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CONNECTICUT REPORTS

Vol. 343

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

WILLIE A. SAUNDERS *v.* COMMISSIONER OF CORRECTION (SC 20430)

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

Syllabus

The petitioner, who had been convicted of the crimes of sexual assault and risk of injury to a child, sought a writ of habeas corpus, claiming that his rights to due process were violated because, at the time of his criminal trial, he suffered from severe intellectual disabilities and physiological and mental health afflictions that rendered him incompetent to stand trial. He further alleged that, during his criminal trial, neither his trial counsel, the state, nor the trial court sought a competency examination for him, in violation of statute (§ 54-56d). At his criminal trial and on direct appeal to the Appellate Court, which upheld his conviction, the petitioner did not raise any claim regarding his competency to stand trial. The respondent, the Commissioner of Correction, filed a return in response to the petitioner's habeas petition, asserting that the petitioner had procedurally defaulted because his due process claims were not raised during his criminal trial or on direct appeal and that he could not establish cause and prejudice to excuse the procedural defaults. The petitioner filed a reply, in which he asserted that the defense of procedural default did not apply to his due process claims, that he could not have raised those claims previously because of his developmental and intellectual disabilities, and, in the alternative, that he could establish cause and prejudice to overcome the procedural defaults. The respondent filed a motion to dismiss, and the habeas court granted that motion and rendered judgment dismissing the habeas petition. The habeas court determined that the petition and reply were

deficient because an allegation of incompetency was legally insufficient to establish cause and prejudice. Accordingly, the habeas court concluded that the petitioner's due process claims were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the defaults. On the granting of certification, the petitioner appealed to the Appellate Court, which upheld the habeas court's judgment. On the granting of certification, the petitioner appealed to this court, claiming, inter alia, that the Appellate Court incorrectly had concluded that the procedural default doctrine applies to competency claims. *Held*:

1. The Appellate Court correctly concluded that the petitioner's competency claim was subject to the procedural default doctrine, as the prudential interests in finality and uniformity underlying that doctrine militated against carving out an exception to it for competency claims: application of the procedural default doctrine to competency claims encourages the timely assertion of those claims when the trial court is in the best position to determine competency and to provide a timely remedy, and the passage of time could result in the potential for loss of evidence or the improvement or deterioration of the petitioner's condition, and could hinder a habeas court's ability to make a meaningful determination regarding a petitioner's competency at the time of his criminal trial; moreover, this court has emphasized the importance of applying the cause and prejudice standard consistently to all procedural defaults and has recognized only two exceptions to the application of the procedural default doctrine, including for claims of actual innocence, and the reasons that led this court to carve out those exceptions were not applicable in the context of competency claims; furthermore, this court declined to follow federal cases that have held, pursuant to the waiver rule of *Wainwright* v. *Sykes* (433 U.S. 72), that procedural default does not apply to substantive competency claims, as the great weight of federal and Connecticut habeas jurisprudence since *Wainwright* has transitioned from a waiver standard to a forfeiture standard for procedural default, and the procedural default standard in Connecticut is more akin to forfeiture, which addresses the petitioner's timing in raising a constitutional claim rather than the mental state driving the petitioner's decision to waive such a claim.

2. The Appellate Court incorrectly concluded that the petitioner had failed to allege sufficient cause and prejudice to overcome his procedural defaults:

   a. This court rejected the Appellate Court's conclusion that mental incompetency is internal, rather than external, to the petitioner and, thus, that a claim of incompetency is legally insufficient to satisfy the cause prong of the cause and prejudice standard: the term "internal" is defined as something fairly attributable to the petitioner, whether cause is internal presumes a level of participation by the petitioner in his defense, and the duty that § 54-56d (c) imposes on trial counsel, the state, and the

trial court to raise the issue of competency indicates that incompetency is external to the petitioner; moreover, there was a lack of precedential support for the respondent's claim that, on collateral review, procedurally defaulted due process competency claims must be brought with an accompanying ineffective assistance of counsel claim, as habeas petitioners are not precluded from raising freestanding competency claims, when, as in the present case, an objective factor is external to the defense yet still tangential to effective assistance of counsel.

b. The habeas court incorrectly determined that the petitioner had failed to allege sufficient prejudice to survive the respondent's motion to dismiss: the petitioner sufficiently alleged that, if the trial court had him evaluated, his several cognitive limitations and significant physiological and mental health afflictions would have established that he was incompetent to stand trial, was not restorable to competency and, therefore, would not have been tried and convicted; accordingly, the judgment was reversed and the case was remanded so that the petitioner could produce evidence to support his claim and to rebut the defense of procedural default.

Argued October 18, 2021—officially released April 19, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Prescott* and *Moll*, *Js.*, which affirmed the judgment of the habeas court, and the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Vishal K. Garg, for the appellant (petitioner).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Bruce R. Lockwood*, supervisory assistant state's attorney, and *Eva B. Lenczewski*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

D'AURIA, J. In this certified appeal, we must determine whether the defense of procedural default, which prevents courts from reaching the merits of a constitutional claim raised for the first time in a habeas proceeding in the absence of a showing of cause and prejudice, applies to a due process claim that is based on incompetency to stand trial.

The petitioner, Willie A. Saunders, appeals from the judgment of the Appellate Court, which upheld the habeas court's dismissal of his petition for a writ of habeas corpus as barred by procedural default. The petitioner claims that the Appellate Court incorrectly concluded that (1) the defense of procedural default applies to competency claims, and (2) his pleadings failed to allege sufficient cause and prejudice to overcome the procedural default defense. We disagree with the petitioner that competency claims are categorically exempt from being procedurally defaulted because incompetency may satisfy the cause and prejudice standard to excuse a procedural default. In the petitioner's case, our review of the petition leads us to conclude that his pleadings met the standard necessary to survive a motion to dismiss. Accordingly, we reverse the Appellate Court's judgment and remand the case to that court with direction to remand it to the habeas court for an evidentiary hearing on the threshold question of whether the petitioner was incompetent at the time of his underlying criminal trial or his direct appeal and, if so, whether he suffered any resulting prejudice, thereby excusing his procedural default.

The Appellate Court's opinion contains the pertinent facts and procedural history; see *Saunders* v. *Commissioner of Correction*, 194 Conn. App. 473, 475–81, 221 A.3d 810 (2019); which we summarize in relevant part. A jury found the petitioner guilty of sexual assault in

the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). Id., 477. The trial court sentenced the petitioner to ten years of imprisonment followed by fifteen years of special parole. Id. The petitioner appealed to the Appellate Court, claiming that "the state adduced insufficient evidence to sustain his conviction . . . the trial court improperly allowed the state to comment on missing witnesses during final argument, and the . . . state engaged in prosecutorial impropriety during final argument and, therefore, deprived him of his due process right to a fair trial." (Internal quotation marks omitted.) Id., 477–78 n.3. The petitioner raised no claim regarding his competency to stand trial. See id. The Appellate Court upheld the petitioner's conviction on direct appeal; see *State* v. *Saunders*, 114 Conn. App. 493, 509, 969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009); and this court denied his petition for certification to appeal. *State* v. *Saunders*, 292 Conn. 917, 973 A.2d 1277 (2009).

The present case is the petitioner's second in which he seeks a writ of habeas corpus.[1] He raises claims of two "due process violations under the fifth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution on the grounds that [he] was incompetent to be prosecuted and to stand trial . . . ." *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 478. Count one of his habeas petition alleges that, at the time of trial, the petitioner suffered from severe intellectual disabilities, including "an inability to read or write, a

[1] In his first habeas petition, the petitioner alleged that his trial counsel rendered ineffective assistance by failing to call additional alibi witnesses. *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 478. The habeas court denied the petition and denied certification to appeal. Id. The petitioner appealed to the Appellate Court, which dismissed the appeal. See *Saunders* v. *Commissioner of Correction*, 143 Conn. App. 902, 67 A.3d 316, cert. denied, 310 Conn. 917, 76 A.3d 632 (2013).

diagnosis of 'mental retardation' at a young age, and brain functioning equivalent to that of a ten year old child." Id. Because of these deficiencies, the petitioner alleges, he "could not comprehend the nature of the criminal proceedings against him, other than the general nature of the charges and the fact that he was facing incarceration if convicted." Id. Count two of the petition alleges that, at the time of trial, the petitioner also suffered from "significant physiological and mental health afflictions," including "a long history of epileptic seizures, a visibly misshapen head, paranoia, schizophrenia, and depression, and that he had been hospitalized on numerous occasions in North Carolina prior to his arrest . . . ." Id., 479. Both counts allege that his trial counsel, the state, and the trial court failed to request a competency examination during the course of the proceedings, in violation of General Statutes § 54-56d. Id., 478–79.

The respondent, the Commissioner of Correction, filed a return denying the petitioner's material allegations and asserting several affirmative defenses, including procedural default as to both counts of the petition. Id., 479. The respondent argued that the petitioner did not raise his due process claims regarding competency to stand trial during his criminal trial or on direct appeal and, therefore, had procedurally defaulted. Id., 479–80. The respondent further contended that the petitioner could not establish sufficient cause and prejudice to excuse the defaults. Id., 480.[2] The petitioner, in his reply, argued

[2] The respondent also argued that, to the extent the petition raised an ineffective assistance of counsel claim, that claim had been raised and resolved in the prior habeas proceeding. *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 479 n.5. "The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient

that the defense of procedural default did not apply to his due process claims, that he could not have raised those claims previously because of his developmental and intellectual disabilities, and, in the alternative, that he could establish cause and prejudice to overcome the procedural defaults. Id.

The respondent moved to dismiss the second habeas petition on the ground that the petitioner's due process claims were procedurally defaulted. Id., 480–81. The habeas court granted the motion, "determin[ing] that the petitioner's due process claims were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the procedural defaults." (Footnotes omitted.) Id., 481.

The habeas court granted the petitioner certification to appeal to the Appellate Court, which upheld the habeas court's judgment. See id., 481, 504. We granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the doctrine of procedural default applies to competency claims?" And (2) "[d]id the Appellate Court correctly conclude that the petitioner's pleadings

to allow recovery." (Footnote omitted; internal quotation marks omitted.) *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842, 878 A.2d 1088 (2005). Although the petition does allege that defense counsel failed to request a competency evaluation, the petitioner specifically disclaimed that he was raising an ineffective assistance of counsel claim. The habeas court agreed, concluding that a "fair and liberal reading of the . . . petition supports the conclusion that the petitioner is alleging only a due process violation, and that he is not alleging ineffective assistance of counsel in violation of the petitioner's rights under the sixth amendment [to] the United States constitution. Nor is the petitioner alleging ineffective assistance of appellate counsel on direct appeal [or] ineffective assistance by prior habeas counsel." The petitioner also disclaimed that he was raising an ineffective assistance of counsel claim on appeal to the Appellate Court; see *Saunders* v. *Commissioner of Correction*, supra, 483 n.12; and at oral argument before this court. The respondent does not press this issue before this court. Thus, consistent with these prior proceedings and the limited issues we have certified for appeal, we do not revisit this issue.

failed to allege sufficient cause and prejudice to overcome a procedural default?" *Saunders* v. *Commissioner of Correction*, 334 Conn. 917, 222 A.3d 103 (2020). We will discuss additional facts and procedural history as necessary to address the petitioner's claims.

I

The petitioner first claims that the Appellate Court incorrectly concluded that the procedural default defense applies to competency claims. He argues that, because an incompetent defendant cannot waive any rights,[3] including fundamental rights, any valid waiver of a fundamental right must be made on the record. Specifically, he argues that (1) this court should follow the guidance of federal courts that have declined to apply procedural default to competency claims because the harm of prosecuting an incompetent defendant outweighs the interests protected by the judge-made doctrine of procedural default, and (2) even if procedural default is a forfeiture rule, and not a waiver rule, this court should reject its applicability to competency claims. In response, the respondent argues that the Appellate Court correctly

[3] We express concern that, during the habeas proceedings, the petitioner's counsel indicated that the petitioner's mother was in the courtroom and represented that she is the petitioner's "legal protector . . . I should say, legal guardian. And she has signed, a while ago, a release to me that she wanted—she agreed that I should pursue his habeas [case], Your Honor." When the respondent's counsel expressed concern about whether there would be any effective waiver of attorney-client confidentiality because "I have trial counsel I would like to call as a witness, and there really is no ineffective assistance of counsel claim," the petitioner's counsel indicated that, if the respondent was considering calling the petitioner's criminal trial counsel as a witness, "*I* have no objection to Attorney [Alan D.] McWhirter testifying about the trial." (Emphasis added.) It is not clear from the record before us that habeas counsel could unilaterally waive the petitioner's attorney-client privilege if habeas counsel had determined it was necessary to have someone other than the petitioner approve the filing of the petition on his behalf due to the petitioner's alleged incompetency and inability to be restored to competence. Habeas counsel should consult rule 1.14 of the Rules of Professional Conduct on remand.

(1) applied Connecticut's habeas jurisprudence, and followed the majority of federal and other state courts, in holding that procedural default applies to competency claims, (2) declined to follow the decision of the United States Court of Appeals for the Second Circuit in *Silverstein* v. *Henderson*, 706 F.2d 361 (2d Cir.), cert. denied, 464 U.S. 864, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983), and other federal and state court decisions, because they improperly conflate waiver and procedural default, and (3) concluded that the interest in the finality of convictions outweighs the risk that a criminal defendant will be deprived of his right not to be prosecuted while incompetent. We agree with the respondent.

It is well established that, although federal postconviction jurisprudence does not bind us, this court has adopted the procedural default standard articulated in *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). See, e.g., *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 70–71, 136 A.3d 596 (2016). "Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition." (Internal quotation marks omitted.) Id., 71. The cause and prejudice standard "is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . ." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 191, 982 A.2d 620 (2009). The procedural default doctrine is a prudential limitation on the right to raise constitutional claims in collateral proceedings that vindicates the interests of finality of judgments and uniformity. See, e.g., *Hinds* v. *Commissioner of Correction*, supra, 71–72; *Crawford* v. *Commissioner of Correction*, supra, 188–89.

Raising the defense of procedural default in Connecticut proceeds as follows: The petitioner files a petition for a writ of habeas corpus under oath, stating the specific acts on which each claim is based and the relief requested; whether he has, in prior petitions, challenged the same confinement; the dispositions taken in connection with those petitions; and whether "the legal grounds [on] which the petition is based were previously asserted at the criminal trial, on direct appeal or in any previous petition." Practice Book § 23-22 (3). The respondent is then required to file a return to the petition and, specifically, must "allege any facts in support of any claim of procedural default . . . ." Practice Book § 23-30 (b). The petitioner must then file a reply to "allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. The reply shall not restate the claims of the petition." Practice Book § 23-31 (c). The habeas court, sua sponte or on a motion by the respondent, may dismiss the petition for "any other legally sufficient ground . . . ." Practice Book § 23-29 (5).[4] Alternatively, the habeas court may conduct a trial, an evidentiary hearing, or hear argument on a dispositive question of law. Practice Book § 23-40. The habeas court's conclusion that the petitioner procedurally defaulted his due process claims involves a question of law; our review is therefore plenary. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

Neither this court nor the United States Supreme Court has considered whether the defense of proce-

[4] Practice Book § 23-29 provides that a habeas court may dismiss a petition if it determines that "(1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists."

dural default applies to due process competency claims. We note, however, that we do not write on a clean slate. Rather, the same interests in finality and uniformity that apply to other procedurally defaulted constitutional claims apply in the present case. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71–72; *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 188. We conclude that these interests militate against carving out an exception to the defense of procedural default for competency claims.

As to finality, procedural default encourages petitioners to undertake "the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. . . . This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 189. Procedural default also discourages petitioners from sitting on claims for tactical and strategic reasons, and ensures that evidence that is crucial to petitioners' claims is available for review. "Memories fade with the passage of time, exhibits are lost, and other evidence is less likely to be available." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 416, 589 A.2d 1214 (1991). The greater lapse in time that occurs between conviction and a habeas court's consideration of a petition, unlike the direct appellate process with its stricter time limits, has serious consequences on the availability of witnesses and evidence. Id. Compare Practice Book § 63-1 (a) (direct appeal must be filed within twenty days of judgment), with General Statutes § 52-470 (c) (rebuttable presumption that habeas peti-

tion was delayed without good cause if not filed within five years of conviction deemed to be final judgment after appellate review or expiration of time for seeking such review) and General Statutes § 52-470 (d) (rebuttable presumption that successive habeas petition was delayed without good cause if not filed within two years of final judgment on prior petition due to conclusion of appellate review or expiration of time for seeking such review).

The petitioner argues that, because the state does not need to retry him if he succeeds on his competency claim, the finality interest is diminished, thereby militating against the application of the procedural default rule in this context. We do not agree. In fact, if anything, the passage of time heightens the concern that constitutional claims regarding competency be made timely. Not only is there the potential for the loss of evidence concerning a petitioner's incompetency at the time of his trial—in this case, fifteen years after it concluded—but, potentially, the petitioner's condition might further deteriorate, improve, or otherwise materially change. Courts have commented on the difficulties posed by attempting "retrospectively [to] determin[e] an accused's competence to stand trial." *Pate* v. *Robinson*, 383 U.S. 375, 387, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); see also *Gold* v. *Warden*, 222 Conn. 312, 317–18, 610 A.2d 1153 (1992). Although certain circumstances require a court to conduct nunc pro tunc, or retroactive, competency hearings, they are generally disfavored because of the "risk that the post hoc reconstruction of the defendant's mental state will be unduly speculative and inherently unreliable." *State* v. *Burgos*, 170 Conn. App. 501, 529, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017). The passage of time hinders the ability of postconviction courts to make meaningful determinations regarding a petitioner's competency at the time of trial. See, e.g., *United States* v. *Arenburg*, 605 F.3d

164, 171–72 (2d Cir. 2010) (remanding for nunc pro tunc competency determination if trial court determines meaningful hearing can be held); *United States* v. *Auen*, 846 F.2d 872, 878 (2d Cir. 1988) (same). The trial court "is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 523–24, 973 A.2d 627 (2009). A petitioner's failure to raise the issue of competency at trial or on direct appeal deprives the habeas court of the crucial perspective of the jurist presiding at the trial. Consistent with these policies, applying the procedural default defense to competency claims encourages the timely assertion of those claims when the trial court is in the best position to determine competency and to provide a timely remedy.

As to uniformity, we have emphasized the importance of applying the cause and prejudice standard consistently to all procedural defaults, whether the default occurred at trial or on direct appeal. See, e.g., *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 182 ("[i]n setting out [the cause and prejudice] standard, the [United States] Supreme Court emphasized the importance of the uniform application of procedural default standards, regardless of the specific nature of the procedural default"); see also *Coleman* v. *Thompson*, 501 U.S. 722, 747, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (explaining that United States Supreme Court cases since *Wainwright* "have been unanimous in applying the cause and prejudice standard"); *Newland* v. *Commissioner of Correction*, 331 Conn. 546, 561, 206 A.3d 176 (2019) (claim of complete denial of trial counsel was subject to procedural default, but prejudice is assumed); *Council* v. *Commissioner of Correction*, 286 Conn. 477, 489, 944 A.2d 340 (2008) (challenge

to validity of plea subject to procedural default when petitioner failed to file motion to withdraw guilty plea or to challenge validity of plea on direct appeal); *Correia* v. *Rowland*, 263 Conn. 453, 461–62, 820 A.2d 1009 (2003) (failure to raise issue of due process violation at trial or on direct appeal for state's failure to preserve evidence was procedurally defaulted); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 37–38, 779 A.2d 80 (2001) (failure to challenge allegedly illegal sentence at trial or on direct appeal was subject to procedural default); *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 409 (failure to challenge jury array or to raise ineffective assistance of counsel claim at trial or on direct appeal was subject to procedural default).

