General Statutes § 20-418 et seq., and violation of the Connecticut Unfair Trade Practices Act (CUTPA). After a trial, the trial court determined that the defendant had breached the contact by using improper techniques and methods to perform the contract. It further determined that the defendant violated the HIA by failing to comply with several statutory requirements for a home improvement contract. Finally, it concluded that, on the basis of the HIA violations, the defendant committed a per se CUTPA violation. The court rendered judgment in part in favor of the plaintiff, awarding him $100,173.32 in compensatory damages and $126,126.91 in attorney's fees under CUTPA. The defendant appealed, claiming that the trial court improperly rendered judgment in favor of the plaintiff on the CUTPA claim based on its finding that he failed to comply with the contract requirements prescribed by the HIA. He contended that the HIA was not applicable because the work he performed did not constitute a "home improvement" for the purposes of the HIA but rather involved "[t]he construction of a new home," which is expressly exempt from the provisions of the HIA. In *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666 (1995), the Supreme Court held that determining whether work constitutes "new home" construction is dependent on whether the particular work and the construction of the home "were so interrelated, temporally or otherwise, that the [work] constituted an integral part of the construction of a new home." Here, the Appellate Court (198 Conn. App. 792) concluded that the work performed by the defendant constituted "new home" construction under *Rizzo* and, therefore, the HIA was not applicable. In support of its conclusion, the court noted that (1) the parties' contract was linked directly to the new home construction contract between the plaintiff and GHB and (2) the work the defendant contracted to perform directly contributed to the habitability of the home. The court also rejected the plaintiff's contention that the definition of "home improvement" includes work performed on land regardless of whether there is an existing building, stating that such an interpretation would render the "new home" construction exception meaningless. Accordingly, it reversed the judgment in favor of the plaintiff on the HIA claim and also on the CUTPA claim and the related award of attorney's fees becuase the sole basis for the defendant's CUTPA liability was his alleged HIA violations. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the HIA did not apply to the defendant's work for the plaintiff.

MALISA COSTANZO, ADMINISTRATRIX (ESTATE OF ISABELLA R. COSTANZO), et al. *v.* TOWN OF PLAINFIELD et al., SC 20537

Judicial District of Windham

Appellate Jurisdiction; Final Judgment; Municipalities; Apportionment; Whether Dismissal of Apportionment Complaint Was Final Judgment Permitting Appellate Review; Whether Defendants Can Seek Apportionment of Liability in Action Brought Under Municipal Liability Statute, General Statutes § 52-557n. The plaintiff administratrix brought this action seeking to recover damages in connection with the drowning death of her daughter, the decedent, in an aboveground pool on residential property that she rented in Plainfield. The plaintiff alleged that the defendants, the town of Plainfield and two town employees, issued a building permit for the pool without inspecting it to ensure that mandated safety measures, such as an alarm or a self-closing or self-latching gate, had been installed. The defendants filed an apportionment complaint pursuant to General Statutes § 52-102b against the owners of the property for their failure to ensure that the pool met all safety requirements and the former tenants of the property who had the pool constructed. The plaintiff objected and argued that her complaint set forth a cause of action pursuant to the municipal liability statute, General Statutes § 52-557n (b) (8), alleging recklessness and that the apportionment statute applies only to negligence actions. Section 52-557n (b) (8) provides that municipalities are immune from liability for damages "resulting from the failure to make an inspection or making an inadequate inspection of any property to determine whether the property complies with or violates any law or contains a hazard to health and safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety." The trial court sustained the plaintiff's objection, and the defendants appealed from the ruling. The Appellate Court (200 Conn. App. 755) reversed, holding that the trial court erred in sustaining the plaintiff's objection to the defendants' filing of an apportionment complaint. The Appellate Court found that the plaintiff's complaint implicated both exceptions to the municipal immunity contained in § 52-557n (b) (8) and that the actual notice exception employs a negligence, not a recklessness, standard. The Appellate Court further found that, because the plaintiff alleged in part a claim of negligence, the defendants may seek apportionment of liability from the property owners and the former tenants. In this certified appeal by the plaintiff, the Supreme Court will decide (1) whether the trial court's order

dismissing the defendants' apportionment complaint constituted a final judgment permitting interlocutory appellate review and, if so, (2) whether the Appellate Court correctly concluded that the trial court erred in sustaining the plaintiff's objection to the defendants' filing of an apportionment complaint.