This court has recognized only two exceptions to the requirement that a petitioner's claims are subject to the defense of procedural default: (1) claims pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008),[5] and (2) like the United States Supreme Court, claims of actual innocence. We exempted *Salamon* claims from procedural default because we concluded that the finality interests[6] were "insufficiently weighty" in those cases and, further, that the state would "effectively be in the same position even if the petitioner had raised

[5] *Salamon* claims are habeas claims seeking to vacate a kidnapping conviction pursuant to this court's decision in *State* v. *Salamon*, supra, 287 Conn. 509, in which we overruled our long-standing interpretation of our kidnapping statutes. See id., 542; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 68–69.

[6] These finality interests included "(1) the fact that law enforcement relied on the old interpretation of the kidnapping statutes while trying the petitioner; (2) the fact that the retroactive application of *Salamon* has no deterrent value or remedial purpose; (3) the fear that our courts will be flooded with habeas petitions from other inmates convicted under [General Statutes] § 53a-92 (a) (2) (A); (4) the difficulty of retrying such cases where significant time has elapsed since conviction; and [5] perhaps most [important] . . . the concern that victims will be retraumatized by again having to testify and endure another round of judicial proceedings." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 73.

a *Salamon* type challenge in his criminal proceedings." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 76. Similarly, we have held that the "strong interest in the finality of judgments, and the state's interest in retrying a defendant with reasonably fresh evidence, does not require the continued imprisonment of one who is actually innocent" and, therefore, have allowed petitioners to raise a substantial claim of actual innocence for the first time on collateral review. *Summerville* v. *Warden*, 229 Conn. 397, 422, 641 A.2d 1356 (1994); see also *Murray* v. *Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). In acknowledging both exceptions, we have recognized that *Salamon* claims and claims of actual innocence are exceedingly rare. See, e.g., *Hinds* v. *Commissioner of Correction*, supra, 74–75 ("[o]f the 1.5 percent of [D]epartment of [C]orrection inmates incarcerated for kidnapping or unlawful restraint, one can reasonably assume that only a small subset will fall within the ambit of *Salamon*"); see also *Schlup* v. *Delo*, 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ("habeas . . . petitions that advance a substantial claim of actual innocence are extremely rare"). Thus, the finality interests and, as we explain next, the distinct and limited basis for actual innocence claims, which previously persuaded this court to carve out exceptions to the defense of procedural default, are not present for competency claims. We see no other prevailing reason to exempt competency claims from our uniform application of procedural default.

Citing *Wainwright* v. *Sykes*, supra, 433 U.S. 91, the petitioner also argues that procedural default should not apply to competency claims because the petitioner " 'will be the victim of a miscarriage of justice.' " Both the United States Supreme Court and this court, however, have limited this exception to claims of actual innocence. See *Schlup* v. *Delo*, supra, 513 U.S. 321; *Sum-*

merville v. *Warden*, supra, 229 Conn. 422. A petitioner's claim of incompetency at the time of trial is not the same as a claim of incompetency at the time of his crimes. The latter claim would address his culpability and, therefore, his "actual innocence." *Perkins* v. *Hall*, 288 Ga. 810, 826, 708 S.E.2d 335 (2011), overruled in part on other grounds by *State* v. *Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020). Instead, the claim of incompetency at the time of trial is "a trial right—a [due process] based protection designed to ensure that he received a fair trial." (Emphasis omitted.) Id. The habeas petitioner "does not come before the [c]ourt as one who is innocent, but on the contrary as one who has been convicted by due process of law . . . ." (Internal quotation marks omitted.) *Summerville* v. *Warden*, supra, 423. Thus, the application of procedural default to claims addressing competency to stand trial would not result in the same "miscarriage of justice" that *Wainwright* contemplated.

Nonetheless, the petitioner argues that we should follow the decisions of several federal courts, including the Second Circuit, and hold that substantive competency claims[7] cannot be procedurally defaulted. In *Silverstein* v. *Henderson*, supra, 706 F.2d 361, the Second Circuit declined to hold that a petitioner's claim regarding competency to stand trial was subject to procedural default. See id., 366. The court in *Silverstein* applied the logic of *Pate* v. *Robinson*, supra, 383 U.S. 375, in which the United States Supreme Court held that a petitioner could not waive his right to a competency hearing at trial by failing to request one because "it is contradictory to argue that a defendant may be incom-

[7] "A procedural competency claim is based [on] a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, [whereas] a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent." (Internal quotation marks omitted.) *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 489 n.14, quoting *Lay* v. *Royal*, 860 F.3d 1307, 1314 (10th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 1553, 200 L. Ed. 2d 752 (2018).

petent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id., 384. The Second Circuit held that this rationale also applied to a petitioner's failure "to object or to take an appeal on the issue" on collateral review, resting its holding that procedural default does not apply to competency claims or *Wainwright*'s waiver rule. See *Silverstein* v. *Henderson*, supra, 367. Waiver, in this context, is "an intentional relinquishment or abandonment of a known right or privilege by the petitioner personally and depended on his considered choice." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 131, 629 A.2d 413 (1993).

As the respondent and the Appellate Court aptly noted, however, in the nearly forty years since *Silverstein*, the great weight of federal and Connecticut habeas jurisprudence has transitioned from a waiver standard to a forfeiture standard for procedural default. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 488–93. We explained in *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 165, that our prior habeas jurisprudence, using the deliberate bypass standard for procedural defaults, "was predicated on an assumption about federal law that later was refuted by the federal adoption of cause and prejudice for all procedural defaults . . . ." Id., 188. We have defined forfeiture in the criminal context as "the failure to make the timely assertion of a right . . . ." (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71, 967 A.2d 41 (2009). Thus, our procedural default standard is more akin to forfeiture, which addresses the petitioner's timing in raising a constitutional claim and not the mental state driving his decision to waive a claim. Additionally, *Silverstein* does not discuss the finality or uniformity interests served by procedural default. We are persuaded that, given the

more recent move away from a waiver standard for procedural default, and the compelling finality and uniformity interests implicated, *Silverstein* is not helpful in resolving the contemporary question of whether to apply procedural default to competency claims.[8]

In concluding that the Appellate Court correctly held that the petitioner's claim is subject to procedural default, we recognize the predicament facing habeas petitioners who may have been incompetent at the time of trial and, because of that incompetency, failed to raise the issue at trial or on direct appeal. Because we conclude, however, that, if properly pleaded, incompetency is a legally cognizable "cause" that may survive a motion to dismiss; see part II A of this opinion; the potential harm of applying procedural default to competency claims is mitigated.

II

The petitioner next challenges the Appellate Court's conclusion that his pleadings failed to allege sufficient cause and prejudice to overcome a procedural default. As to the cause prong, he argues that incompetency can constitute cause.[9] As to the prejudice prong, he

[8] The petitioner also contends that our decision in *State* v. *Gore*, 288 Conn. 770, 777–78, 955 A.2d 1 (2008), should lead us to conclude that we have adopted a "nonforfeiture doctrine with respect to fundamental constitutional rights." We are not persuaded. *Gore* is a waiver case, and, therefore, the petitioner's argument falters on the same analytical defect in *Silverstein*. See *State* v. *Gore*, supra, 776–77 ("[o]ur task, therefore, is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to a jury trial"). We agree that an incompetent defendant cannot, at the time of trial, knowingly, intelligently, and voluntarily waive the right not to be tried while incompetent in violation of the wisdom of *Pate* v. *Robinson*, supra, 383 U.S. 384. However, our case law regarding procedural default is consistent with a forfeiture regime, not waiver. In fact, we previously have held that a petitioner *can* procedurally default the right to a jury trial, the constitutional claim advanced in *Gore*. See *Duperry* v. *Solnit*, 261 Conn. 309, 330–33, 803 A.2d 287 (2002).

[9] In particular, the petitioner argues that his allegation of incompetency sufficiently established cause because the trial court's failure to conduct a competency hearing during his underlying criminal trial was external to the

argues that prejudice must be presumed because incompetency to stand trial constitutes structural error. The respondent counters that the Appellate Court correctly held that the petitioner's reply was deficient pursuant to Practice Book § 23-31 (c).[10] As to cause, the respondent argues that the Appellate Court correctly held that the petitioner's mental impairment is not an external impediment to his defense and, thus, cannot suffice to overcome the procedural default. The respondent also posits that, on collateral review, due process claims of incompetence to stand trial must be brought with an accompanying ineffective assistance of counsel claim. The respondent does not address the sufficiency of the petitioner's allegation of prejudice. We address each prong in turn.

A

The United States Supreme Court has left open for resolution the precise definition of cause and prejudice for more than forty years; see *Wainwright* v. *Sykes*,

defense. Because we hold that the petitioner's claim of incompetency in general is external to him, we do not address this specific argument.

[10] The respondent argues that the petitioner's reply was deficient because he failed to plead a legally sufficient cause to rebut the defense of procedural default. The respondent relies on *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 788–89, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009), in which the Appellate Court held that the habeas court properly dismissed in part a habeas petition because the petitioner's reply "fail[ed] to allege any facts or [to] assert any cause and resulting prejudice to permit review of his claims" to rebut the affirmative defense of procedural default. Id., 788. In the present case, the habeas court and the Appellate Court concluded that the petition and the reply were deficient because an allegation of incompetency was not legally sufficient to establish cause. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 498–99. Because we hold that incompetency may constitute legally sufficient cause, we find the respondent's argument unavailing. Both the petitioner's petition and his reply specifically allege that he suffers from "severe [i]ntellectual and [a]daptive disabilities" and "significant physiological and mental health afflictions" that prevented him from comprehending the nature of the legal proceedings against him and from assisting in his defense. Thus, the pleadings satisfy Practice Book § 23-31 (c).

supra, 433 U.S. 87; but has explained "that the existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor *external to the defense* impeded counsel's efforts to comply with the [s]tate's procedural rule." (Emphasis added.) *Murray* v. *Carrier*, supra, 477 U.S. 488; accord *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 568. "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Davila* v. *Davis*, U.S. , 137 S. Ct. 2058, 2065, 198 L. Ed. 2d 603 (2017). Objective factors external to the defense include, but are not limited to, "a showing that the factual or legal basis for a claim was not reasonably available to counsel," outside interference by officials that made compliance impracticable, and ineffective assistance of counsel that violates the sixth amendment. *Murray* v. *Carrier*, supra, 488.

Cause and prejudice replaced the "deliberate bypass" standard in federal and state habeas jurisprudence as the standard courts apply in response to a procedural default. The deliberate bypass standard had assessed "whether the record affirmatively disclose[d] that the petitioner's decision to waive his right to appeal was made voluntarily, knowingly and intelligently." *Valeriano* v. *Bronson*, 209 Conn. 75, 79, 546 A.2d 1380 (1988). The cause and prejudice standard, instead, "rests not only on the need to deter intentional defaults" but also on the judgment that the costs of habeas review are high when a trial default has occurred. *Murray* v. *Carrier*, supra, 477 U.S. 487. A trial default "deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and exacts an extra charge by undercutting the [s]tate's ability to enforce its procedural rules." (Internal quotation marks omitted.) Id. The United States Supreme Court has explained that these costs "do not

disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim." Id.; see also *Wainwright* v. *Sykes*, supra, 433 U.S. 87–88 (noting that cause and prejudice standard is narrower than deliberate bypass standard).

The cause and prejudice standard, therefore, is designed to default inadvertent forfeitures of constitutional claims, as well as intentional waivers. The cause and prejudice standard is also designed to excuse procedural defaults beyond a petitioner's control. For a cause to be "internal," the law presumes some level of participation by the petitioner in his defense so that we hold him answerable for failing to raise a claim at trial or on direct appeal, whether it is active participation, such as intentional waivers, or passive participation, such as inadvertent forfeitures. Incompetency, on the other hand, has the effect of the petitioner's being unable to participate in his defense. See General Statutes § 54-56d (a). The due process protection against trying an incompetent defendant finds support in the common-law ban on "trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." (Internal quotation marks omitted). *Drope* v. *Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Indeed, we measure incompetence to stand trial by whether the defendant "is unable to understand the proceedings against him or her or to assist in his or her own defense." General Statutes § 54-56d (a).

Determining whether a cause is internal or external based on a petitioner's ability to participate in his defense is similar to drawing the distinction between the kinds of attorney error that we do or do not impute to petitioners for purposes of satisfying the cause prong of the cause and prejudice standard. On the one hand, a petitioner is bound by counsel's tactical decisions, whether

counsel is flouting procedural rules or hedging against strategic risks. See *Reed* v. *Ross*, 468 U.S. 1, 13–14, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). In those situations, excusing the procedural default "would be contrary to [well settled] principles of agency law." *Coleman* v. *Thompson*, supra, 501 U.S. 754, citing 1 Restatement (Second), Agency § 242, p. 534 (1958) (master is subject to liability for harm caused by negligent conduct of servant within scope of employment). On the other hand, "if the procedural default is the result of ineffective assistance of counsel, the [s]ixth [a]mendment itself requires that responsibility for the default be imputed to the [s]tate. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate." (Citation omitted; internal quotation marks omitted.) *Coleman* v. *Thompson*, supra, 754.

We decline to follow the Appellate Court's analysis, and that of several federal courts of appeals, holding that mental incompetency is "internal" to the petitioner and therefore not recognizing incompetency as legally sufficient to satisfy the cause prong of the cause and prejudice standard. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 503–504. Four circuits have concluded that incompetency is internal because "[s]omething that comes from a source within the petitioner is unlikely to qualify as an external impediment." *Harris* v. *McAdory*, 334 F.3d 665, 669 (7th Cir. 2003), cert. denied, 541 U.S. 992, 124 S. Ct. 2022, 158 L. Ed. 2d 499 (2004); see also *Gonzales* v. *Davis*, 924 F.3d 236, 242–44 and 244 n.4 (5th Cir. 2019), cert. denied, U.S. , 140 S. Ct. 1143, 206 L. Ed. 2d 199 (2020); *Johnson* v. *Wilson*, 187 Fed. Appx. 455, 458 (6th Cir. 2006), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 96 (2007); *Hull* v. *Freeman*, 991 F.2d 86, 91

(3d Cir. 1993). We find the analysis of these courts flawed and, therefore, reject this conclusion. Specifically, we do not read the case law to consider pertinent to a determination of external versus internal cause whether that cause comes from "within the petitioner" (e.g., within his mind or body). Rather, "internal" is defined as "something fairly attributable to the petitioner," and, as we have explained, whether cause is internal presumes a level of participation by the petitioner in his defense.[11] The fact that our statutes impose a duty on defense counsel, the state, and the trial court—but not the defendant himself—to raise the issue of competency also informs us that incompetency is external to the petitioner. See General Statutes § 54-56d (c). And, unlike other causes of procedural default that courts have held are internal to a petitioner, such as illiteracy or limited education; see, e.g., *Harris* v. *McAdory*, supra, 669; only competence to stand trial is a constitutionally protected due process right.

We instead agree with the United States Court of Appeals for the Eighth Circuit, which has recognized incompetency as legally sufficient to satisfy the cause prong of the cause and prejudice standard and to excuse

[11] We also are unpersuaded that the same alleged incompetency that would have exempted the petitioner from standing trial in 2006 is also "fairly attributable" to the petitioner so that, if proven as alleged, it would not serve as cause to excuse procedural default. Such circuitous logic defies common sense and our constitutional, statutory, and jurisprudential protections against convicting an incompetent defendant. See *State* v. *Johnson*, 253 Conn. 1, 20, 751 A.2d 298 (2000) ("Connecticut jealously guards" right of accused persons who are not legally competent to stand trial to not be convicted); see also General Statutes § 54-56d (a) (providing that "[a] defendant shall not be tried, convicted or sentenced while the defendant is not competent"); *Drope* v. *Missouri*, supra, 420 U.S. 171–72 ("it suffices to note that the prohibition [on trying a mentally incompetent defendant] is fundamental to an adversary system of justice"). To keep a petitioner incarcerated because of a procedural bar, if the claim that the petitioner was incompetent to have stood trial is correct, would be repugnant to these ideals.

procedural default. In doing so, the Eighth Circuit held that "there must be a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and [to] make rational decisions regarding his or her case at the time during which he or she should have pursued . . . relief." *Holt* v. *Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999); see also *Schneider* v. *McDaniel*, 674 F.3d 1144, 1154 (9th Cir.) (explaining that Ninth Circuit precedent does "not necessarily foreclose the possibility that a pro se petitioner might demonstrate cause in a situation where a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance"), cert. denied, 568 U.S. 1001, 133 S. Ct. 579, 184 L. Ed. 2d 380 (2012); *Farabee* v. *Johnson*, 129 Fed. Appx. 799, 802 (4th Cir. 2005) (assuming, without deciding, "that profound mental illness may constitute cause to excuse a procedural default in certain circumstances" but determining that petitioner did not demonstrate that any mental illness actually caused his procedural defaults). Consistent with the standard the Eighth Circuit has articulated, if a petition has been sufficiently pleaded to survive a motion to dismiss, habeas courts must assess whether a petitioner's incompetency satisfies the cause prong of the cause and prejudice standard.

In the present case, the Appellate Court was "persuaded that the risk of a truly incompetent person being convicted and sentenced without any requested examination of, or other challenge to, his or her competency during the criminal trial proceedings or on direct appeal is so minimal that the systemic interests of finality, accuracy of judicial decisions, and conservation of judicial resources vastly outweighed such risk." *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 493. This assumption is premised on attorneys—those appearing on behalf of the petitioner and the state, as well as the court itself—being duty bound to raise the

issue if it appears that the defendant is not competent to stand trial. See General Statutes § 54-56d (c); see also *Pate* v. *Robinson*, supra, 383 U.S. 385 (court must conduct competency hearing when evidence "raises a 'bona fide doubt' " as to defendant's competence to stand trial); *State* v. *Skok*, 318 Conn. 699, 722, 122 A.3d 608 (2015) ("[a] trial court has an independent obligation to inquire, sua sponte, into a defendant's competency when there is sufficient evidence before the court to raise a reasonable doubt as to whether the defendant can understand the proceedings or assist in her defense"). There is also the presumption that a defendant is competent to stand trial. See General Statutes § 54-56d (b). Given this presumption, and our confidence in our state bar to raise issues of competency, we agree with the Appellate Court that the risk of a truly incompetent person being convicted and sentenced without challenge is minimal—but not zero.[12] The cause and prejudice standard is meant to balance the need for keeping habeas relief available to those petitioners who warrant it against the societal costs of habeas relief, and is not meant to thwart the interest in preventing a miscarriage of justice. See *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 559–60.

We disagree with the respondent that due process competency claims must therefore be brought with an accompanying ineffective assistance of counsel claim. "In habeas corpus proceedings, courts often describe constitutional claims that are not tethered to a petition-

[12] We emphasize that we hold only that the petitioner's allegations of incompetency suffice to survive a motion to dismiss. On remand, to excuse his procedural default, the petitioner must still satisfy (1) the cause requirement of the cause and prejudice standard by establishing that he was incompetent at the time of his underlying criminal trial or direct appeal, *and* that his incompetency interfered with his ability to appreciate his position and make rational decisions regarding his case at the time during which he should have pursued relief, *and* (2) the prejudice requirement by showing that there is a reasonable probability that, had the issue been raised, the trial court would have found him incompetent and not restorable to competency.

er's sixth amendment right to counsel as 'freestanding.' " *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810 n.8, 218 A.3d 638 (2019). Although ineffective assistance of counsel in violation of the sixth amendment is the most commonly asserted basis for cause to excuse procedural default; 7 W. LaFave et al., Criminal Procedure (3d Ed. 2007) § 28.4 (d), p. 202; it is not the exclusive basis. In holding that a novel constitutional claim could give rise to cause and excuse a procedural default, the United States Supreme Court has explained that there is a "broad range of potential reasons for an attorney's failure to comply with a procedural rule, and [a] virtually limitless array of contexts in which a procedural default can occur . . . ." *Reed* v. *Ross*, supra, 468 U.S. 13. "[T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." Id., 14. The United States Supreme Court, therefore, has recognized as sufficient to establish cause a scenario in which, as in the present case, an objective factor is external to the defense yet still tangential to the effective assistance of counsel. Given the lack of precedential support for the proposition that procedurally defaulted competency claims *must* be brought with an ineffective assistance of counsel claim, we do not preclude the petitioner from raising a freestanding competency claim.[13]

[13] Indeed, there is the risk that the petitioner's incompetency prevented him from relating his incompetency to his attorneys. Incompetence, in that instance, may have impeded "[defense] counsel's efforts to comply with the [s]tate's procedural rule" requiring that counsel request a competency examination and, therefore, constitutes an external cause to excuse procedural default. *Murray* v. *Carrier*, supra, 477 U.S. 488. A defendant representing himself at trial may also have no avenue to vindicate his due process rights against being tried while incompetent if his incompetency caused his procedural default. These examples highlight why an ineffective assistance of counsel claim does not necessarily need to accompany a due process competency claim. See *McCarthy* v. *Commissioner of Correction*, supra, 192 Conn. App. 811 (determining that petitioner's due process claim that his guilty plea was involuntary because of his misunderstanding of state's evidence, while related to petitioner's claim of ineffective assistance of

B

Although the petitioner alleged prejudice in his reply, stemming from his conviction, incarceration, and special parole, the habeas court concluded that his allegation did not suffice. On appeal, the petitioner argues only that he was not required to allege or prove prejudice because prejudice is presumed for competency claims. See *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 548 (concluding that, "for purposes of procedural default, after the petitioner has established good cause for failing to raise his claim that he was completely deprived of his right to counsel [at his criminal trial], prejudice is presumed"). The petitioner provides no further support as to this issue. The respondent argues that the petitioner's reply was deficient because he failed to plead a legally sufficient cause to rebut the defense of procedural default.

The habeas court concluded that the petition and reply were deficient because an allegation of incompetency is legally insufficient to establish cause and prejudice. The Appellate Court agreed with the habeas court to the extent that an allegation of incompetency is not legally sufficient to establish cause but did not address the petitioner's argument regarding prejudice. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 499, 503 n.20.

With respect to the prejudice prong, a habeas petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis in original.) *United States* v. *Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); accord *Hinds* v. *Commissioner of Correction*, supra, 321 Conn.

counsel, is "a separate, freestanding due process claim subject to procedural default").

84. "In applying that standard, the [United States Supreme Court] indicated that the petitioner would have to demonstrate that, with the proper instruction, there was a 'substantial likelihood' that the jury would not have found the petitioner guilty of the crime of which he was convicted. . . . Substantial likelihood or reasonable probability does not require the petitioner to demonstrate that the jury more likely than not would have acquitted him had it properly been instructed. . . . 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (Citations omitted.) *Hinds* v. *Commissioner of Correction*, supra, 84–85; 7 W. LaFave, supra, § 28.4 (d), p. 207 (explaining that United States Supreme Court has clarified that, "in order to establish prejudice under [*Wainwright*], a petitioner must demonstrate that had the constitutional claim been raised in accordance with state rules, there is a 'reasonable probability that the result of the trial would have been different' "). The prejudice inquiry often overlaps or merges with the showing of harm required to prevail on the underlying constitutional claim of error. See *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 570–71 (showing of prejudice necessary to succeed on ineffective assistance of counsel claim necessarily satisfies prejudice prong of procedural default); see also *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 600 n.6, 119 A.3d 1153 (2015) ("[i]n the context of a guilty plea . . . to succeed on the prejudice prong the petitioner must demonstrate that, but for counsel's alleged ineffective performance, the petitioner would not have pleaded guilty and would have proceeded to trial" (internal quotation marks omitted)).[14] In the context of a claimed due process violation

[14] Other courts have held, in the context of counsel's failure to raise the issue of competency, that a petitioner must show that "there is a reasonable probability that the trial court would have found [the petitioner] incompetent had the issue been raised." *Blakeney* v. *United States*, 77 A.3d 328, 348 (D.C. 2013), cert. denied, 574 U.S. 1013, 135 S. Ct. 689, 190 L. Ed. 2d 392 (2014); see id., 348 n.65 (citing cases). Similarly, our Appellate Court has concluded

for being tried and convicted while incompetent, to prove prejudice, the petitioner therefore must show that there is a reasonable probability that, had the issue been raised, the trial court would have found him incompetent and not restorable to competency.[15]

We disagree with the habeas court that the petitioner failed to allege sufficient prejudice to survive a motion to dismiss. Because the habeas court dismissed the petition on a motion by the respondent, the petitioner was not allowed to make a conclusive showing that, had the trial court ordered a competency evaluation, he would have been found incompetent to stand trial and not restorable to competency. The petitioner's reply to the respondent's return states that he "is prejudiced because he stands convicted of sexual assault in the first degree and is currently serving [ten] years of special parole." The petition further alleges that the petitioner "was not competent to be prosecuted and to stand trial" and that, due to his severe cognitive limitations and significant physiological and mental health afflictions, it was impossible for him to (1) "have any legally competent understanding of the criminal justice court system at the time of his arrest and subsequent trial," (2) "under-

that a petitioner failed to show prejudice to excuse procedural default for counsel's failure to request additional competency evaluations because the petitioner failed to present credible evidence that he was not competent throughout his criminal trial. See *Andrades* v. *Commissioner of Correction*, 108 Conn. App. 509, 520, 948 A.2d 365, cert. denied, 289 Conn. 906, 957 A.2d 868 (2008).

[15] To excuse a defendant from standing trial, the trial court is required to find both that the defendant is incompetent and not restorable to competency. See General Statutes § 54-56d (f) ("[i]f the court finds that the defendant is not competent, the court shall also find whether there is a substantial probability that the defendant, if provided with a course of treatment, will regain competency within the maximum period of any placement order permitted under this section"). Because the prejudice prong of the cause and prejudice standard requires the petitioner to show that the trial court would have found him incompetent had the issue been raised at trial or on direct appeal, this inquiry must necessarily include the additional showing that the petitioner was not restorable to competency at the time of trial.

stand the criminal justice legal proceedings engendered by and encompassed by his arrest and subsequent trial," and (3) "appreciate and to understand in a legally competent manner his pending prosecution and criminal trial, such that he could not effectively assist in his defense." Reading the pleadings "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842, 878 A.2d 1088 (2005); we are satisfied that the petitioner has sufficiently alleged that, had the trial court had him evaluated, his severe cognitive limitations and significant physiological and mental health afflictions would have established that he was incompetent to stand trial, was not restorable to competency and, therefore, would not have been tried and convicted. Thus, we conclude that the pleadings satisfy Practice Book § 23-31 (c). See footnote 10 of this opinion. On remand, the petitioner must produce evidence to support this claim and thereby successfully rebut the defense of procedural default.

Accordingly, the case must be remanded to the habeas court to address whether the petitioner was incompetent at the time of his criminal trial or direct appeal, thereby satisfying the cause and prejudice exception to the doctrine of procedural default.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the habeas court's judgment and to remand the case to the habeas court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

CARMEN LOPEZ *v.* WILLIAM RAVEIS REAL ESTATE, INC., ET AL.
(SC 20574)

Robinson, C. J., and D'Auria, Mullins, Ecker and Keller, Js.

Syllabus

Pursuant to statute (§ 46a-64c (a) (1)), it is a discriminatory practice "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . lawful source of income . . . ."

Pursuant further to statute (§ 46a-64c (a) (3)), it is a discriminatory practice "[t]o make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . lawful source of income . . . or an intention to make any such preference, limitation or discrimination."

The plaintiff sought to recover damages for alleged housing discrimination in connection with certain statements that the defendant H, a real estate salesperson, made regarding the plaintiff's participation in the Section 8 Housing Choice Voucher Program. H served as an independent contractor for the named defendant, R Co., a real estate broker. R Co., through H, entered into a listing contract with the defendant V for the exclusive right to lease an apartment owned by V and his wife. Thereafter, the plaintiff, through her real estate agent, B, submitted an application and offer to lease the apartment. After receiving the documents and speaking with V, who wanted the apartment rented by April 1, 2017, H notified B that they were "all set" for a lease commencing on that date. B then sent H blank section 8 paperwork to accompany the plaintiff's application. H and B then proceeded to exchange e-mails and text messages, in which H repeatedly indicated that she was not aware that the plaintiff would be using a section 8 voucher, that she would have to speak to V, that the decision was up to V, and that she was not sure if V would want to wait for the section 8 approval process. H eventually texted B that V had received a competing offer for the apartment, and, several hours later, H texted B that V had accepted the competing offer. The plaintiff alleged that H violated § 46a-64c (a) (1) and (3) by denying her the opportunity to rent the apartment on the basis of her lawful source of income and by making statements that indicated any preference, limitation, or discrimination on the basis of lawful source of income, and, in addition, that R Co., V, and V's wife were vicariously liable for H's statements. After a trial to the court, the trial court rendered judgment for the defendants, concluding that the plaintiff had failed to prove unlawful discrimination. Specifically, with respect to the plaintiff's

claim under § 46a-64c (a) (3), the court determined that H's statements would not convey to an ordinary listener a rejection of or otherwise disfavor a section 8 tenancy. On the plaintiff's appeal from the trial court's judgment, *held*:

1. The trial court incorrectly concluded that H's statements did not indicate any preference, limitation, or discrimination based on lawful source of income, in violation of § 46a-64c (a) (3):

a. Contrary to the plaintiff's claim, the trial court properly applied the ordinary listener standard in determining whether H's statements conveyed an impermissibly discriminatory preference: this court considered the statute's legislative history, as well as cases interpreting federal fair housing laws and the federal counterpart to § 46a-64c (a) (3), in particular, and concluded that, when a notice, statement, or advertisement that allegedly violates § 46a-64c (a) (3) is plainly discriminatory on its face, courts need not examine the surrounding context or the speaker's intent to determine whether the statement indicates any impermissible preference, limitation, or discrimination to the ordinary listener, but, when such a notice, statement, or advertisement is not discriminatory on its face, courts may consider context and the intent of the speaker to aid in determining the way an ordinary listener would have interpreted it; in the present case, the trial court apparently concluded that H's statements were not facially discriminatory, and, because this court agreed with that determination, it was not improper for the trial court to consider the context of H's statements in determining whether they indicated any preference, limitation, or discrimination based on lawful source of income.

b. The trial court's conclusion that H's statements would not have conveyed to an ordinary listener an impermissible preference with respect to lawful source of income was clearly erroneous: there was overwhelming evidence in the trial court's factual findings that supported the plaintiff's housing discrimination claim, as, after indicating that the plaintiff was "all set," H stated four separate times that she was not aware that the plaintiff intended to use a section 8 voucher to pay rent and that she was not sure whether V would want to wait, H had already made two of those statements before receiving the competing offer, meaning that she could not reasonably rely on the competing offer to explain her earlier statements, and, in context, H's statements could not reasonably be understood to mean anything other than that the plaintiff's intention to use her section 8 voucher to pay rent would be an obstacle to her lease application; moreover, the trial court's conclusion in favor of H undercut the broad protections afforded by § 46a-64c (a) (3), which is intended to protect against the psychic injury caused by discriminatory statements, especially in light of this state's public policy that landlords may not discriminate against housing applicants who use section 8 assistance and the legislature's manifest intent to afford low income families access to the rental housing market; in the present case, the plaintiff

indicated that she was able to satisfy V's interest in an April 1, 2017 tenancy, any preference to avoid the administrative process the section 8 program involved was an impermissible consideration under both subdivisions (1) and (3) of § 46a-64c (a), and this court was left with the definite and firm conviction that the trial court's conclusion that H's statements did not express a preference with respect to, or discriminate on the basis of, the plaintiff's lawful source of income was not simply an alternative yet permissible view of the evidence.

2. Although the trial court did not address the issue of vicarious liability, this court determined, as a matter of law, that R Co. was vicariously liable for H's statements but that V and his wife were not, and, accordingly, this court reversed the judgment of the trial court and remanded the case with direction to render judgment for the plaintiff as to liability against H and R Co. under § 46a-64c (a) (3) and for further proceedings to determine, inter alia, the damages to which the plaintiff was entitled: the parties stipulated, and the trial court found, that R Co. is a real estate broker and that H is R Co.'s independent contractor, and, because H acted on behalf of R Co. when she executed the listing contract with V and her statements were made in furtherance of that contract, R Co. was liable to the same extent as if H were its employee pursuant to the statute (§ 20-312a) governing the vicarious liability of real estate brokers; moreover, although V and his wife had an independent contractor relationship with H, there was no evidence that the listing contract gave V any control over H, and, in the absence of any exception to the general rule that employers are not liable for the torts of their independent contractors, V and his wife were not vicariously liable for any of H's statements.

Argued October 14, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for alleged housing discrimination, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the case was tried to the court, *Kowalski*, *J.*; judgment for the defendants, from which the plaintiff appealed. *Reversed in part*; *further proceedings*.

Jeffrey Gentes, for the appellant (plaintiff).

Tracey Lane Russo, for the appellees (named defendant et al.).

Joseph P. Sargent, for the appellees (defendant Anthony Vaccaro et al.).

Opinion

ROBINSON, C. J. In this appeal, we consider the standard for determining whether a statement made in connection with the sale or rental of a dwelling violates General Statutes § 46a-64c (a) (3)[1] by indicating a "preference, limitation, or discrimination," or an "intention to make any such preference, limitation or discrimination," on the basis of an individual's "lawful source of income . . . ." The plaintiff, Carmen Lopez, appeals[2] from the judgment of the trial court rendered in favor of the defendants, William Raveis Real Estate, Inc. (Raveis), Sarah Henry, a licensed real estate salesperson, and Anthony Vaccaro and Eve Vaccaro,[3] in this action alleging housing discrimination in violation of § 46a-64c (a). On appeal, the plaintiff claims that the trial court, in considering whether Henry violated § 46a-64c (a) (3) by making certain statements in the course of renting an apartment owned by the Vaccaros, improp-

[1] General Statutes § 46a-64c (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section:

"(1) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, familial status or status as a veteran.

* * *

"(3) To make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, familial status, learning disability, physical or mental disability or status as a veteran, or an intention to make any such preference, limitation or discrimination. . . ."

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we subsequently granted the plaintiff's motion to transfer this appeal from the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] For purposes of convenience, we refer to the defendants individually as appropriate. Consistent with the trial court's memorandum of decision, we refer to Anthony Vaccaro individually as "Vaccaro" and to Eve Vaccaro by her full name.

erly considered whether Henry had the subjective intent to discriminate on the basis of lawful source of income when she made those statements. The plaintiff specifically contends that she is entitled to judgment in her favor because (1) Henry's statements were facially discriminatory, rendering her subjective intent irrelevant as a matter of law, and (2) even if we were to conclude that Henry's statements were not facially discriminatory, the trial court nevertheless incorrectly determined that the statements, considered in context, did not convey an impermissible preference. We conclude that, although the trial court applied the proper legal standard in considering the plaintiff's claims under § 46a-64c (a) (3), its ultimate conclusion as to liability on the facts of this case was clearly erroneous with respect to Henry. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following relevant facts, as found by the trial court, and procedural history. At all relevant times, the Vaccaros owned a two family home located at 5 Prince Street in Danbury. On January 28, 2017, Vaccaro entered into an exclusive right to lease listing contract with Raveis, through its authorized representative, Henry, to lease a rental apartment located in the two family home (rental apartment). Henry is a real estate salesperson who is affiliated with Raveis, a real estate broker, pursuant to an independent contractor agreement. Vaccaro informed Henry that he wanted to ensure a new tenancy was in place for the rental apartment by April 1, 2017. Henry listed the rental apartment on the multiple listing service database, and, on March 9, the plaintiff, through her real estate agent, Sarah Becker, submitted to Henry an application and offer to lease the rental apartment. Henry received the documents on March 11, and, despite the plaintiff's having left blank portions of the offer to lease,[4] Henry

[4] The trial court found the following facts with respect to the plaintiff's offer to lease: "The offer to lease identified [the plaintiff] as the tenant,

forwarded the offer to Vaccaro on March 12. The next day, March 13, following a phone call with Vaccaro, Henry e-mailed Becker: "[A]ll set for April 1st. I will get the lease over to you. [It's] one month rent and one month security."

Later on March 13, Becker sent Henry blank paperwork for the Section 8 Housing Choice Voucher Program (section 8) to accompany the plaintiff's application to lease the rental apartment. After Henry received the section 8 documents on March 15, the following conversation occurred:

At 8:29 a.m., Henry e-mailed Becker: "*I wasn't aware that this was a* [*s*]*ection 8 tenant.* I have to speak with [Vaccaro] today. [He] is looking for a security deposit for this rental . . . . I will give you a call later today."

At 9:46 a.m., Becker e-mailed Henry: "To whom should [the] check be made out . . . . I can be there for [the] housing inspection if you like, but [I] will need access to [the] basement. It's oddly one of the best parts of [my] working with housing—free inspections. I had a state paid tenant in one of my buildings for [more than eight] years (not [section] 8 but similar), the direct deposit payments and yearly inspections were great really—that agency monitored the condition of the apartment, and they kept a paper trail and photos. No disagreements over who did what to a place, plus I

Prince Street as the premises, a lease term starting on April 1, 2017, ending '[one] year, may renew,' and a lease price of $1500 per month, but left a blank where it would have been indicated that an initial deposit was tendered with the offer. There were other blanks that were not filled in on the offer to lease, including two consecutive lines that were left blank, as follows:

"Security Deposit: Payable to Landlord or Landlord's Agent upon Signing of Lease: $ _____

"Additional Rent: Payable to Landlord or Landlord's Agent upon Signing of Lease: $ _____

"Although these lines were left blank, the words 'AS REQUESTED' were handwritten next to the additional rent line. . . . The offer to lease further provided that it would expire at midnight 'ASAP' if not accepted by all parties and identified as a contingency 'kitchen sink faucet leaking, needs repair.' "

knew I'd get paid [which made it] easier to sleep at night. Plus to get a voucher the state has already checked out the tenant financially and their background, so that is a huge benefit to a landlord as well. Win-win. [Vaccaro] hasn't had anyone with voucher assistance before? You can let him know that most of the rent will come from the tenant, and a part from the state via direct deposit, and other than that it's pretty normal. Let me know how I can help. . . . Will need to get paperwork in ASAP so [we] can have [the] place inspected fast to meet [the] April 1 start date. Usually a place may fail the first time on a stuck/broken window or no [ground fault circuit interrupter (GFCI)] outlets, basic safety issues that should be in place for any tenant, and then passes on [the] second trip. If [the] windows function OK and [there are GFCI] outlets by [the] sinks, [it] should be in good shape, place looks nice."

At 10:41 a.m., Henry texted Becker: "Good morning *I was not aware of the* [*s*]*ection 8 when I spoke with you I'm not sure* [*Vaccaro*] *would want to wait. I know it takes a couple of weeks for the process and he wants to* [*rent*] *it by April 1st* I will speak with him today and let you know thanks." (Emphasis added.)

At 12:31 p.m., Henry texted Becker: "I will speak with [Vaccaro] later today to make a decision about the rental."

At 1:36 p.m., Henry texted Becker: "*You did not inform me of section 8 when I spoke with you about the offer. I have to present that to* [*Vaccaro*]. [*I'm*] *not sure if* [*he*] *wants to* [*wait*] *through the process.* It is up to my client. We do not have a signed offer yet." (Emphasis added.)

At 1:50 p.m., Henry texted Becker: "[Vaccaro] has another offer he's also looking at we do not have an offer without a signed lease. *You were not upfront with me with* [*s*]*ection 8 and I didn't* [*present it*] *to* [*Vaccaro*]

that way as well. It's up to [*Vaccaro*] *what he would like to do with the offers as well as the waiting.* I will get back to you tonight thank you." (Emphasis added.)