RONALD CAVERLY, ADMINISTRATOR (ESTATE OF JAMES CAVERLY) *v.* STATE OF CONNECTICUT D/B/A UCONN HEALTH CENTER/JOHN DEMPSEY HOSPITAL, SC 20577

Judicial District of Hartford

Sovereign Immunity; Whether Third Party Payment Took Plaintiff's Claim Against State Outside Scope of Claims Commissioner's Waiver of Sovereign Immunity. The plaintiff administrator brought this malpractice action against the state alleging that health care providers employed by the UCONN John Dempsey Hospital negligently prescribed and monitored the use of the anticoagulant medication Warfarin, resulting in the death of the decedent. The Claims Commissioner waived the state's sovereign immunity and authorized the plaintiff to bring the action on April 5, 2019. On March 15, 2019, the plaintiff had commenced a separate action against CVS Health Corporation and associated entities (collectively referred to hereinafter as CVS) alleging negligence in the filling of the decedent's prescription for Warfarin in an excessive dose. The CVS action settled for $2,000,000 in December of 2019. The state then filed a motion to dismiss the present action, claiming that, because of the compensation for the claim that the plaintiff received from CVS, this action no longer fell within the scope of the Claims Commissioner's waiver of sovereign immunity. The state relied for its argument on General Statutes § 4-160b, which provides that the Claims Commissioner "shall not accept or pay any subrogated claim or any claim directly or indirectly paid by or assigned to a third party." The trial court denied the motion to dismiss. The trial court found that the state's interpretation of § 4-160b would require it to rewrite the statute to add the disjunctive phase "or payable" because, absent that addition, the statute does not address the present circumstances where a third party paid a claim after the claim was accepted by the Claims Commissioner. The trial court found that the proper interpretation of § 4-106b is that the legislature meant simply to limit its waiver of sovereign immunity by excluding subrogees and assignees of claims from its application. The state appeals, claiming that the trial court improperly denied its motion to dismiss because

the payment received by the plaintiff from CVS placed the plaintiff's claim against the state outside the scope of the Claims Commissioner's waiver of sovereign immunity. The state argues that the trial court improperly failed to apply the rule of construction applicable to statutory waivers of sovereign immunity pursuant to which a waiver may be found only if that is the only possible interpretation of the language of the statute and reliance on extratextual evidence is prohibited. The state also argues that the trial court, in holding that the statute applied only to subrogated and assigned claims, rendered statutory language surplusage because the plain language of the statute applies to "any claim directly or indirectly paid by . . . a third party." The state further argues that the trial court erred in relying on the timing of when payment is made, as that would mean that even assigned and subrogated claims can be brought if they arise after the Claims Commissioner waives sovereign immunity and grants permission to sue.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-V: Rate Increase for Certified Nurse-Midwife and Podiatrist Services; Adding Select Vaccine Codes to the Physician Office & Outpatient and Medical Clinic Fee Schedules; Physician Services HIPAA Compliance Billing Code Quarterly Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, SPA 21-V will amend Attachment 4.19-B of the Medicaid State Plan to the following changes.

First, this SPA increases the rates for nurse-midwife and podiatrist services to 100% of the physician fee schedule. Prior to this SPA, the rates were set at 90% of the applicable physician fee schedule rates. The purpose of this change is to comply with section 369 of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended, which is anticipated to be signed into law shortly. Specifically, that state law provides that the Medicaid rates for nurse-midwife and podiatrist services will be set at the same rate as if they were performed by a physician.

Next, this SPA adds procedure codes for the influenza vaccine, ebolavirus vaccine and the meningococcal conjugate vaccine to the physician office and outpatient fee schedule and the medical clinic fee schedule effective July 1, 2021. The reimbursement rates for these vaccines are calculated on the formula of 100% of the 2021 July Medicare Average Sale Price (ASP) Drug file. The purpose of this change is to ensure that reimbursement is available for these vaccines when applicable.

Finally, this SPA also incorporates various Healthcare Common Procedure Coding System (HCPCS) updates (additions, deletions and description changes) from the most recent federal HCPCS quarterly update issued by CMS to the physician office and outpatient and medical clinic fee schedules. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category. The purpose of this change is to ensure that these fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS estimates that the rate increase for certified nurse-midwives will increase annual aggregate expenditures by approximately $607,000 in State Fiscal Year (SFY) 2022 and $624,000 in SFY 2023.

DSS estimates that the rate increase for podiatrists will increase annual aggregate expenditures by approximately $462,000 in SFY 2022 and $477,000 in SFY 2023.

DSS does not anticipate that the billing code update component of this SPA will significantly change annual aggregate expenditures.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-V: Rate Increase for Certified Nurse-Midwife and Podiatrist Services; Adding Select Vaccine Codes to the Physician Office & Outpatient and Medical Clinic Fee Schedules; Physician Services HIPAA Compliance Billing Code Quarterly Update''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 14, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-W: Independent Radiology Services – Adding Select Electroencephalogram Procedure Codes

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to adding select electroencephalogram (EEG) procedure codes to the independent radiology fee schedule. These newly added codes are being priced using a comparable methodology to the physician radiology fee schedule. The purpose of this change is to increase access to these services.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will not significantly change annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at the following link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 21-W: Independent Radiology Services – Adding Select Electroencephalogram Procedure Codes''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 14, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-X: Ambulance Rate Increase

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-B of the Medicaid State Plan in order to increase the rates for emergency and non-emergency ambulance rates by 10% (excluding the mileage rate) and increase the ambulance mileage rates for all emergency and non-emergency transports by $3.00.

The purpose of this SPA is to comply with section 376 of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended, An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. That bill is anticipated to be signed into law shortly after this notice is submitted for publication in the Connecticut Law Journal. Specifically, that bill provides that the Medicaid rates for ambulance services must be increased in the manner and amounts set forth above.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $7.7 million in State Fiscal Year (SFY) 2022 and $8.4 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''Ambulance Rate Increase.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 14, 2021.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-Y: Chronic Disease Hospitals and Natchaug Hospital – Rate Increases

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-A of the Medicaid State Plan in order to make the following changes.

First, this SPA will implement a 4% increase in the inpatient per diem rates for free-standing chronic disease hospitals.

Second, this SPA will maintain the inpatient per diem rate for Natchaug Hospital at $975. Under the current approved Medicaid State Plan (as required by section 315 of Public Act 19-117), this rate would have applied only during State Fiscal Year (SFY) 2021 and, effective July 1, 2021, would have reverted to the lower rate in effect as of June 30, 2020 unless a new SPA is submitted.

The purpose of these changes is to comply with sections 378 and 379, respectively of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended, An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. That bill is anticipated to be signed into law shortly after this notice is submitted for publication in the Connecticut Law Journal. Specifically, that bill requires DSS to make the rate changes set forth above.

Fiscal Impact

DSS estimates that the chronic disease hospital rate increase will increase annual aggregate expenditures by approximately $2.7 million in State Fiscal Year (SFY) 2022 and $3 million in SFY 2023.

DSS estimates that maintaining Natchaug Hospital's per diem rate at $975 will increase annual aggregate expenditures (compared to the rate in effect prior to July 1, 2020) by approximately $1 million in SFY 2022 and $1 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-Y: Chronic Disease Hospitals and Natchaug Hospital – Rate Increases''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than July 29, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-Z: Home Health – Rate Increase for Select Services

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, based on the information available at this time, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to update the home health services fee schedule by increasing the rates by 1.7% for complex cases for pediatric skilled nursing services provided by home health agencies. Skilled nursing services are billed with Healthcare Common Procedure Coding System (HCPCS) codes S9123 (skilled nursing RN) with the appropriate modifier(s) or with HCPCS Code S9124 (skilled nursing LPN) with the appropriate modifier(s) by licensed home health agencies.

The purpose of this SPA is to comply with section 374 of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended, An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. That bill is anticipated to be signed into law shortly after this notice is submitted for publication in the Connecticut Law Journal. Specifically, that bill provides for a rate increase for pediatric skilled nursing services provided by home health agencies, including allocating the funding for the state share of this increase. This SPA also reflects the acuity of these services and helps ensure sufficient access to this service.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $335,000 in State Fiscal Year (SFY) 2022 and $335,000 in SFY 2023.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 21-Z: Home Health – Rate Increase for Select Services.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 14, 2021.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-AA: Nursing Facility Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, based on the information available at this time, this SPA will amend Attachment 4.19-A of the Medicaid State Plan to make the following proposed changes to the reimbursement for nursing facilities.

First, this SPA implements a 4.5% increase to nursing home rates in State Fiscal Year (SFYs) 2022 and 2023 for employee wage enhancements. If a facility receives a rate increase but does not enhance employee wages, DSS may decrease the rate by the same amount as the rate increase.