At 1:52 p.m., Becker texted Henry: "It is not necessary to identify [my] client as having a voucher to all places she applies to, I respect her privacy, only that income is sufficient."

At 2:23 p.m., Henry texted Becker: "Yes, it is necessary by law. *It needs to be on the offer if paying from a* [*third*] *party.* [Vaccaro] will let me know tonight either way thanks." (Emphasis added.)

At 7:09 p.m., Henry texted Becker: "Hi, [Vaccaro] has decided to go with the other offer, [s]orry."

As reflected in the conversation, Henry received a second offer to lease on behalf of Everton Thompson and Saudia Dyer (Thompson and Dyer offer) on March 15, 2107, at 11:37 a.m. The Thompson and Dyer offer was accompanied by a completed rental application. It also proposed a lease term beginning on March 15, 2017, and ending on February 28, 2018, a lease price of $1500 per month, and a security deposit of $3000, and identified no contingencies. Vaccaro instructed Henry to accept the Thompson and Dyer offer and had a fully executed lease for the rental apartment by March 18.

The plaintiff subsequently brought this action for, inter alia, compensatory damages, punitive damages, and declaratory and injunctive relief, claiming that the defendants violated § 46a-64c (a) by (1) denying her the opportunity to rent property on the basis of her lawful source of income,[5] in violation of subdivision (1) of

[5] By way of background, General Statutes § 46a-63 (3) defines "lawful source of income" as "income derived from Social Security, supplemental security income, *housing assistance*, child support, alimony or public or state-administered general assistance." (Emphasis added.) "[T]he lawful sources of income protected from discrimination by § 46a-64c include 'section 8 rental subsidies as a form of housing assistance.' " *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250 Conn. 763, 775, 739 A.2d 238 (1999).

§ 46a-64c (a), and (2) making a statement with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination on the basis of lawful source of income, in violation of subdivision (3) of § 46a-64c (a). The case was tried to the court over four days. The trial court issued a memorandum of decision and rendered judgment in favor of the defendants, concluding that the plaintiff failed to prove that the defendants had discriminated against her on the basis of her lawful source of income in light of Henry's statements. Given its conclusion as to Henry's liability, the trial court also declined to reach the plaintiff's derivative claims against Raveis and the Vaccaros.

Subsequently, the plaintiff filed a motion for reargument and reconsideration on the grounds that the trial court either failed to analyze her § 46a-64c (a) (3) claims or improperly analyzed those claims under the mixed motive analysis applicable to § 46a-64c (a) (1) claims. The trial court granted the plaintiff's motion and issued an addendum to its memorandum of decision, further explaining its judgment in favor of the defendants on the plaintiff's § 46a-64c (a) (3) claims. Specifically, the trial court stated in that addendum that it "must determine whether Henry's statements convey a preference against Lopez to an ordinary listener, hearing the statements in context." Applying that standard, the trial court ultimately concluded that Henry's statements did "not convey a rejection [of] or disfavor[ing] . . . a section 8 tenancy" and, therefore, did not violate § 46a-64c (a) (3).[6] This appeal followed.

[6] In reaching this conclusion, the trial court focused extensively on Becker and her communications with the plaintiff. The trial court stated: "[F]rom Becker's messages and conduct on March 15, it appears that Becker immediately jumped to the conclusion that [the plaintiff's] section 8 participation was a problem. . . .

"Then, in an exchange of messages between Becker and [the plaintiff] beginning at 10:59 a.m., Becker asked [the plaintiff] if she could call her housing contact because 'the landlord is a flight risk' and is 'trying to back off which is illegal and I will report them.' . . . By 1:35 p.m., Becker messaged [the plaintiff] that '[she] called the president of the real estate board.

On appeal, the plaintiff asks us to direct judgment in her favor, claiming that Henry's statements were facially discriminatory on the basis of her lawful source of income, in violation of § 46a-64c (a) (3), rendering it unnecessary to consider the context of those statements. The plaintiff further claims that the record supports a conclusion as a matter of law that the other defendants, Raveis and the Vaccaros, are vicariously liable for Henry's statements. We address each claim in turn.

I

We begin with the plaintiff's claims with respect to whether the trial court correctly determined that Henry's statements did not violate § 46a-64c (a) (3). Specifically, the plaintiff argues that (1) the trial court applied an improper legal standard in considering this claim, and (2) the trial court's finding that Henry's statements did not convey a discriminatory message to an ordinary listener was clearly erroneous.

A

We first address the plaintiff's claim that the trial court improperly applied the ordinary listener standard articulated by the United States Court of Appeals for the Second Circuit in *Soules* v. *United States Dept. of Housing & Urban Development*, 967 F.2d 817 (2d Cir. 1992), when it considered the context surrounding Henry's statements in determining whether they stated a preference or discriminated on the basis of lawful source of income, in violation of § 46a-64c (a) (3). Relying on the Second Circuit's subsequent decision in

If they do continue with the other offer (that suddenly exists) you have [a] legal case against [the] landlord [and] his agent. Minimum fine is around [$5000] to them.' By 9:05 p.m., Becker told [the plaintiff] that she had a 'perfect paper trail on this discrimination case and [was] reporting [it] to [the relevant state authorities]' and had identified counsel who was willing to help her pursue a discrimination claim."

Rodriguez v. *Village Green Realty, Inc.*, 788 F.3d 31 (2d Cir. 2015), the plaintiff argues that, under *Soules*, the proper analysis of facially discriminatory statements like those made by Henry is limited to whether an ordinary listener would infer that the speaker had stated a preference against a member of the protected class, and does not take into account whether the speaker had the subjective intent to discriminate. To this end, the plaintiff also argues that the trial court improperly failed to decide at the outset whether Henry's statements were facially discriminatory in determining whether it was appropriate to consider their context, instead concluding that it is *always* appropriate to consider context in determining whether a statement violates § 46a-64c (a) (3).

In response, Raveis and Henry argue that the plaintiff misreads *Soules* and that, under that case, the trial court properly considered context in determining whether Henry's statements violated § 46a-64c (a) (3). The Vaccaros, relying on several federal district court decisions following *Soules*, namely, *Thurmond* v. *Bowman*, 211 F. Supp. 3d 554, 566 (W.D.N.Y. 2016), appeal dismissed, Docket No. 16-3545, 2016 WL 10100759 (2d Cir. November 1, 2016), *Short* v. *Manhattan Apartments, Inc.*, 916 F. Supp. 2d 375, 394 (S.D.N.Y. 2012), and *Mancuso* v. *Douglas Elliman LLC*, 808 F. Supp. 2d 606, 625 (S.D.N.Y. 2011), argue that the trial court properly applied the ordinary listener test, as utilized in the Second Circuit, because the ordinary listener always considers statements in their context. We agree with the plaintiff's argument that the ordinary listener considers context only when necessary to analyze a notice, statement, or advertisement that is not clearly discriminatory on its face, but, applying that standard, we conclude that the trial court properly considered context in the present case.

Whether the trial court applied the proper standard for analyzing the statements under § 46a-64c (a) (3)

presents an issue of statutory construction that raises a question of law, over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). "It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 696, 258 A.3d 1268 (2021).

As required by § 1-2z, we begin with the text of the statute, which provides in relevant part that it is "a discriminatory practice" to "make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . lawful source of income . . . or an intention to make any such preference, limitation or discrimination." General Statutes § 46a-64c (a) (3); see footnote 1 of this opinion (complete text of § 46a-64c (a) (1) and (3)).

Section 46a-64c (a) (3) is silent as to the proper standard by which to analyze statements alleged to violate the statute, leaving the statute susceptible to multiple, plausible interpretations as to the proper standard. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 400, 999 A.2d 682 (2010) (silence as to scope of provision rendered statute ambiguous with respect to its scope because there was more than one plausible interpretation). When silence renders a statutory provision ambiguous "with respect to [the issue at hand], our analysis is not limited by . . . § 1-2z . . . . In addition to the words of the statute itself, we look to . . . the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter." (Citation omitted; internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008).

Turning to the legislative history, we note that then state Senator Richard Blumenthal described the bill that was enacted in 1990 as the Connecticut Discriminatory Housing Practices Act as having "all the standards and assurances that exist under federal law" and "incorporat[ing] the federal [Fair Housing Act, 42 U.S.C. 3601 et seq. (federal act)] into our state statute . . . ." 33 S. Proc., Pt. 2, 1990 Sess., p. 3494. With no on point discussion in the legislative history of the provision enacted as § 46a-64c (a) (3), we are left to consider how the state fair housing act relates to common-law principles and federal fair housing laws. In interpreting our state fair housing laws, "we are guided by the cases interpreting federal fair housing laws . . . despite differences between the state and federal statutes." (Citation omitted.) *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 202, 596 A.2d 396 (1991); see, e.g., *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 407 ("this court previously has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws"). We find particularly instructive the constructions of the federal act by the United States Court of Appeals for the Second Circuit in the absence of a United States Supreme Court decision on point. See *Feehan* v. *Marcone*, 331 Conn. 436, 478, 204 A.3d 666 ("[i]n considering claims of federal law, it is well settled that, when the United States Supreme Court has not spoken, we find decisions of the Second Circuit particularly persuasive"), cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019). Accordingly, we will look to cases interpreting 42 U.S.C. § 3604 (c),[7] which is the

[7] Section 3604 (c) of title 42 of the 2018 edition of the United States Code provides that it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

federal counterpart to § 46a-64c (a) (3), even though the state statute is unique insofar as it includes lawful source of income as a protected class.

Our analysis begins with the Second Circuit's decision in *Ragin* v. *New York Times Co.*, 923 F.2d 995 (2d Cir.), cert. denied, 502 U.S. 821, 112 S. Ct. 91, 116 L. Ed. 2d 54 (1991), in which that court analyzed the statutory language of 42 U.S.C. § 3604 (c) in upholding the denial of a motion to dismiss an action claiming that a newspaper had violated the federal act by publishing real estate advertisements that featured virtually no black models, thus indicating a preference for white purchasers. See id., 998–1000. "Beginning [its] analysis with the statutory language, [the Second Circuit noted that] the first critical word is the verb 'indicates.' Giving that word its common meaning, [the court] read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question." Id., 999.

"[The court] read the word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it." Id., 999–1000. "Moreover, the statute prohibits *all* ads that indicate a racial preference to an ordinary reader *whatever the advertiser's intent*. To be sure, the intent of the creator of an ad *may* be relevant to a factual determination of the message conveyed . . . but *the touchstone is nevertheless the message*. If, for example, an advertiser seeking to reach a group of largely white consumers were to create advertisements that discouraged potential black consumers from responding, the statute would bar the ads, [regardless of] whether the creator of the ad had a subjective racial intent."[8] (Citation omitted; emphasis

[8] In responding to the plaintiff's reliance on *Ragin* v. *New York Times Co.*, supra, 923 F.2d 995, Raveis and Henry set forth this quoted language without analysis or context. Having considered it, we understand the Second Circuit to mean that the analysis must begin with the message itself, with the speaker's subjective intent only relevant when a court must look beyond

added.) Id., 1000. The court also noted that the "ordinary reader is neither the most suspicious nor the most insensitive of our citizenry." Id., 1002. Considering the advertisement at issue in the context of twenty years of advertisements, the Second Circuit determined that it presented a viable claim of a violation of 42 U.S.C. § 3604 (c) by stating racial preferences in the context of the sale of real estate, emphasizing "a long-standing pattern of publishing real estate ads in which models of potential consumers are always white while black models largely portray service employees, except for the exclusive use of black models for housing in predominantly black neighborhoods." Id., 1001.

Subsequently, the Second Circuit more clearly delineated when and why the ordinary listener considers evidence beyond the statement itself in *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 817. In *Soules*, the court considered whether a real estate agent violated the federal act by asking a prospective tenant how old her child was because "an elderly person lived in the first floor unit, and . . . she did not want an upstairs resident who would make too much noise." Id., 820. The court stated that, "[i]n cases [in which statements] are clearly discriminatory, a court may look at [the statement] and determine whether it indicates an impermissible preference to an ordinary reader, and inquiry into the author's professed intent is largely unnecessary." Id., 824. The court also stated that, because written content does not communicate the inflection of the speaker, "courts must turn to other evidence in determining whether a violation of the [federal act] occurred." Id., 825. "[Fact finders] may examine intent . . . because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it." Id. Deeming the real estate agent's statement not facially discriminatory, the

the plain language of the statement at issue to determine whether it conveys an impermissible preference.

court stated that the context and intent of the speaker could either expose an impermissible preference or simply explain why the statement was made, and upheld the administrative law judge's conclusion that the statements at issue were made to determine whether the prospective tenants were noisy.[9] Id., 825–26; see also *Jancik* v. *Dept. of Housing & Urban Development*, 44 F.3d 553, 554–55 (7th Cir. 1995) (considering context, including two statements that indicated express preference against children and teenagers, to determine that " 'mature person preferred' " advertisement expressed impermissible preference).

Significantly, the Second Circuit also suggested in *Soules* that context is particularly helpful when there may be a legitimate reason for inquiring into one's status as a protected class, observing that, "whereas [t]here is simply no legitimate reason for considering an applicant's race . . . there are situations in which it is legitimate to inquire about the number of individuals interested in occupying an apartment and their ages." (Internal quotation marks omitted.) *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 824. "In [*Soules*], for example, [the real estate agent] asked [the perspective tenant] whether her child was noisy and later stated that an elderly tenant 'would probably not be able to take a noisy child running around.' Depending on the context and intent of the speaker, the latter question either could intimate an impermissible preference or simply might explain—to a desired tenant—why the first question had been asked. It also might send a message that a tenant with a noisy child will

[9] The Vaccaros argue that the court in *Soules* stated the proper inquiry was whether the ordinary listener, in light of all the circumstances, would have interpreted the statement to indicate an impermissible preference. It is true that the court stated such, but it did so in a portion of the decision immediately *preceding* this section, which distinguished the statements in question from those that are facially discriminatory and discussed the distinct analysis that facially discriminatory statements warrant. See *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 824.

probably be confronted with regular complaints from the elderly tenant making the apartment less attractive to the prospective tenant." Id., 825.

Finally, in *Rodriguez* v. *Village Green Realty, Inc.*, supra, 788 F.3d 36–39, the Second Circuit considered whether there was sufficient evidence to raise a genuine issue of material fact as to whether a real estate agent had violated 42 U.S.C. § 3604 (c) by making certain comments with respect to the tenants' disabled child. Concluding that 42 U.S.C. § 3604 (c) could be violated even if the person who was the subject of the statements did not actually qualify as disabled under the federal act; id., 41; the court explained that it would contradict the language of 42 U.S.C. § 3604 (c) to hold that the inquiry depended on the speaker's subjective state of mind. See id., 53. Rather, the inquiry under 42 U.S.C. § 3604 (c) depends on whether the challenged statement conveyed a prohibited preference to the ordinary listener, with the " 'touchstone' " of the inquiry being the message itself.[10] Id. Section 3604 (c) prohibits all ads that indicate an impermissible preference to an ordinary reader, regardless of intent. See id. However, when the message does not convey an impermissible preference on its face, courts may turn to evidence beyond the message to determine whether the ordinary reader would, in fact, interpret the message to violate the statute. See id.

Guided by this Second Circuit case law, we conclude that, when a notice, statement, or advertisement that allegedly violates § 46a-64c (a) (3) is plainly discriminatory on its face, courts need not examine the surround-

[10] The defendants argue that the court in *Rodriguez* did not articulate a standard for facially discriminatory statements. However, the court expressly stated that, "[u]nder [42 U.S.C. §] 3604 (c), the speaker's subjective belief is not determinative. What matters is whether the challenged statements convey a prohibited preference or discrimination to the ordinary listener." (Emphasis omitted.) *Rodriguez* v. *Village Green Realty, Inc.*, supra, 788 F.3d 53.

ing context or the speaker's intent to determine whether the statement indicates any impermissible preference, limitation, or discrimination to the ordinary listener. When, however, such a notice, statement, or advertisement is not facially discriminatory, courts may consider the context and intent of the speaker to aid in determining the way an ordinary listener would have interpreted it.[11] In the present case, the trial court did not expressly conclude whether the statements were facially discriminatory, stating only that "Henry made no statement that conveys the message that she was disinclined to proceed with a prospective . . . tenancy [by the plaintiff] because of section 8 program participation." We understand that statement to mean that the court concluded that the statements were not facially discriminatory—a conclusion with which we agree. Thus, it was not improper for the trial court to consider the context of the statements in determining whether they stated a preference with respect to lawful source of income, in violation of § 46a-64c (a) (3).[12]

[11] The three federal District Court cases cited by the Vaccaros do not support their argument that the ordinary listener always considers context in evaluating an allegedly discriminatory statement. In *Mancuso*, the court proceeded to a consideration of context only following its initial assessment that the statement in question did "not clearly convey an impermissible preference to an ordinary person." *Mancuso* v. *Douglas Elliman, LLC*, supra, 808 F. Supp. 2d 626; see *Short* v. *Manhattan Apartments, Inc.*, supra, 916 F. Supp. 2d 394 (reciting standard from *Mancuso*, in which statements in question were not clearly discriminatory and, thus, warranted consideration of context). Further, although the court in *Thurmond* stated that the "ordinary listener hears the statement in context," it proceeded to forgo a consideration of the context as the statements at issue therein were "plainly" in violation of the federal act. *Thurmond* v. *Bowman*, supra, 211 F. Supp. 3d 566; see id., 567 ("[the] statements, in and of themselves, are enough to trigger liability under [42 U.S.C.] § 3604 (c), because the intent of the speaker is not determinative of liability").

[12] We note that the plaintiff claims that the trial court's finding that Henry did not subjectively intend to discriminate was clearly erroneous. We need not consider this claim because, although it would have been proper for the trial court to consider Henry's subjective intent insofar as the statements were not facially discriminatory, we nevertheless agree with Raveis and Henry that the trial court did not do so in its § 46a-64c (a) (3) analysis.

B

We now turn to the plaintiff's contention that the trial court incorrectly concluded that Henry's statements, even when considered in context, would not have conveyed an impermissible preference to an ordinary listener. Under Second Circuit case law, the ordinary listener inquiry is one of fact. See, e.g., *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) ("[T]he inquiry directed by *Ragin* [v. *New York Times Co.*, supra, 923 F.2d 995] is whether a *hypothetical ordinary reader* would find that a defendant's ads expressed an impermissible racial preference. Like the inquiry in negligence cases concerning whether a defendant's conduct conformed with that of the reasonable person, this question is one that the [fact finder] can answer by viewing the ads and the defendants' conduct and then applying common sense." (Emphasis in original.)); *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 825 ("[i]t is for this reason that [fact finders] may examine intent, not because a lack of design constitutes an affirmative defense to [a] . . . violation [of the federal act], but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it"); *Ragin* v. *New York Times Co.*, supra, 1000 ("the intent of the creator of an ad may be relevant to a *factual determination* of the message conveyed" (emphasis added)); *Gilead Community Services, Inc.* v. *Cromwell*, 432 F. Supp. 3d 46, 68 (D. Conn. 2019) ("whether the various statements . . . '*convey* a prohibited pref-

Indeed, in its memorandum of decision, the trial court focused on the plaintiff's § 46a-64c (a) (1) claim, including in its findings. It does not address whether the trial court found that Henry intended to indicate a preference in her statements to Becker. The trial court's addendum, which specifically addresses the § 46a-64c (a) (3) claim, similarly lacks a finding as to whether Henry intended her statements to Becker to be discriminatory. The addendum relies on context only to determine how the ordinary listener would have interpreted the nonfacially discriminatory statements.

erence or discrimination to the ordinary listener' . . . should be determined by the jury" (citation omitted; emphasis in original)).

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when *although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis added; internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 417, 211 A.3d 20 (2019). Further, "[b]ecause it is the trial court's function to weigh the evidence and [to] determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 259, 152 A.3d 470 (2016).