Second, within a total pool of approximately $30.8 million ($15.4 million state share) in SFY 2023, this SPA implements rate increases for nursing homes that provide enhanced employee health care and pension benefits. If a facility receives a rate increase but does not provide enhanced health care and pension benefits, DSS may decrease the rate by the same amount as the rate increase.

Third, within a total pool of up to approximately $5 million ($2.5 million state share) for each of SFY 2022 and SFY 2023, this SPA implements a targeted rate increase to the extent necessary to enable implementation of a modification of the social work staff requirements in nursing homes to one full-time social worker per sixty residents for nursing homes that are not currently providing such staffing. This rate increase does not apply to nursing homes already providing such staffing.

Fourth, within a total pool of up to approximately $85.84 million for SFY 2022 (up to $40 million state share), this SPA implements a temporary rate increase for nursing homes for a nursing home settlement.

Fifth, within a total pool of approximately $1 million ($500,000 state share) in each of SFY 2022 and SFY 2023, this SPA implements a targeted rate increase to the extent necessary to enable implementation of a minimum staffing level requirement for nursing homes of at least three hours of direct care per resident per day for nursing homes that are not currently providing such staffing. This rate increase does not apply to nursing homes already providing such staffing.

The purpose of this SPA is to implement changes in the approved state budget and anticipated changes in state law, each as enacted by the Connecticut General Assembly and either signed into law by the Governor or anticipated to be signed into law shortly. Specifically, the appropriations set forth in section 29(b)(3) and (39) of Special Act 29-15, An Act Concerning the State Budget For The Biennium Ending June Thirtieth, 2023, and Making Appropriations Therefor, and Making Deficiency and Additional Appropriations for the Fiscal Year Ending June Thirtieth, 2021 and also to comply with sections 355, 356, 359, and 360, as applicable, of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended,

An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. That bill is anticipated to be signed into law shortly after this notice is submitted for publication in the Connecticut Law Journal. Collectively, as applicable, both enacted bills referenced above allocate the state share for the increases set forth above and for certain of the changes, specifically mandate such changes.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $137.4 million in SFY 2022 and $170.8 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-AA: Nursing Facility Reimbursement''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than July 29, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA21-AB: Private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to make the following changes to the reimbursement methodology for private ICF/IIDs.

For SFY 2022 and SFY 2023, the minimum per diem, per bed rate for each private ICF/IID increases to $501. Any private ICF/IID with a rate below such amount will be increased to that rate for SFY 2022 and SFY 2023.

For State Fiscal Year (SFY) 2022 and SFY 2023, this SPA implements a rate increase for the purpose of wage and benefit enhancements for ICF/IID employees. Facilities that receive a rate adjustment for the purpose of wage and benefit enhancements but do not provide employee salary increases on or before July 31, 2021, and July 31, 2022, respectively, may be subject to a rate decrease in the same amount as rate increase.

For SFY 2022, rates shall not exceed those in effect for SFY 2021, except that DSS may, in the commissioner's discretion and within available appropriations, provide pro rata fair rent increases to facilities that have documented fair rent additions placed in service in the cost report year ending September 30, 2020, that are not otherwise included in rates issued. For SFY 2023, rates shall not exceed those in effect for SFY 2022, except that DSS may, in the commissioner's discretion and within available appropriations, provide pro rata fair rent increases to facilities which have documented fair rent additions placed in service in the cost report year ending September 30, 2021, that are not otherwise included in rates issued. For SFY 2022 and SFY 2023, a facility may receive a rate increase for a capital improvement approved by the Department of Developmental Services, in consultation with DSS, for the health or safety of the residents during SFY 2022 or SFY 2023, only to the extent such rate increases are within available appropriations.

For SFY 2022 and SFY 2023, DSS may provide fair rent increases to any facility that has undergone a material change in circumstances related to fair rent and has an approved certificate of need.

The purpose of this SPA is to comply with sections 356 and 361 of Senate Bill 1202 of the June special session of the Connecticut General Assembly, as amended, An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023. That bill is anticipated to be signed into law shortly after this notice is submitted for publication in the Connecticut Law Journal. Section 361 specifically requires DSS to increase the minimum per diem rate for private ICF/IIDs to $501. Section 356 sets forth authorization for the other changes described above.

Fiscal Impact

Based on the information that is available at this time, DSS anticipates that this SPA will increase annual aggregate Medicaid expenditures by approximately $4.9 million in SFY 2022 and $6.8 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference: ''SPA 21-AB: Private ICF/IID Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 29, 2021.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-AC: Physician Supplemental Payments for CCMC Affiliate

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to implement a supplemental payment for the difference between payment at Medicare and Medicaid rates for physician services provided by the physician group affiliated with Connecticut Children's Medical Center (CCMC). The specific methodology for calculating this amount is set forth in the SPA page, which involves collecting data on total Medicaid paid claims for this physician group at the end of each calendar quarter and calculating the difference between that amount and the amount that would have been paid by Medicare for the same services.

The purpose of this SPA is to provide the supplemental payment set forth above to reflect the unique services provided by and unique costs of such services for the affiliated physician group of CCMC, which is currently the only licensed short-term children's general hospital in Connecticut.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $5.1 million in State Fiscal Year (SFY) 2022 and $6.8 million in SFY 2023.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: This SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-AC: Physician Supplemental Payments for CCMC Affiliate''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than July 29, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-AD: Supplemental Payment for Obstetrical Services Program - Modifications to Specified Quality Performance Measures

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2021, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to update the following performance measures for the supplemental reimbursement for obstetrical services, which is also known as the obstetrics pay-for-performance program. Specifically, this SPA implements two changes: First, measure v. in the approved state plan is revised to read as follows: ''Full term (39 weeks gestation), vaginal delivery''. That measure previously awarded points only for full-term vaginal deliveries after spontaneous delivery. Second, measure vi. in the approved state plan is revised to read as follows: ''At least one postpartum visit within 21 days after delivery.'' That measure previously had a timeframe of within 21-56 days after delivery.

The purpose of this SPA is to align this quality performance measure updated American College of Obstetricians and Gynecologists (ACOG) clinical recommendations. The first change reflects that current ACOG guidelines provide that pregnant individuals should be offered the choice of labor induction, including discussion of the potential risks and benefits. The second change reflects that ACOG current guidelines provide for an early postpartum visit within 21 days after delivery to address acute issues, which is then followed by ongoing care as needed and ending with a visit from 22 to 84 days after delivery.

Fiscal Impact

This SPA will not change annual aggregate expenditures because DSS anticipates that the full $1.2 million allocated for this supplemental payment will continue to be paid per state fiscal year, which is not changing based on the quality measure revision implemented by this SPA.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 21-AD: Supplemental Payment for Obstetrical Services Program - Modification to Specified Quality Performance Measures''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 14, 2021.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in April and May 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Arnold, Sabrina Lynn of Alexandria, VA
Bonaiuto Blatche, Kaprice M. of West Haven, CT
Carchia, Ettore F. of North Haven, CT
Cooley, Tara of Fort Myers, FL
Coppola, Andrea M. of Hawthorne, NJ
Dangremond, Samuel Plant Chapin of Old Lyme, CT
DeEsso, Elise Lauren of Carmel, NY
Filindarakis, Maria of Old Saybrook, CT
Franks, Diandra Yvonne of Melrose, MA
Freiman, Eric of New Haven, CT
Ghadiri, Misha N. of Iowa City, IA
Hachem, John Halim of Melrose, MA
LaRoche, Brian Kenneth of Rutherford, NJ
Mangan, Chloe Margaret of Norwalk, CT
Morrison, Daniel T. of Westport, CT
Roach, Edward Sean of Kingston, MA
Szyszkiewicz, Amanda Elizabeth of Rahway, NJ
Tarasidis, Georgios Kyriakou of Greensboro, NC
Tsouristakis, Elias Anthony of New Rochelle, NY
Vazquez, Jonathan of Johnston, RI
Wood, Thomas George of Hartford, CT
Young, Rachel Elizabeth of Boston, MA
Zhou, Yaling of New Haven, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in April and May 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Bjornlund, Kyle Evan of Boston, MA
Buyske, Jennifer Marie of West Hartford, CT
Feder, Benjamin D. of Stamford, CT
Greene, Ira S. of Westport, CT
Horwitz, Ethan of New York, NY
Kumar, Dimple of Forest Hills, NY
Lalor, Justin Foster of Manchester, CT
Lavin, Scott Andrew of Demarest, NJ
Litvin, Vita Viktoria of West Hartford, CT
Maldonado, Roger Daniel of Dobbs Ferry, NY
Nussbaum, Irving Lawrence of Boston, MA
Porretto, Joseph of New York, NY
Ross, Katrina Marie of Las Vegas, NV
Topouzis, Theodore Aris of Warwick, RI
Wilson, Eric Roy of Greenwich, CT