We begin with the facts that the trial court included in its addendum discussing the plaintiff's § 46a-64c (a) (3) claim. As support for its conclusion that Henry's statements did not violate § 46a-64c (a) (3), the trial court cited the fact that Henry forwarded a *sample* lease to the plaintiff after finding out about her section 8 status. We fail to see the significance of this fact in light of the overwhelming evidence in the trial court's findings that support the plaintiff's § 46a-64c (a) (3) claim.[13] Immediately prior to learning about the plaintiff's section 8 status, Henry had communicated that the deal was "all set for April 1st." After Henry learned

[13] The trial court also spent a significant portion of its discussion on text messages exchanged between Becker and the plaintiff subsequent to Becker's receipt of the text messages from Henry. See footnote 6 of this opinion. We disagree with the trial court's extensive reliance on these statements because Becker's subjective reaction to Henry's statements hardly informs how an ordinary listener would understand Henry's statements.

of the plaintiff's section 8 status, she abruptly shifted gears to inform Becker that (1) they did "not have an offer without a signed lease," (2) Henry was "not sure [Vacarro] would want to wait," as she knew it took "a couple of weeks for the process," and (3) according to Henry, Vaccaro had to decide "whether he would want to wait for the section 8 program process to run its course given his expressed desire to have the [rental apartment] rented by April 1, 2017," as the trial court stated. In the hours following her receipt of the plaintiff's section 8 forms, Henry stated four separate times that she was not previously aware of the plaintiff's intention to use a section 8 voucher to pay the rent.

The Vaccaros argued that the fact that the plaintiff's initial paperwork was incomplete was also relevant to place Henry's statements in context, as was the existence of the competing offer from Thompson and Dyer. The facts, however, undermine the strength of this argument. After the plaintiff's initial submission of incomplete paperwork, Henry had stated that the deal was still "all set for April 1st." In regard to the competing offer, the trial court found that it was e-mailed to Henry at 11:37 a.m. on March 15, 2017. By that time, Henry had already made two of the four statements at issue and had stated that she was not sure Vaccaro would want to wait. The chronology of events does not reasonably permit her to rely on the competing offer to explain the statements that she made earlier that morning.

Thus, the trial court's ultimate finding that the ordinary listener would not have inferred that Henry's statements indicated any preference, limitation or discrimination was inconsistent with all but one of the subordinate facts it found. Put differently, Henry's statements could not reasonably be understood in context to mean anything other than that the plaintiff's intention to use her section 8 voucher to pay the rent would be a stumbling block to completing the transaction.

Beyond being inconsistent with the other facts it found, the trial court's conclusion undercuts the broad protections provided by § 46a-64c (a) (3). As the plaintiff argues, the purpose of 42 U.S.C. § 3604 (c), the federal provision on which § 46a-64c (a) (3) is modeled, "is to protect against the 'psychic injury' caused by discriminatory statements made in relation [to] the housing market."[14] See R. Schwemm, "Discriminatory Housing Statements and § 3604 (c): A New Look at the Fair Housing Act's Most Intriguing Provision," 29 Fordham Urb. L.J. 187, 249–50 (2001); see also *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 424–25 (2d Cir. 2005) ("[T]he [D]istrict [C]ourt's view that [the provision's] purpose is to 'prevent expressions that result in the denial of housing' is too narrow. The statute also 'protect[s] against [the] psychic injury' caused by discriminatory statements made in connection with the housing market. . . . If that were not so, Congress likely would not have made [the provision] applicable to dwellings that are otherwise exempt from [the act's] prohibition on discrimination." (Citations omitted.)). Our statute mirrors the broad language of the federal provision and differs only in its inclusion of additional protected classes, such as lawful source of income. See footnotes 1 and 7 of this opinion.

The protections against psychic injury provided by § 46a-64c (a) (3) are particularly significant with respect

[14] We note that 42 U.S.C. § 3604 (c) is itself broader than the other federal antidiscrimination laws on which it is modeled, namely, Title VII of the Civil Rights Act, which provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-3 (b) (2018). Section 3604 (c) expanded those protections into the fair housing context by adding "statement[s]" to the practices banned by the provision and by adding language that brought even stated intentions under the protection of fair housing laws. 42 U.S.C. § 3604 (c) (2018). That expansion was consistent with an overarching goal of the federal act, which is to promote "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968), remarks of Senator Walter F. Mondale.

to lawful source of income. "Unlike the federal provisions governing section 8, the provisions of § 46a-64c, which require landlords to accept otherwise qualified tenants whose lawful source of income may include section 8 housing assistance, are *mandatory*. Pursuant to this statute, it is a part of the public policy of this state that landlords may not discriminate against housing applicants because such applicants, otherwise qualified as potential tenants, look to section 8 assistance for payment of the stipulated rent."[15] (Emphasis added.) *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250 Conn. 763, 774, 739 A.2d 238 (1999). The statute reflects "the legislature's manifest intent to afford low income families access to the rental housing market." Id., 782. Given the mandatory nature of the section 8 program in Connecticut, landlords may not justify disfavoring housing vouchers, which are a lawful source of income, by claiming reluctance to undertake the various administrative burdens that attend participation, such as undergoing rental unit inspections.[16]

[15] In contrast, in states with voluntary section 8 programs, statutes banning lawful source of income discrimination often have been read to allow landlords to refuse a section 8 tenant for legitimate business reasons related to compliance with that program's requirements. See, e.g., *Dussault* v. *RRE Coach Lantern Holdings, LLC*, 86 A.3d 52, 60 (Me. 2014) ("We recognize the . . . purpose [of the Maine Human Rights Act] to protect public assistance recipients' rights to secure decent housing. We will not, however, read into [that act] a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program."); *Edwards* v. *Hopkins Plaza Ltd. Partnership*, 783 N.W.2d 171, 177 (Minn. App. 2010) ("Minnesota law does not require property owners in Minnesota to participate in [s]ection 8 programs. . . . And we conclude that refusal to participate in a voluntary program for a legitimate business reason does not constitute discrimination under the [Minnesota Human Rights Act]." (Citations omitted.)).

[16] However, "nothing in the statutes forbidding discrimination against tenants receiving section 8 rental subsidies requires landlords to accept tenants who may be unqualified to rent for nondiscriminatory reasons such as, for example, a poor rental history, poor references, or poor credit. The target of the statutes is, instead, the unspoken presumption that section 8 assistance recipients, by virtue only of their source of income, are undesirable tenants for a landlord's rental properties." (Footnote omitted.) *Commission on*

See id., 778–82 (rejecting claim that exception existed under antidiscrimination provision allowing landlords not to participate in section 8 program by refusing use of statutorily mandated lease); see also *DiLiddo* v. *Oxford Street Realty, Inc.*, 450 Mass. 66, 77, 876 N.E.2d 421 (2007) (declining to carve out exception to mandatory section 8 program in Massachusetts for landlords facing substantial economic harm from compliance with its requirements).

Thus, given that the plaintiff indicated that she would have been able to meet Vaccaro's desired occupancy date of April 1, 2017, particularly with Becker's demonstrated desire to expedite the transaction, any preference to avoid the administrative process of the section 8 program in this transaction could not have been a determinative consideration in Vaccaro's rental decision under § 46a-64c (a) (1), which, ipso facto, renders it impermissible under § 46a-64c (a) (3) for Henry to express that Vaccaro planned to consider the length of the section 8 process in his rental decision.[17] Henry stated that she was "not sure if [Vaccaro] wants to [wait] through the process" and that it was up to him. By expressing that Vaccaro may not want to participate

Human Rights & Opportunities v. *Sullivan Associates*, supra, 250 Conn. 776.

[17] This is not to say that the plaintiff's status as a section 8 voucher holder automatically required the Vaccaros to rent the apartment to her, or otherwise privilege her application over other applications. Indeed, the trial court found credible Vaccaro's testimony that Thompson and Dyer presented a better offer. This illustrates the distinction between the protections offered by subdivisions (1) and (3) of § 46a-64c (a). Subdivision (3) prohibits all statements that express even an intention to indicate a preference or limitation based on any of the protected classes. As a result, there can be a violation of § 46a-64c (a) (3) even in the absence of a violation of § 46a-64c (a) (1). Put differently, the defendants did not violate the housing discrimination statute by the act of communicating and taking a better offer. Rather, Henry violated the statute by making a statement that an ordinary listener surely would understand to mean that the section 8 approval process could be a determinative consideration in the rental decision, when, as previously discussed, it cannot be.

in the section 8 approval process, and that the transaction may not proceed after Becker had surprised her with the plaintiff's section 8 status, Henry indicated that the administrative process would be a significant consideration in Vaccaro's rental decision, which is a clear indication of an intention to make a preference based on lawful source of income.

The trial court ultimately concluded that Henry's statements "would not have been understood as discriminatory by an ordinary listener . . . ." However, a violation of § 46a-64c (a) (3) does not require discriminatory animus. Nor does it require a rejection of or disfavoring a lawful source of income. Section 46a-64c (a) (3) bars statements that a reasonable listener would understand to *convey* an intention to make any such "preference, limitation, or discrimination . . . ." In light of the broad language of § 46a-64c (a) (3) and the abundance of facts supporting an inference that the ordinary listener would have understood Henry's statements to fall within the reach of the statute, we are left with a definite and firm conviction that the trial court's conclusion was not simply an alternative yet permissible view of the evidence. See, e.g., *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 96, 920 A.2d 357 ("whe[n] there are two permissible views of the evidence, the [fact finder's] choice between them cannot be clearly erroneous" (internal quotation marks omitted)), cert. denied, 284 Conn. 901, 931 A.2d 261 (2007). It was clear error for the trial court to find that Henry's statements did not indicate even so much as an intention to make an impermissible consideration of section 8 in the rental decision. Accordingly, we conclude that the plaintiff is entitled to judgment as a matter of law as to liability on her § 46a-64c (a) (3) claim against Henry,[18] with remand to the trial court

[18] Although there are instances in which a reversal by this court based on a holding of clear error required a new trial as an appellate remedy; see, e.g. *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015) (determining

necessary for consideration of the plaintiff's claims for damages, attorney's fees, and declaratory and injunctive relief. See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 132–33, 161 A.3d 1227 (2017).

II

Because the trial court rendered judgment in favor of the defendants on the basis of its conclusion as to Henry's statements, it did not reach the plaintiff's derivative liability claims. The plaintiff argues that there is sufficient evidence in the record to conclude as a matter of law that, pursuant to General Statutes § 20-312a,[19] Raveis is vicariously liable for Henry's conduct. The plaintiff also asserts that, by virtue of authorizing Raveis and Henry to list a unit that he and his wife owned, Vaccaro created an agency relationship with

that requirement of different legal standard generally entitles parties to new trial); *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 225, 990 A. 2d 326 (2010) (trial court's damages award was clearly erroneous and case was remanded for new trial limited to determining adequate damages); a review of our case law does not require a new trial as to liability in the present case. We find persuasive our recent decision in *Bilbao* v. *Goodwin*, 333 Conn. 599, 217 A.3d 977 (2019). In that case, we reviewed the trial court's factual determination that an agreement was not supported by consideration. See id., 617. In determining that the trial court's finding was clearly erroneous and that the agreement was supported by consideration, this court cited inconsistent facts and facts supporting the contrary conclusion, as well as the trial court's improper reliance on certain case law. See id., 617–20. Rather than remanding the case for a new trial, this court remanded with direction to render the judgment the trial court would have rendered in the absence of its clearly erroneous factual finding. See id., 623; see also *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 556–57, 893 A.2d 389 (2006) (concluding that trial court's agency determination was clearly erroneous and directing judgment consistent with lack of agency relationship); *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 419–20, 880 A.2d 882 (2005) (concluding that trial court's finding of actual notice was clearly erroneous and directing judgment consistent with lack of notice).

[19] General Statutes § 20-312a provides: "In any action brought by a third party against a real estate salesperson affiliated with a real estate broker as an independent contractor, such broker shall be liable to the same extent as if such affiliate had been employed as a real estate salesperson by such broker."

the Vaccaros as the principals and Raveis and Henry as their agents, and, thus, the Vaccaros are vicariously liable for the tortious acts of Raveis and Henry. In response, the defendants claim that agency law requires a fact intensive inquiry, and, because the trial court did not adjudicate the vicarious liability claims against them, there is no record for this court to consider. We agree with the plaintiff that Raveis is vicariously liable for Henry's statements as a matter of law but disagree with respect to the Vaccaros.

This court need not remand the case for the trial court's decision on the issue of vicarious liability if it can be determined as a matter of law on the record before us. See *Hudson Wire Co.* v. *Winsted Brass Workers Union*, 150 Conn. 546, 552, 191 A.2d 557 (1963). In other words, if the evidence necessary for resolution is undisputed, then this court can decide the issue as a matter of law without need for a remand for factual findings. See, e.g., *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 309–310, 788 A.2d 1199 (2002); see also *Allstate Ins. Co.* v. *Palumbo*, 296 Conn. 253, 267–68, 994 A.2d 174 (2010) (citing cases).

Again, turning to cases interpreting the federal act, we note that the United States Supreme Court has stated that the federal statute incorporates "ordinary [tort related] vicarious liability rules . . . ." *Meyer* v. *Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003). As applied in the state law context, under this court's well established vicarious liability jurisprudence, an employer is liable for the negligent and wilful torts of an employee that occurred within the scope of employment and were done in furtherance of the employer's business. E.g., *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 208, 579 A.2d 69 (1990); see *Matthiessen* v. *Vanech*, 266 Conn. 822, 840 n.16, 836 A.2d 394 (2003) ("an employer generally is liable for intentional torts committed by his employees to the

same extent that he is liable for damages arising out of the negligent or reckless conduct of those employees").

In Connecticut, the vicarious liability of a real estate broker is governed by § 20-312a, which provides: "In any action brought by a third party against a real estate salesperson affiliated with a real estate broker as an independent contractor, such broker shall be liable to the same extent as if such affiliate had been employed as a real estate salesperson by such broker." The parties stipulated to the fact that Raveis is a broker and that Henry is a real estate salesperson associated with Raveis by an independent contractor agreement. The trial court also made these findings in its memorandum of decision. Thus, under § 20-312a, Raveis is liable to the same extent as if Henry were its employee.

The trial court found that Henry acted on behalf of Raveis when she executed the exclusive right to lease listing contract with Vaccaro in relation to the rental apartment. It cannot reasonably be contended that statements made about the plaintiff's prospective tenancy in the Vaccaros' rental apartment were not in furtherance of the listing contract, and there is no evidence to suggest that Henry's conversations with Becker in regard to the rental apartment were outside the scope of that engagement. Therefore, we conclude as a matter of law that Raveis is vicariously liable for Henry's statements in violation of § 46a-64c (a) (3).

The plaintiff also asserts that, having authorized Raveis and Henry to list a unit that he and his wife owned, Vaccaro created an agency relationship with the Vaccaros as the principal and Raveis and Henry as their agents, and, thus, the Vaccaros are vicariously liable for the wrongful acts of those agents. At oral argument before this court, counsel for the Vaccaros argued that Vaccaro hired Henry as an independent contractor and provided no training, tools, equipment or instructions, other than the desired amount of rent,

and, thus, cannot be held liable for her wrongful acts. We agree with the Vaccaros and conclude that Henry had an independent contractor relationship with them for purposes of their vicarious liability.

A principal is generally liable for the authorized acts of their agent. E.g., *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996). Agency is "the fiduciary relationship [resulting] from [the] manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act . . . ." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 102, 209 A.3d 629 (2019). "The test of the [agency] relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." (Internal quotation marks omitted.) *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 697, 651 A.2d 1286 (1995). Further, "[a]n independent contractor has been defined as one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." (Internal quotation marks omitted.) Id.

Turning to the record, we observe that the listing contract Henry executed between Raveis and Vaccaro stated that "[Raveis] will use reasonable efforts to lease the [rental apartment]." This provision does not state or imply that the Vaccaros had the right to intervene as to the means or methods by which to lease the listed property. Outside of the limited terms of the listing contract, there is no evidence to suggest that Vaccaro had the right to control anything other than the result, namely, the terms of the lease and which offer he

accepted.[20] Accordingly, we conclude that Vaccaro and Henry had an independent contractor relationship as a matter of law.

Generally, an employer is not liable for the torts of its independent contractors. E.g., *Gazo* v. *Stamford*, 255 Conn. 245, 257, 765 A.2d 505 (2001). "The explanation for [this rule] most commonly given is that, [because] the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and [the contractor], rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 517–18, 825 A.2d 72 (2003).

The plaintiff raised an exception to this general principle in its brief to this court, at least as to Eve Vaccaro. Relying on *Alexander* v. *Riga*, 208 F.3d 419, 432–33 (3d Cir. 2000), cert. denied, 531 U.S. 1069, 121 S. Ct. 757, 148 L. Ed. 2d 660 (2001), the plaintiff argues that the duty not to discriminate is nondelegable in nature. This court has previously stated that "[t]he nondelegable duty doctrine is . . . an exception to the rule that an employer may not be held liable for the torts of its independent contractors." *Gazo* v. *Stamford*, supra, 255

[20] The plaintiff also did not provide any support for holding an owner liable for the wrongful acts of a real estate salesperson. The case cited by the plaintiff purporting to do so in its posttrial memorandum actually involved vicarious liability for the actions of an agent acting as a property manager. Although it is well established that, under the federal act, "owners of real estate may be held vicariously liable for discriminatory acts by their agents and employees"; (internal quotation marks omitted) *United States* v. *Hylton*, 944 F. Supp. 2d 176, 190 (D. Conn. 2013), aff'd, 590 Fed. Appx. 13 (2d Cir. 2014); the plaintiff does not provide any authority for the proposition that real estate salespersons who are hired as independent contractors under circumstances similar to those in the present case are deemed to be agents for purposes of tort liability, and our independent research does not reveal any.

Conn. 257. The United States Supreme Court, however, has held that the duty not to discriminate under the federal act is not nondelegable in nature because a conclusion to the contrary would extend vicarious liability beyond the ordinary tort principles imposed by the federal act. See *Meyer* v. *Holley*, supra, 537 U.S. 286; see also id., 290. Having concluded that Henry was an independent contractor, and, in the absence of an exception to the general rule that employers are not liable for the torts of their independent contractors, we conclude that the Vaccaros are not vicariously liable for any of Henry's statements that constitute a violation of § 46a-64c (a) (3).[21]

The judgment is reversed in part and the case is remanded with direction to render judgment for the plaintiff as to liability against the defendants Sarah Henry and William Raveis Real Estate, Inc., in connection with the plaintiff's claim under § 46a-64c (a) (3) and for further proceedings in accordance with this opinion; the judgment is affirmed with respect to the trial court's determination that the defendants Anthony Vaccaro and Eve Vaccaro were not liable to the plaintiff.

In this opinion the other justices concurred.

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[21] Because we conclude that Vaccaro, the contracting owner involved in the transaction, is not vicariously liable, we can assume without deciding that Eve Vaccaro, a noncontracting owner of the rental apartment, is similarly not subject to vicarious liability.

ORDERS

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ORDERS

MONICA R. OVERLY *v.* MARK S. OVERLY

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 504 (AC 43249), is denied.

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

Peter J. Zarella, in support of the petition.

Sarah E. Murray, in opposition.

Decided April 5, 2022

SERENA BAKER *v.* OSCAR ARGUETA

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 843 (AC 43827), is denied.

David N. Rubin, in support of the petition.

Decided April 5, 2022

STATE OF CONNECTICUT *v.* THEODORE JONES

The defendant's petition for certification to appeal from the Appellate Court, 210 Conn. App. 249 (AC 42674), is denied.

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

Julia K. Conlin, assigned counsel, and *Emily Graner Sexton*, assigned counsel, in support of the petition.

Brett R. Aiello, deputy assistant state's attorney, in opposition.

Decided April 5, 2022

STATE OF CONNECTICUT *v.* KRISTOPHER JOSEPH PRUDHOMME

The state's petition for certification to appeal from the Appellate Court, 210 Conn. App. 176 (AC 43302), is denied.

Laurie N. Feldman, deputy assistant state's attorney, in support of the petition.

Andrew P. O'Shea, assigned counsel, in opposition.

Decided April 5, 2022

JOHN SALCE *v.* JOAN CARDELLO

The plaintiff's petition for certification to appeal from the Appellate Court, 210 Conn. App. 66 (AC 43648), is granted, limited to the follow issues:

"1. Did the Appellate Court correctly conclude that the defendant had violated the in terrorem clauses in the decedent's will and trust agreement when the defendant challenged the trustee's refusal (1) to remove her bank account from the estate's Connecticut estate and gift tax return, and (2) to deduct the outstanding mortgages from the value of the estate?

"2. If the answer to the first question is 'yes,' did the Appellate Court correctly conclude that enforcement of the in terrorem clauses in the decedent's will and trust agreement would violate public policy and that the clauses, therefore, were unenforceable as to the defendant's conduct?

"3. If the answer to the second question is 'no,' does the good faith exception to the enforcement of in terrorem clauses apply in this case?"

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

Kenneth A. Votre, in support of the petition.

Matthew D. McCormack, in opposition.

Decided April 5, 2022

RODNEY CHASE *v.* COMMISSIONER OF CORRECTION

The petitioner Rodney Chase's petition for certification to appeal from the Appellate Court, 210 Conn. App. 492 (AC 44048), is denied.

J. Christopher Llinas, in support of the petition.

Linda F. Rubertone, senior assistant state's attorney, in opposition.

Decided April 5, 2022

SYED K. RAFI *v.* YALE UNIVERSITY SCHOOL OF MEDICINE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 44976) is denied.

Syed K. Rafi, self-represented, in support of the petition.

Patrick M. Noonan, in opposition.

Decided April 5, 2022

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CONNECTICUT APPELLATE REPORTS

Vol. 211

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STEVEN BERNBLUM *v.* THE GROVE COLLABORATIVE, LLC, ET AL.
(AC 44177)

Bright, C. J., and Prescott and Clark, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, B and G Co., for, inter alia, breach of contract relating to his negotiations with B over a potential lease of certain commercial property by G Co., B's limited liability company. The negotiations began in October, 2012, and several proposed lease agreements were drafted by the plaintiff's attorney and exchanged by the parties. All of the proposed leases listed G Co. as the sole tenant and C Co., a limited liability company that was not formed by the plaintiff until August, 2013, as the sole landlord. During the course of lease negotiations, B expressed a need for certain improvements to be made to the space, specifically, the construction of additional walls. The plaintiff paid for the construction of those additional walls on an assurance by G Co. that he would be reimbursed, and the final version of the proposed lease contained a provision pursuant to which the tenant would have been required to reimburse the landlord for the wall construction by way of additional rent. The plaintiff also made several additional repairs and improvements to the property. In February, 2013, the plaintiff delivered a final version of the proposed lease to B. Although B made an oral representation to the plaintiff that he intended to sign it once his accountant returned from a trip, the lease was never executed. Despite the absence of a finalized lease, the plaintiff provided G Co. with access to the property later in February, 2013, to conduct a grand opening event. Soon thereafter, G Co. removed items it had brought into the space and began operating its business out of another property, and the defendants never made any payments to the plaintiff. Following a bench trial, the court rendered judgment for the plaintiff on the counts of the revised complaint sounding in breach of contract, breach of lease, detrimental reliance, and negligent misrepresentation, and for the defendants on the fraud counts. The trial court subsequently denied the

defendants' motion to reconsider/reargue. On the defendants' appeal to this court, *held*:

1. The plaintiff lacked standing to bring the counts of the complaint sounding in breach of contract, breach of lease, and detrimental reliance: the plaintiff did not have a direct interest in the litigation with respect to those counts because no contractual relationship existed, or was ever contemplated, between the plaintiff in his individual capacity and the defendants, as the plaintiff was not a party to any of the underlying proposed lease agreements and the plaintiff was, instead, negotiating solely on behalf of C Co.; moreover, the plaintiff brought the underlying action not on behalf of C Co., as the real party in interest, but in his own name individually.
2. The trial court improperly rendered judgment for the plaintiff on the counts of the complaint sounding in negligent misrepresentation, the plaintiff having failed to meet his burden of proof on those counts: the plaintiff failed to establish that his asserted expenditures for improvements to the property were made to his detriment in reasonable reliance on B's statement, in February, 2013, that he would sign the lease once his accountant returned, because, although the trial court admitted into evidence copies of checks reflecting payments that the plaintiff attributed to the cost of the repairs and improvements to the space, the vast majority of those checks predated B's February, 2013 statement, and, therefore, it could not reasonably be inferred from the checks that the plaintiff made the improvements in reliance on the February, 2013 representation by B; moreover, although there was evidence that B made statements during negotiations about changes that he would have liked to have seen made to the property and entered into a contract for the construction of additional walls, which the plaintiff paid for, those requests by B were not alleged to be the negligent misrepresentation on which the plaintiff reasonably relied to his detriment.

Argued December 6, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *Baio, J.*; judgment in part for the plaintiff, from which the defendants appealed to this court. *Reversed in part*; *judgment directed.*

Robert M. Frost, Jr., with whom, on the brief, was *Erica A. Barber*, for the appellants (defendants).

Earle Giovanniello, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this action arising out of negotiations over a potential commercial lease, the defendants, The Grove Collaborative, LLC (The Grove), and its sole member, Slate Ballard, appeal from the judgment of the trial court, rendered following a bench trial, in favor of the plaintiff, Steven Bernblum, and from the court's denial of the defendants' motion to reconsider/reargue.[1] The defendants claim on appeal that the court improperly (1) concluded that the plaintiff had standing to bring those counts of the complaint sounding in breach of contract, "breach of lease," and "detrimental reliance" (contract counts), because he, individually, was not a party to any purported lease or the lease negotiations that underlie the allegations with respect to those counts[2] and (2) concluded that the plaintiff had estab-

[1] The Grid, a collection of various organizations in New Haven, including The Grove, that formed to strategize and apply for a state economic development grant, was also named as a defendant in the initial complaint, but the counts against it were dismissed. Because it has not participated in the present appeal, all references in this opinion to the defendants collectively are to Ballard and The Grove only.

[2] The defendants also claim with respect to the breach of contract and "breach of lease" counts that the court improperly determined that the parties entered into an enforceable contract that was not barred by the statute of frauds. The statute of frauds, which is codified at General Statutes § 52-550, provides in relevant part: "(a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is *made in writing* and *signed by the party*, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property; (5) upon any agreement that is not to be performed within one year from the making thereof . . . ." (Emphasis added.) Because we conclude that the plaintiff, in his individual capacity, was not a party to any lease agreement contemplated by the parties during negotiations and thus lacks standing to pursue any contractual or quasi-contractual remedies, we need not address the applicability of the statute of frauds to the facts of this case.

The defendants also claim that the court improperly rendered judgment in favor of the plaintiff on the "detrimental reliance" count because such an alternative theory of recovery should have been barred due to the court's finding that a valid and enforceable contract existed. Given our conclusion that the plaintiff lacked standing to assert any of the contract counts, it is unnecessary to address the merits of this claim.

lished those counts sounding in negligent misrepresentation.[3] We conclude that the plaintiff lacked standing to bring the contract counts and that he failed to meet his burden of proof with respect to the negligent misrepresentation counts. Accordingly, we reverse in part and affirm in part the judgment of the court.

The following procedural history and facts, which either were found by the court and set forth in its memorandum of decision or are undisputed in the record, are relevant to our resolution of the present appeal. Starting in October, 2012, the plaintiff and Ballard began negotiations regarding a potential lease by The Grove of certain commercial space located in a building at 770 Chapel Street in New Haven. The Grove operated a "coworking space" at another location in New Haven that subleased private office space to other businesses, provided dedicated desk space to individuals, and rented out space for events. The 770 Chapel Street property is a multistory building composed of various suites and, at the time of the lease negotiations, was owned by the plaintiff. Portions of the building were occupied by tenants, but other areas were not in rentable condition. The space at issue in the present case was located in the rear of the third floor.

Several proposed lease agreements were drafted by the plaintiff's attorney and exchanged by the parties.

Finally, the defendants claim that the court improperly awarded damages against Ballard in his individual capacity despite the fact that the uncontested evidence establishes that, at all times relevant, he was acting solely in his representative capacity on behalf of The Grove. Because we reverse the judgment of the court on other grounds, we do not reach this claim.

[3] The defendants also claim on appeal that the court rejected their argument that recovery for negligent misrepresentation, a tort theory of liability, was barred in the present case by the economic loss doctrine, "a [common-law] rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 469 n.41, 54 A.3d 1005 (2012). Because we conclude that the plaintiff failed to meet his burden of proof

Despite the fact that the plaintiff personally owned the 770 Chapel Street property at the time of the lease negotiations, all of the proposed leases listed The Grove as the sole tenant and 770 Chapel Street, LLC, an as yet to be formed limited liability company,[4] as the sole landlord. Printed under the signature lines on each of the proposed leases exchanged by the parties were the names of The Grove and 770 Chapel Street, LLC, only. The plaintiff quitclaimed title to 770 Chapel Street to 770 Chapel Street, LLC, on December 3, 2013.

with respect to the negligent misrepresentation counts, it is unnecessary to address the applicability of the economic loss doctrine.

[4] 770 Chapel Street, LLC, was formed on August 2, 2013. Its members are Bernblum and his daughter and business partner, Julie Bernblum. In *BRJM, LLC* v. *Output Systems, Inc.*, 100 Conn. App. 143, 917 A.2d 605, cert. denied, 282 Conn. 917, 925 A.2d 1099 (2007), this court, as an apparent matter of first impression, considered whether a contract entered into on behalf of a limited liability company *prior* to that company's formation was invalid. Id., 152. This court concluded that "a contract entered into prior to an entity's formation is not void ab initio due to *lack of capacity* because the individual entering into the contract on behalf of the unformed entity has the requisite capacity. It follows that, in the situation of an unformed entity, the individual serves as the party to the contract although the contract is entered into in the entity's name." (Emphasis added.) Id. Accordingly, this court held that "contracts entered into by individuals acting on behalf of unformed entities are enforceable." Id., 153.

This court's opinion in *BRJM, LLC*, however, is limited to the issue of whether a contract fails due to the lack of capacity of one of the contracting parties if, at the time the contract is executed, one of the parties to the contract is an unformed limited liability company. We do not read the opinion to stand for the proposition that, once a company named as a party to a contract has been duly formed, any individual member of that company retains standing to bring an action to enforce a contract executed only in the name of the company. As we note later in this opinion, even after this court's decision in *BRJM, LLC*, appellate courts clearly have rejected such a proposition. See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214–16, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013); *Padawer* v. *Yur*, 142 Conn. App. 812, 818, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); but see *Saunders* v. *Briner*, 334 Conn. 135, 181, 221 A.3d 1 (2019) (recognizing limited single member exception to general rule prohibiting members of limited liability companies from bringing direct actions to recover harms suffered by company only). Because 770 Chapel Street, LLC, is a two member company, the *Saunders* exception is inapposite.

During the course of lease negotiations, Ballard expressed a need for certain improvements to be made to the space—namely, the construction of some additional walls. Ballard entered into a separate contract with DiStasio Building & Remodeling (DiStasio) to construct those walls for $7300 (wall contract), which was paid for by the plaintiff on an assurance by The Grove that he would be reimbursed. During the time that the parties engaged in lease negotiations, the plaintiff also made additional repairs to the space and continued with ongoing improvements to the property, also utilizing DiStasio for these renovations. When asked at trial to describe these repairs/improvements, the plaintiff stated: "Any holes in walls were repaired and there were holes in the walls. The whole place was painted with several coats of paint. The ceiling, parts of the ceiling [were] replaced. Electrical was brought up to what he needed. We built a . . . large room for him called a—I think it was called a training room. . . . We put in a kitchenette. We totally recarpeted the place, changed the front door, a lot of minor repairs." The plaintiff estimated that these repairs/improvements cost him between $68,000 and $78,000.

The plaintiff was not able to produce invoices or payment records at trial with respect to the repairs/improvements because those invoices purportedly had been destroyed. Instead, the trial court admitted into evidence copies of checks reflecting payments that the plaintiff and his daughter/partner attributed to the cost of the repairs and improvements to the space. With respect to the condition of the premises that The Grove was offered to lease, all versions of the proposed lease indicated that the landlord, 770 Chapel Street, LLC, would "be responsible to furnish the [t]enant with a 'vanilla box' . . . ." The plaintiff testified at trial on cross-examination that this term meant that "everything is painted white, you have carpeting, and a ceiling, heat,

utilities, electric." Although the final version of the proposed lease contained a provision pursuant to which the tenant would have been required to reimburse the landlord by way of additional rent for the wall contract with DiStasio, none of the proposed leases provided for reimbursement related to any of the additional repairs/improvements referenced by the plaintiff, all of which were undertaken by him without his having obtained a signed lease or collecting any deposit from the defendants, and most of which arguably would have been required to conform the space to the so-called "vanilla box" he would have needed to provide any tenant.

In February, 2013, the plaintiff delivered a final version of the proposed lease to Ballard. The terms included the rental by The Grove of 6782 square feet of the property, which included approximately 404 square feet of common area. The duration of the proposed lease was for a stated period of five years. The base rent for the first year was to be $5500 per month plus an additional $608.33 per month as reimbursement for the construction of the additional walls built by DiStasio.[5] During the second year, rent was set to increase to $6782 per month. Rent would also increase by 3 percent in years three and five of the lease. The Grove also would pay as additional rent a pro rata share of the property's real estate taxes, fire and liability insurance, and utility costs.

The proposed landlord and tenant never executed this final proposed lease or any other written lease agreement, despite an oral representation by Ballard to the plaintiff after receiving the February, 2013 final proposed lease that he intended to sign it once his accountant had returned from a trip. Nevertheless, despite the absence of a finalized lease, later in February, 2013, the plaintiff provided The Grove with access

[5] $608.33 multiplied by twelve equals approximately $7300, the amount of Ballard's contract with DiStasio.

to the property to conduct a February 25, 2013 "grand opening" or ribbon cutting event that was highly publicized and well attended by other businesses and municipal leaders, including the mayor. Soon after that grand opening event, however, The Grove, without further discussions with the plaintiff, removed the items it had brought into the space prior to the event and began operating its business out of another property in the same neighborhood. The defendants never made any payments to the plaintiff.

After The Grove vacated the space, the plaintiff continued to advertise the space through brokers and the Internet in an attempt to lease it to another tenant. The space eventually was leased to SeeClickFix, which previously had been a client of The Grove.[6]

In January, 2014, the plaintiff commenced the underlying action in his name individually. The operative ten count revised complaint was filed on November 7, 2016. Counts one through five were against The Grove, and sounded in, respectively, breach of contract, "breach of lease," fraud, "detrimental reliance," and negligent misrepresentation.[7] Counts six through ten alleged iden-

[6] At trial, the plaintiff testified that he was able to rent the space for one year at $6500 per month for a total of $78,000. The court appears to have used this amount in its damages calculation as representing the plaintiff's mitigation of damages.

[7] The operative complaint is not a model of clarity with respect to the causes of action that the plaintiff sought to assert against the defendants. The defendants, however, never filed a request to revise or a motion to strike with respect to the operative revised complaint. The breach of contract counts assert that the defendants breached the terms of the final proposed written lease, which it is undisputed never was executed by the parties. The "breach of lease" counts also appear to assert a breach of the terms of the unexecuted written lease but also contains as an additional allegation that the defendants agreed orally to sign the proposed written lease. The counts labeled as "detrimental reliance" appear to assert a cause of action sounding in quasi contract or promissory estoppel. "[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A

tical counts against Ballard individually. The defendants filed an answer that effectively disputed the material elements of the complaint.

At trial, the defendants argued during summation that the parties never had reached a meeting of the minds as to all material terms of the proposed lease and no version of the proposed lease was ever signed by the parties. The defendants also argued that the plaintiff did not properly mitigate his damages. Finally, the defendants argued that 770 Chapel Street, LLC, was the entity listed as the landlord in the proposed lease, not the plaintiff, and that that entity had not been established at the time relevant to this matter.

Following the two day trial before the court, *Baio*, *J.*, the court issued a memorandum of decision on May 8, 2020, rendering judgment in favor of the defendants on the plaintiff's fraud count, but in favor of the plaintiff on all remaining counts of the complaint. The court analyzed the breach of contract and breach of lease counts together. It stated in relevant part: "In this matter, there was evidence to support that the parties had time to negotiate the terms and conditions of the lease and did engage in negotiations. The evidence demonstrates that the parties engaged in substantive discussions related to the lease agreement, the plaintiff was provided with ample opportunity to inspect the premises, engaged in business planning based upon the proposed lease and both proceeded to negotiate and finalize the agreement. *The lease, however, was never executed,*

fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor *could reasonably have expected to induce reliance*. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . . Additionally, the promise must reflect a present intent to commit *as distinguished from a mere statement of intent to contract in the future*. . . . [A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . and, therefore, is not sufficiently promissory." (Emphasis added; internal quotation marks omitted.) *T & M Building*

although the evidence supports that [Ballard] represented that he intended to sign the lease upon his accountant's return from a trip." (Emphasis added.) Rather than providing additional analysis regarding whether and on what legal theory an enforceable oral or written contract was formed and between whom, the court instead turned to the defendants' arguments that any claim of breach of contract or breach of lease would be barred by the statute of frauds. The court acknowledged that "[a]bsent a signed writing to establish the existence of this agreement, this action is barred by the statute of frauds."

The court, referencing the final proposed lease offered by the plaintiff in support of his contractual claims, concluded that "the document submitted by the plaintiff fails to satisfy the basic requirement of the statute of frauds that the written agreement be signed by the party, or the agent of the party to be charged. See [General Statutes] § 52-550. The document, therefore, upon initial examination, violates the statute of frauds, and any action brought on the contract would be barred unless any exception applies." (Internal quotation marks omitted.) The court agreed with the plaintiff's contention, however, that the parties' contract was "excepted from the statute of frauds on the basis of partial performance," explaining that "[a]cts on the part of a promisee may be sufficient to take an *oral contract* out of the statute of frauds" and that a "contract is enforceable, despite the statute, when, subsequent to the making of the contract, there has been conduct that amounts to part performance." (Emphasis added; internal quotation marks omitted.) The court agreed with the plaintiff that "the defendants' actions in requesting and directing various improvements and occupancy of the premises constitute[d] partial performance of the terms of the lease,

Co. v. *Hastings*, 194 Conn. App. 532, 553–54, 221 A.3d 857 (2019), cert. denied, 334 Conn. 926, 224 A.3d 162 (2020); see also footnote 10 of this opinion.

creating an exception to the statute of frauds." The court thus concluded: "[T]he evidence demonstrates by a fair preponderance of the evidence that there was partial performance of the lease agreement which would except it from the statute of frauds and render the agreement enforceable, *at least for the one year*." (Emphasis added.)

In addition to apparently concluding that the defendants had breached an oral lease agreement that was excepted from the statute of frauds, the court also concluded that "[t]he plaintiff has met the burden of proof on the claims against each of the two defendants based on detrimental reliance." The court stated: "Separate from the breach of lease claims, the plaintiff submits that the defendants benefitted at the expense of the plaintiff through [their] representation that they intended to lease the premises and the actions taken to support that representation resulting in the plaintiff making substantial improvements as requested by the defendants." The court agreed with the plaintiff, stating as follows: "[T]he plaintiff alleges that in reliance on the defendants' representations, the plaintiff began renovating the premises in order to tailor it to the defendants' specific needs, refrained from showing the premises to anyone else, and as a result of the defendants' representations, the plaintiff put his efforts into renovating the premises and suspended work on the common areas in order to get the premises ready for the defendant[s]. Renovation of the common area is necessary in order to have the building ready to show to other prospective tenants. . . . The plaintiff claims reliance on the defendants' statements, conduct and commitments and that the defendants moved into the premises and used it. . . .

"During the period at issue, the defendants were able to market their business, participate in a large, public grand opening event attended by business people and local leaders, and the plaintiff incurred expenses for

improvements all directed by the defendant[s], who vacated without notice. The defendants argue that the plaintiff benefitted as well, as the premises were in such a state of disrepair that the premises became marketable by the improvements. The defendants also submit that the grand opening event showcased the premises and provided advertising for the plaintiff, and the plaintiff did end up with a tenant for at least a one year term, and the tenant was one of the subtenants of the defendants. While each makes valid points, the fact remains that the plaintiff was not able to market the premises during the time when he thought in good faith that he had a lease agreement with the defendants. Hence, even if the grand opening event may have provided an advertising opportunity, the plaintiff could not use it as such for the premises in question. Additionally, while there is validity to the argument that the plaintiff may have benefitted from the improvements made, the fact remains that the improvements, or at least these specific improvements, may not have been made but for the arrangement with the defendants. The improvements were made based on the express understanding that this was part of the agreement with the defendants. To the extent there is any claim that the improvements were some benefit to the plaintiff, this argument is more appropriately considered in relation to the claim for damages if liability is found." (Citations omitted; internal quotation marks omitted.)

Finally, the court rejected the plaintiff's claim of fraud or intentional misrepresentation, but, in summary fashion, concluded that the plaintiff nevertheless had met his burden of proof with respect to the negligent misrepresentation counts. Without analysis or discussion, the court concluded that the evidence submitted had established that The Grove, through its representative Ballard, misrepresented that it would lease the space and

the plaintiff had relied on that representation to his detriment.

With respect to damages, the court awarded the plaintiff a total of $73,318.87. That total consisted of compensatory damages of $73,299.96, which is equal to the amount of base rent that the plaintiff would have been due for the first year under the final proposed lease plus reimbursement for the $7300 wall contract; plus an additional $78,018.91 as restitution for the "buildout" of the space; less the $78,000 in rent that the plaintiff collected in mitigation of his damages.

On May 28, 2020, the defendants filed a motion to reconsider and/or reargue. The defendants asserted that (1) no contract between the plaintiff in his individual capacity and the defendants existed, and, thus, the plaintiff lacked standing to prosecute the present action; (2) no judgment should have entered against Ballard individually on the contract counts because the plaintiff presented no evidence that Ballard had acted in his individual capacity rather than as a principal of The Grove; (3) recovery under the tort theory of negligent misrepresentation was barred by the economic loss doctrine; (4) the court incorrectly concluded that the plaintiff had proven the elements of negligent misrepresentation; (5) any recovery on a theory of detrimental reliance was unavailable given the court's finding of an enforceable contract; and (6) the court improperly calculated damages. The plaintiff objected to the defendants' motion, arguing, in relevant part, that the court's decision was supported by the evidence and that, as "the owner of the subject premises," he had "standing to assert his claims for breach of the lease agreement and negligent misrepresentation."

The court issued a decision denying the motion for reconsideration/reargument and sustaining the plaintiff's objection to the motion. The court stated in relevant part: "The court understands that the defendants

disagree with some of the court's decision, however, that is not a basis for a motion for reconsideration, nor is the desire to present arguments or evidence not presented at the time of trial. . . . As to the defense argument relating to the status of the plaintiff the same was disputed, with arguments and evidence on both sides. The court did not accept the defense argument." This appeal followed.

I

The defendants claim that the court improperly concluded that the plaintiff had standing to bring the underlying action despite the undisputed fact that he, individually, was not a party to any of the proposed lease agreements or the negotiations that form the basis of the allegations in the complaint. We agree with the defendants that the plaintiff lacked standing to prosecute the present action with respect to the contract counts of the complaint.

We begin with our standard of review and general legal principles. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 603,

193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018).

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [If], for example, the harms asserted to have been suffered directly by a plaintiff *are in reality derivative of injuries to a third party*, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Emphasis added; internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 540, 219 A.3d 948 (2019).

"The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. In order for a plaintiff to have standing, it must be a proper party to request adjudication of the issues." (Internal quotation marks omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347, 780 A.2d 98 (2001).

It is axiomatic that "[a] limited liability company is a distinct legal entity whose existence is separate from its members. . . . [It] has the power to sue or to be sued in its own name . . . or may be a party to an action brought in its name by a member or manager. . . . *A member or manager*, *however*, *may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Kelly* v. *Kurtz*, supra, 193 Conn. App. 540; see also *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123,

138, 161 A.3d 1227 (2017) (member of limited liability company cannot recover for injury allegedly suffered by member's company and, accordingly, lacks standing to bring claim in individual capacity); but cf. *Saunders* v. *Briner*, 334 Conn. 135, 181, 221 A.3d 1 (2019) (recognizing limited exception applicable only to single member limited liability companies).

Furthermore, "[i]t is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract. . . . Under this general proposition, if the [nonparty] is neither a party to, nor a contemplated beneficiary of, [the] agreement, [it] lacks standing to bring [its] claim for breach of [contract]." (Internal quotation marks omitted.) *Nassra* v. *Nassra*, 180 Conn. App. 421, 431, 183 A.3d 1198 (2018).[8]

Turning to the present appeal, whether the plaintiff had standing to initiate the action in this case hinges on whether the facts in the record demonstrate that he had a direct interest in the litigation, meaning an interest that was not remote, indirect or simply derivative of

[8] "[T]he fact that a person is a *foreseeable* beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary." (Emphasis added.) *Grigerik* v. *Sharpe*, 247 Conn. 293, 317–18, 721 A.2d 526 (1998); see also *Hilario's Truck Center, LLC* v. *Rinaldi*, supra, 183 Conn. App. 605 ("Although . . . it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed [third-party] beneficiary . . . the only way a contract could create a direct obligation between a promisor and a [third-party] beneficiary would have to be . . . because the parties to the contract so intended. . . . [B]oth contracting parties must intend to confer enforceable rights in a third party . . . in order to give the third party standing to bring suit." (Citations omitted; internal quotation marks omitted.)); 2 Restatement (Second), Contracts § 302, comment (e), p. 443 (1981) ("Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . no duty to him is created."). Here, the plaintiff never asserted before the trial court that he was an intended beneficiary of the lease or any promise made by the defendants during negotiations, nor is there evidence in the underlying record that would support such an assertion.

an injury to another party.[9] On the basis of our review of the record and arguments of the parties, we conclude that the plaintiff did not have a direct interest in the litigation with respect to those counts of the complaint sounding in breach of contract, "breach of lease," or "detrimental reliance."[10]

No contractual relationship between the plaintiff in his individual capacity and the defendants existed or was ever contemplated.[11] The plaintiff was not a named party to the contract with respect to any of the underlying proposed lease agreements, and he was negotiating

[9] The plaintiff does not claim any statutory authority that would have conferred standing upon him to bring the underlying action nor is there evidence in the record from which to reach such a conclusion.

[10] We have concluded that, for the purpose of considering the plaintiff's standing to bring the various causes of actions raised in the complaint, the "detrimental reliance" count, which, as previously noted in footnote 7 of this opinion, we construe as sounding in promissory estoppel, is properly viewed through the same jurisprudential lens as those counts sounding in breach of contract. Promissory estoppel, after all, is a theory of recovery that permits courts to award damages incurred in reliance on a promise that is otherwise unenforceable as a contract; see *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 194, 90 A.3d 219 (2014); and thus is quasi-contractual in nature. See 1 Restatement (Second), Contracts § 90, p. 242 (1981); 3 A. Corbin, Contracts (Rev. Ed. 1996) § 8.12, pp. 58–59, 98–101. Logically, just as only a party to a contract or a contemplated beneficiary ordinarily has standing to bring an action to enforce a contractual promise; *Tomlinson* v. *Board of Education*, 226 Conn. 704, 718, 629 A.2d 333 (1993); only a promisee, as the party to whom a promise is addressed, has standing to seek damages for detrimental reliance on that promise under a theory of promissory estoppel. Here, because any possible promise to the plaintiff was made in the context of lease negotiations, and the plaintiff ostensibly was acting during those negotiations not in his individual capacity but on behalf of his contemplated limited liability company, he was neither a party to any contemplated contract nor the party to whom any promise was made during negotiations.

[11] Although the court acknowledged multiple times that no written contract was executed by the parties, it nevertheless proceeded to award damages on the basis of what it described as partial performance of an oral lease. The only parties to any enforceable oral lease agreement, if any, were 770 Chapel Street, LLC, the only landlord that the evidence presented at trial suggests was contemplated by the parties, and The Grove as the sole putative tenant.

solely on behalf of his contemplated and soon to be formed limited liability company, 770 Chapel Street, LLC. Each of the four proposed leases that were exchanged between the parties and admitted into evidence listed The Grove as the sole tenant and 770 Chapel Street, LLC, of which the plaintiff was one of two members, as the sole landlord. Indeed, from the virtual outset of the party's negotiations, it was evident that the lessor was to be 770 Chapel Street, LLC, and not the plaintiff individually. The plaintiff, however, did not commence the underlying action in a representative capacity in the name of 770 Chapel Street, LLC, but in his own name individually. The fact that it was 770 Chapel Street, LLC, as the then owner of the subject property, rather than the plaintiff, that later mitigated any potential contract damages by entering into a lease with SeeClickFix is further evidence that 770 Chapel Street, LLC, and not the plaintiff individually, was the proper party to pursue damages for any alleged harm resulting from the defendants' purported breach of their alleged contractual or quasi-contractual obligations.

Although not dispositive of the standing issue, this court's discussion in *Wasko* v. *Farley*, 108 Conn. App. 156, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008), is nonetheless instructive. In that case, the plaintiff, a dentist who had brought a personal injury action following a motor vehicle accident, appealed from the underlying judgment claiming, inter alia, that the trial court had failed to properly charge the jury on damages related to the cost of hiring an additional dental assistant to do work in her dental practice that her injuries prevented her from doing. Id., 167–68. This court agreed with the trial court that, because the dental practice was organized as a limited liability company, the costs associated with hiring the dental assistant were wholly attributable to the business, not to the plaintiff individually, and, therefore, those costs could

only be recovered by the business, which was not a party to the action before the trial court. Id., 170–71. This court recognized, as previously stated, that a limited liability company is a legal entity whose existence is separate and distinct from that of its members and that, as such, a member lacks standing to sue in an individual capacity to recover damages incurred by the limited liability company. Id., 170. The court concluded: "The plaintiff brought this action in her individual capacity—the limited liability company was not a party. Damages incurred by the limited liability company, therefore, were not at issue in the case. Accordingly, the court properly declined to instruct the jury on damages resulting from additional costs incurred by the plaintiff's dental practice." Id., 170–71. Thus, implicit in the court's holding in *Wasko* is that a plaintiff lacks standing to seek damages for harm suffered by a company associated with the plaintiff. See id.; see also *Scarfo* v. *Snow*, 168 Conn. App. 482, 497–504, 146 A.3d 1006 (2016).[12]

In short, the only contemplated parties to any potential lease, written or oral, underlying the breach of contract, "breach of lease" and "detrimental reliance" counts

[12] In *Scarfo* v. *Snow*, supra, 168 Conn. App. 496–97, the plaintiff, a member of a limited liability company, claimed he had standing individually to bring, inter alia, a claim of breach of fiduciary duty against another member of the company who allegedly had engaged in self-dealing and breached the company's operating agreement. The plaintiff argued that he had suffered "a direct rather than a derivative injury" and therefore had standing to prosecute the tort claim. Id., 496, 504. This court, however, "disagree[d] that th[o]se [we]re direct injuries, and . . . conclude[d] that the plaintiff did not have standing in his individual capacity . . . ." Id., 497. Relevant to the present action, the court stated that "[a]lthough the plaintiff contend[ed] that he suffered direct injury by the alleged action or inaction of [the alleged tortfeasor], any benefit he would have received . . . were it not for the alleged improprieties of [the alleged tortfeasor], would have flowed to him only through [the limited liability company] . . . . Accordingly, if there was an injury, that injury was sustained by [the limited liability company] and then sustained by the plaintiff. Thus, the plaintiff's injury is not direct, and he has no standing to sue in his individual capacity." Id., 504.

were The Grove and 770 Chapel Street, LLC. The plaintiff brought the underlying action not on behalf of 770 Chapel Street, LLC, as the real party in interest, but in his own name individually. Accordingly, the plaintiff lacked standing to prosecute those counts.[13] The court should have dismissed them on that basis and, therefore, improperly rendered judgment for the plaintiff and denied the defendants' postjudgment motion to reconsider/reargue, seeking to set aside the judgment.

II

The defendants next claim that the court improperly rendered judgment against them on those counts sounding in negligent misrepresentation because the plaintiff failed to satisfy his burden of proof with respect to all necessary elements of the tort. In particular, the defendants assert that the plaintiff failed to demonstrate that the repairs and improvements made to the space during lease negotiations were done on the basis of reasonable reliance on a factual misrepresentation made by the defendants. This, the defendants argue, is because the only asserted factual misrepresentation for which evidence was admitted was Ballard's statement in February, 2013, that he would sign the final proposed lease once his accountant returned. That representation, however, came after the repairs and improvements largely already were underway or completed as reflected in the dates on the checks submitted into evidence by the plaintiff as proof of damages. We agree with the

[13] We construe the defendants' standing claim, as it has been briefed, to be limited to the contract counts of the complaint. Nevertheless, because standing implicates subject matter jurisdiction and, thus, cannot be waived; see *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013); we also must consider whether the plaintiff lacked standing in his individual capacity to assert and prosecute the tort counts of the complaint. We are persuaded from our review of the pleadings and the record that, with respect to the tort counts, the plaintiff's allegations pose a colorable claim of direct injuries to the plaintiff individually sufficient to withstand a challenge to his standing to prosecute them.

defendants that, viewing the evidence in the light most favorable to sustaining the court's judgment, the plaintiff failed to establish that his asserted expenditures were made to his detriment in reasonable reliance on this representation, and this failure of proof requires reversal of the court's judgment with respect to the negligent misrepresentation counts.

"[Our Supreme Court] has long recognized liability for negligent misrepresentation. . . . The governing principles are set forth in . . . § 552 of the Restatement Second of Torts [1977]: One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . . [T]he plaintiff need not prove that the representations made by the [defendants] were promissory. It is sufficient . . . that the representations contained false information. . . . There must be a justifiable reliance on the misrepresentation for a plaintiff to recover damages." (Emphasis omitted; internal quotation marks omitted.) *Bellsite Development, LLC* v. *Monroe*, 155 Conn. App. 131, 151, 122 A.3d 640, cert. denied, 318 Conn. 901, 122 A.3d 1279 (2015).

"Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013). In other words, in addition to proving that a defendant negligently made

a misrepresentation of fact, a plaintiff must also demonstrate that any claimed demonstrable harm was a direct result of his reasonable reliance on that misrepresentation. It is the plaintiff's failure at trial to produce evidence to demonstrate this causal link that is at issue.

Although the court made no express findings with respect to each element of negligent misrepresentation, it is implicit in its judgment for the plaintiff that it found each element had been met. The defendants, in effect, claim that the court's implicit finding that the plaintiff reasonably relied on the alleged misrepresentation is clearly erroneous because the plaintiff failed to present evidence sufficient to support such a finding. "Under the clearly erroneous standard, we will overturn a factual finding only if there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 353, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021).

Here, the theory of the plaintiff was that it made significant changes and improvements to the premises in reliance on a false representation by Ballard. The only factual misrepresentation by Ballard identified by the plaintiff as a basis for his claim, however, was Ballard's assurance, made sometime in February, 2013, after he was presented with the final proposed lease, that he would sign the lease as proposed once his accountant had returned from vacation. The evidence presented at trial demonstrates that the plaintiff began the renovations, repairs and upgrades to his building, many of which would have been needed to restore the building to rentable condition, regardless of whether the negotiation with The Grove bore fruit, either prior

to or during the extended lease negotiations and before any assurance by Ballard in February, 2013, that he would sign the proposed lease. Although there was evidence presented that Ballard made statements during negotiations about changes that he would have liked to have seen made to the space and that he contracted with DiStasio for the building of the additional walls, which was paid for by the plaintiff, these requests for changes to the premises were not alleged to be the negligent misrepresentation on which the plaintiff reasonably relied to his detriment.

Further, the only evidence admitted to prove the plaintiff's asserted detrimental reliance on the defendants' alleged misrepresentation following receipt of the February, 2013 lease were copies of checks made to various vendors, thirty-four of which were related to improvements made to the space at issue. A summary of those checks was authenticated and entered into evidence through the testimony of the plaintiff's daughter, acting in her capacity as the plaintiff's partner and bookkeeper for the plaintiff's company. The dates on those checks, however, range from August 21, 2012, which was prior to the start of lease negotiations, through March 16, 2013. Accordingly, the vast majority of the checks predate Ballard's statement sometime in late February, 2013, that he would sign the plaintiff's latest proposed lease. Although two of the checks are dated in March, 2013, there was no evidence presented connecting the dates on the checks to when the plaintiff initiated the work associated with those payments. Thus, it cannot reasonably be inferred from the checks that the plaintiff elected to make the associated improvements in reliance on the February, 2013 representation by Ballard. Rather, the only reasonable inference to be drawn from this evidence was that the plaintiff's alleged expenditures on the space, whether by himself personally or on behalf of his soon to be formed

limited liability company, preceded rather than followed the only alleged misrepresentation.

In short, there simply was no evidence presented from which the court reasonably could have concluded that the plaintiff acted to his detriment in reliance on Ballard's alleged February, 2013 misrepresentation. Because the evidence presented was insufficient to establish this essential element, the court's implicit finding to the contrary was clearly erroneous. Accordingly, the court should have rendered judgment on the merits of the negligent misrepresentation counts, like the fraud counts, in favor of the defendants.

The judgment is reversed with respect to counts one, two, four, five, six, seven, nine and ten of the revised complaint and the case is remanded with direction to render judgment dismissing counts one, two, four, six, seven and nine for lack of standing and for the defendants on counts five and ten; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LOCH VIEW, LLC *v.* TOWN OF WINDHAM
(AC 44169)

Bright, C. J., Suarez and Vertefeuille, Js.

Syllabus

The plaintiff appealed from the trial court's denial of its motion to open the judgment dismissing its 2019 action against the defendant town regarding a municipal tax dispute, claiming that the court failed to exercise its discretion in ruling on that motion or, in the alternative, that it abused its discretion. The court had dismissed the 2019 action pursuant to the prior pending action doctrine, on the basis that the plaintiff had filed a previous action in 2016 against the defendant which had not been resolved and the two actions were virtually alike, both actions having been brought to adjudicate the same underlying rights and factual claims. Thereafter, the trial court in the 2016 action denied the plaintiff's request for leave to amend its complaint to add a count alleging the constitutional

violations that it had asserted in the 2019 action, and the court in the 2019 action denied the plaintiff's motion to open the judgment. *Held* that the trial court exercised its discretion in denying the plaintiff's motion to open, as it considered and rejected the change in circumstances identified by the plaintiff in its motion, and the court did not abuse its discretion in concluding that the court's denial of the plaintiff's request to amend its complaint in the 2016 action did not require that the judgment of dismissal in the 2019 action be opened; moreover, the plaintiff could still fully and fairly litigate its constitutional claims in the 2016 action, as the plaintiff raised an identical constitutional argument as a special defense to the defendant's counterclaim in the 2016 action and the fact that the plaintiff was forced to make its constitutional claim defensively instead of affirmatively did not affect the plaintiff's ability to litigate those arguments; furthermore, the court properly considered the interests of judicial economy and efficiency and the need to avoid duplicative litigation and conflicting results in denying the plaintiff's motion to open.

Argued November 18, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for the defendant's alleged violation of certain of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (plaintiff).

Eric W. Callahan, with whom, on the brief, was *Richard S. Cody*, for the appellee (defendant).

Opinion

BRIGHT, C. J. In this action that arose out of a municipal tax dispute, the plaintiff, Loch View, LLC, appeals from the judgment of the trial court denying its motion to open, modify, and vacate the judgment dismissing the

its action against the defendant, the town of Windham.[1] Specifically, the plaintiff contends that the court either failed to exercise its discretion or abused its discretion in denying its motion to open.[2] We affirm the judgment of the trial court.

The following facts, as summarized in the court's memorandum of decision, and procedural history are relevant to our disposition of this appeal. "On July 2, 2009, [the plaintiff] and [the defendant] entered into a written tax fixing agreement [agreement] whereby [the defendant] agreed to set municipal taxes on two parcels of property on Main Street in Windham at a discounted rate in exchange for [the plaintiff] taking over the properties and investing a certain amount of money into the redevelopment of those properties. To ensure that [the plaintiff was] meeting its obligations under the tax fixing agreement, the agreement require[d] [the plaintiff] to provide periodic reports and documentary evidence to [the defendant] demonstrating that [the plaintiff was] in fact making the required investments in the properties. The [agreement] provide[d] [the defendant] with the right to cancel the [agreement] and recoup any tax benefits provided to [the plaintiff] should [the defendant] determine that [the plaintiff was] not living up to its investment commitments. In 2016, [the defendant]

[1] In its initial complaint, the plaintiff also named Chandler Rose, town assessor, and Gay A. St. Louis, town collector of revenue, as defendants. According to the plaintiff, those defendants were "inadvertently omitted from the summons" that was filed in the action. The plaintiff states that both Rose and St. Louis were eventually made parties to the action but that they were never listed as parties on the electronic docket maintained by the Judicial Branch. In its memorandum of decision, the court did refer to Rose and St. Louis as defendants. Neither Rose nor St. Louis, however, has participated in this appeal. All references to the defendant in this opinion are to the town of Windham.

[2] The plaintiff also initially appealed the court's decision granting the defendant's motion to dismiss. That appeal, however, was dismissed by this court as untimely. Because the plaintiff does not challenge the merits of the dismissal in the present appeal, we do not address the merits of that ruling.

determined that [the plaintiff] was not living up to its obligations under the [agreement] and therefore [the defendant] sought to exercise what [it] viewed as its right to retroactively reassess the relevant properties in order to recoup the tax benefits provided to [the plaintiff] under the agreement."

Thereafter, in *Loch View, LLC* v. *Windham*, Superior Court, judicial district of Hartford, Docket No. CV-16-6149827-S, the plaintiff commenced an action challenging the defendant's termination of the agreement and its attempt to retroactively assess the relevant parcels and charge the plaintiff back taxes (2016 action). The plaintiff specifically alleged that (1) the defendant's tax assessments were "manifestly excessive," (2) the defendant failed to "apply uniform percentages to the present true and actual valuation of the properties," in violation of General Statutes § 12-64,[3] and (3) the valuation of the plaintiff's two parcels of property was grossly and manifestly excessive, in violation of the equal protection clause of the state constitution.

The plaintiff subsequently requested and was granted leave to amend its complaint five times in the 2016 action to add additional counts arising out of the defendant's retroactive adjustment of taxes with respect to additional tax years. Through those amended complaints,

[3] General Statutes § 12-64 (a) provides in relevant part: "All the following mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present true and actual valuation, not exceeding one hundred per cent of such valuation, to be determined by the assessors: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures, house lots, all other building lots and improvements thereon and thereto, including improvements that are partially completed or under construction, agricultural lands, shellfish lands, all other lands and improvements thereon and thereto, quarries, mines, ore beds, fisheries, property in fish pounds, machinery and easements to use air space whether or not contiguous to the surface of the ground. . . ."

the plaintiff also added counts that (1) alleged that the defendant breached the agreement, (2) alleged that the defendant breached the obligation of good faith and fair dealing with respect to its enforcement of the agreement, (3) demanded a declaratory judgment seeking to declare illegal and void the defendant's retroactive assessment, (4) sought injunctive relief arising out of the defendant's enforcement of the contract, and (5) alleged that, in the event that the defendant was permitted to retroactively assess the plaintiff's taxes, the plaintiff sought a refund for its overpayment of taxes.

On April 30, 2019, the defendant filed a counterclaim in the 2016 action, alleging that the plaintiff had breached the agreement and that the defendant was therefore "entitled to recapture a sum equal to the financial benefit the plaintiff received as a result of reduced tax levies . . . ." The defendant specifically alleged that the plaintiff had failed (1) to meet the financial requirements of the agreement, (2) to pay recaptured taxes pursuant to the agreement, (3) to accurately account for the cost of work done on the parcels, and (4) to provide the town with thorough and semiannual reports pursuant to the agreement. Thereafter, on October 21, 2021, the plaintiff filed an answer to the defendant's counterclaim and asserted eight special defenses, including a special defense that the defendant's actions in terminating the agreement deprived the plaintiff of its constitutional right to challenge the tax assessment and violated its procedural and substantive due process rights.

In 2019, while the 2016 action was pending,[4] the plaintiff filed the action underlying this appeal, alleging in a single count that it had been deprived of its constitutional rights, privileges, and immunities (2019 action). The 2019 action specifically alleged that the defendant's

[4] At the time of oral argument in this appeal, the 2016 action was still pending.

cancellation of the tax fixing agreement was "improper, illegal, arbitrary, and capricious," that it violated the plaintiff's state and federal due process rights, and that it constituted a taking under the United States and Connecticut constitutions. Given that the complaint alleged several federal law claims, the defendant removed the case to federal court. Shortly after its removal, however, the plaintiff filed an amended complaint in state court that alleged only state law causes of action, and the case was remanded back to state court. The defendant then moved to dismiss the 2019 action in its entirety, pursuant to the prior pending action doctrine, arguing that the plaintiff's claims in the 2019 action were duplicative of those in the pending 2016 action.

Thereafter, the court, *Budzik*, *J.*, issued a memorandum of decision in which it granted the defendant's motion to dismiss. In so ruling, the court concluded that "both cases require resolution of the same underlying rights and factual claims, specifically, whether [the defendant] properly exercised its rights under the [agreement]" and, consequently, concluded that the plaintiff's 2016 and 2019 actions were virtually alike, and that, "under the circumstances of this case," it was proper for the court to dismiss the 2019 action. In reaching that decision, the court reasoned: "First, there does not appear to be any prejudice to [the plaintiff] in having the terms of the [agreement] determined in the context of the 2016 case. Count three of [the plaintiff's] operative complaint in the 2016 case squarely alleges that [the defendant] violated the [agreement]. [The plaintiff] has offered no reason why the court hearing the 2016 case cannot properly adjudicate that issue, or that [the plaintiff] will not have a full and fair opportunity to litigate that issue as part of the 2016 case. Second, [the plaintiff] has not identified any relief that it is seeking in this case that it cannot receive in the 2016

case. . . . Finally, this case is in its early stages. Therefore, it would serve the interests of judicial economy, avoiding unnecessary litigation, and avoiding conflicting results from different courts to dismiss this case and have [the plaintiff] litigate its claims over the proper application of the [agreement] in the 2016 case."

Thereafter, the plaintiff filed a request for leave to amend its complaint in the 2016 action, so that it could add the constitutional count that it had asserted in the recently dismissed 2019 action. The court, *Cordani*, *J.*, denied that request as untimely. The plaintiff then filed a motion to open and vacate the judgment of dismissal in the 2019 action, alleging that the denial of its request to amend its complaint in the 2016 action constituted a good and compelling reason to open the judgment in the 2019 action. The court denied the plaintiff's motion to open, and this appeal followed. Additional facts and procedural history will be set forth below as necessary.

We first set forth our standard of review and the applicable law. "The principles that govern motions to open . . . a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . . The exercise of equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment." (Internal quotation marks omitted.) *Newtown* v. *Ostrosky*, 191 Conn. App. 450, 468, 215 A.3d 1212, cert. denied, 333 Conn. 925, 218 A.3d 68 (2019). If a court fails to exercise its discretion in ruling on a motion to open, that failure to do so is error. See *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998); see also *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion").

When a court exercises its discretion in ruling on a motion to open, we review the court's decision for an abuse of discretion. See, e.g., *Dimmock* v. *Allstate Ins. Co.*, 84 Conn. App. 236, 241, 853 A.2d 543, cert. denied, 271 Conn. 923, 859 A.2d 577 (2004). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *In re Travis R.*, 80 Conn. App. 777, 782, 838 A.2d 1000, cert. denied, 268 Conn. 904, 845 A.2d 409 (2004); see also *Hall* v. *Hall*, 335 Conn. 377, 396, 238 A.3d 687 (2020) (trial courts enjoy "broad discretion" in determining whether to grant motion to open).

"The prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second [action], and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 247 Conn. 196, 216, 719 A.2d 465 (1998). Under the prior pending action doctrine, the court must determine "whether the two actions are: (1) exactly alike, i.e., for the same matter, cause and thing, or seeking the same remedy, and in the same jurisdiction; (2) virtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies; or (3) insufficiently similar to warrant the doctrine's application. . . . If the two actions are exactly alike

or lacking in sufficient similarities, the trial court has no discretion. In the former case, the court must dismiss the second action, and in the latter instance, the court must allow both cases to proceed unabated. Where the actions are virtually, but not exactly alike, however, the trial court exercises discretion in determining whether the circumstances justify dismissal of the second action." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 397–98, 973 A.2d 1229 (2009); see also id., 403–404 (holding that, when actions are virtually alike, it is proper to dismiss later action if nonmoving party will not be prejudiced, nonmoving party will have opportunity to litigate claims in prior action, prior action provides remedy for claims, and dismissal of later action serves policy interests behind prior pending action doctrine).

On appeal, the plaintiff first claims that the court erred when it denied the plaintiff's motion to open because the court failed to exercise its discretion when it ruled on the motion. We disagree.

In its order denying the plaintiff's motion to open, the court stated: "The fact that the [court in the 2016 action] exercised its discretion to limit amendments and denied [the] plaintiff's request to amend as untimely because the plaintiff waited some [four] years to assert a purported constitutional claim *does not change* this court's analysis on the motion to dismiss that the same underlying facts are at issue in both the [2016 action] and this case and, thus, there is no basis to open the judgment resulting from this court's ruling on the motion to dismiss." (Emphasis added.)

On the basis of this order, we conclude that, contrary to the plaintiff's claim, the court's ruling reflects that it exercised its discretion when it denied the plaintiff's motion. By stating that the plaintiff's inability to amend

its complaint in the 2016 action *did not change* the court's analysis with regard to its judgment dismissing the 2019 action, the court was essentially saying that it had considered the change in circumstances identified by the plaintiff but that it did not conclude as a matter of law that the change provided a sufficient basis for the court to open the judgment. Thus, because the court considered, and rejected, the change in circumstances identified by the plaintiff in its motion, the court exercised its discretion in denying that motion.

The plaintiff next claims that, in the event that the court exercised its discretion when ruling on the plaintiff's motion, it abused that discretion when it denied the motion. We are not persuaded.

Initially, we observe that the court was not required to consider how the plaintiff chose to prosecute the 2016 action or the rulings made by the court in that case when deciding the plaintiff's motion to open. It is undisputed that both actions arose out of the same facts. For whatever reason, when the plaintiff filed its 2016 action it did not allege the constitutional claim that it later asserted in the 2019 action. It also did not seek to amend its complaint in the 2016 action to assert that claim before bringing the 2019 action. The litigation strategy the plaintiff pursued came with attendant risks, and the court in the 2019 action was not required to grant the plaintiff's motion to open to save the plaintiff from the consequences of those risks. Furthermore, the court in the present case was not required to effectively undo the denial of the motion to amend by the court in the 2016 action that was found to be untimely and prejudicial to the defendant.[5] Parties are not entitled

[5] When denying the plaintiff's request to amend its complaint in the 2016 action, the court stated in relevant part: "[T]he court finds that the sixth amended complaint was not timely filed and there is no suitable justification for its untimeliness. Further, the pleadings are closed and a further amendment to the complaint asserting a new count and new claims would be prejudicial to the defendant. As such, the court respectfully declines the plaintiff's request to file a sixth amended complaint."

to subvert the decisions of one court by going to a separate court for relief from those decisions, as would have been the case here had the court granted the plaintiff's motion to open. Finally, to the extent the plaintiff does not prevail in the 2016 action and believes that the court abused its discretion in denying its motion to amend, it can seek appropriate relief on appeal in that action.

We also are unpersuaded by the plaintiff's argument that the court's refusal to open the judgment dismissing the 2019 action constituted an abuse of discretion because that decision prejudiced the plaintiff by leaving it without a forum in which to adjudicate its constitutional claim. In the plaintiff's October 21, 2021 answer to the defendant's counterclaim, the plaintiff raised the same constitutional argument that it sought to raise in the 2019 action but as a special defense instead of an affirmative claim.[6] In that special defense, the plaintiff alleged that "the defendant's actions in retroactively terminating the contract and then simultaneously retroactively reassessing or imposing additional taxes for all the years covered by the contract deprived the plaintiff of its constitutional rights to challenge the amount of the tax reassessment, and was done in a way which violated both procedural and substantive due process." This language closely tracks with the constitutional arguments that the plaintiff asserted in its 2019 action, wherein it alleged that "[t]he actions and conduct of the [defendant] constituted a taking[7] [in violation of the

[6] As the plaintiff conceded at oral argument before this court, the constitutional arguments in both the 2016 and the 2019 actions are, in essence, the same. More specifically, in both actions the plaintiff argues that the application of a one year statute of limitations to its claims unconstitutionally bars the plaintiff from challenging the defendant's imposition of back taxes.

[7] The fact that the plaintiff's special defense to the defendant's counterclaim in the 2016 action does not explicitly mention a takings claim does not affect our analysis, as the plaintiff's claim in its special defense that the defendant's retroactive adjustments "deprived it of its constitutional right to challenge the amount of the tax assessment" is the functional equivalent of such a claim.

state constitution]" and "the [defendant's position] that the plaintiff is without recourse to take any action to seek review and determination by the courts in regard to [the defendant's] wrongful action, constitutes a violation of . . . due process of law. . . ." (Footnote added.)

We do not think that the fact that the plaintiff must make its constitutional claim defensively, instead of affirmatively, affects the plaintiff's ability to litigate its constitutional arguments in the 2016 action. Indeed, regardless of whether its constitutional argument is made as a defense or as an affirmative claim, the plaintiff will need to prove the same things to prevail. Additionally, the remedy sought—the nonpayment of the back taxes—is the same regardless of how, procedurally, the plaintiff's constitutional argument is raised. In fact, at oral argument before this court, the plaintiff was unable to explain how the affirmative claim that it sought to raise in the 2019 action was substantively different from the constitutional defense that it has alleged in the 2016 action.[8] Thus, because the plaintiff still can fully and fairly litigate its constitutional arguments in the 2016 action, we disagree with the plaintiff's contention that the court in the present case left it without a forum in which to make those arguments. Accordingly, there cannot be an abuse of discretion on that basis.

Finally, the policy concerns that the court considered when dismissing the 2019 action—including the interests in judicial economy and efficiency and the need

[8] Indeed, the plaintiff could identify only one difference between the constitutional arguments that it sought to make in the 2016 and 2019 actions, which was that, if it was allowed to assert an affirmative constitutional claim, it might be able to recover costs and attorney's fees, while if the claim was made defensively, such relief would be unavailable. We, however, do not think that the possibility for the plaintiff to recover costs and fees in the 2019 action provides a sufficient reason to conclude that the court abused its discretion when it denied the plaintiff's motion to open.

to avoid duplicative litigation and conflicting results—all remained relevant considerations when it considered the motion to open. Thus, the continued relevance of these policy concerns further supports our conclusion that the court's decision to deny the plaintiff's motion to open was not an abuse of discretion.

For these reasons, we conclude that the court did not abuse its discretion in concluding that the court's denial of the plaintiff's request to amend its complaint in the 2016 action did not require that the court open the judgment of dismissal in the 2019 action.

The judgment is affirmed.

In this opinion the other judges concurred.

HOUSING AUTHORITY OF THE CITY OF NEW BRITAIN *v.* CALVIN W. NEAL
(AC 44720)

Cradle, Suarez and Bear, Js.

Syllabus

The plaintiff housing authority sought, by way of a summary process action, to regain possession of certain premises leased to the defendant tenant. The plaintiff served a notice to quit possession for nonpayment of rent on the defendant and, thereafter, filed a summary process action. Subsequently, the plaintiff and the defendant entered into a stipulated agreement pursuant to which the trial court rendered a judgment of possession in favor of the plaintiff and a stay of execution. In accordance with the stipulated judgment, the plaintiff agreed to allow the defendant to remain in the premises provided that the defendant made reasonable use and occupancy payments to the plaintiff and satisfied other conditions. Thereafter, the plaintiff filed an affidavit of noncompliance requesting an order for execution for possession on the ground that the plaintiff had not received payment from the defendant in accordance with the terms of the stipulated agreement and for the alleged serious nuisance that he committed because he had been arrested for various drug offenses at the premises. The trial court denied the plaintiff's request following a hearing and sustained the defendant's objection thereto, and the plaintiff appealed to this court. *Held*:

1. The trial court's finding that the defendant was not a tenant at sufferance was clearly erroneous because it was unsupported by the facts in the record; the defendant, who continued to reside at the premises after the lease agreement was terminated as a result of the plaintiff having served on the defendant a notice to quit possession of the premises, recognized his change of status when he entered into the stipulated agreement and agreed to make use and occupancy payments instead of rent payments to the plaintiff so long as he continued to occupy the premises.
2. The trial court erred in holding that the requirements of the applicable statute (§ 47a-11) concerning the obligations of a tenant did not apply to the defendant because the stipulated agreement did not include an express condition to that effect; even in the absence of express language in the stipulation, a tenant at sufferance must fulfill all of the statutory obligations otherwise applicable to the tenant.
3. The trial court erred in concluding that an affidavit of noncompliance filed pursuant to the applicable rule of practice (§ 17-53) was not the proper method for the plaintiff to seek the issuance of an execution based on the alleged serious nuisance committed by the defendant because such proceeding would not allow for the defendant to be fully heard on that issue:

   a. The plaintiff was not required to institute a second summary process action to obtain an execution against the defendant for his alleged commission of a serious nuisance as such an action against the defendant would not have survived a motion to dismiss for lack of subject matter jurisdiction because the plaintiff had satisfied the statutory (§ 47a-15) requirement when it served on the defendant a valid notice to quit, which effectively terminated the lease between the parties, making the defendant a tenant at sufferance, and the court rendered judgment in favor of the plaintiff thereafter.

   b. The plaintiff's allegation that the defendant allegedly committed a serious nuisance was properly before the trial court and should have been considered at the hearing on the plaintiff's affidavit of noncompliance filed pursuant to Practice Book § 17-53: although the trial court expressed concerns about the defendant's due process rights, the hearing on the plaintiff's affidavit of noncompliance could have included evidence pertaining to the defendant's violations of § 47a-11 and/or the stipulation because of the separate obligations imposed on him pursuant to the stipulation and § 47a-11; moreover, although Practice Book § 17-53 does specifically reference a scenario in which the landlord seeks an execution based on a serious nuisance included in a statute but not included in a stipulation, Practice Book § 17-53 should be interpreted liberally where the court's narrow interpretation and misapplication of § 47a-11 and Practice Book § 17-53 denied the plaintiff recourse to address the serious nuisance allegedly committed by the defendant on the premises in violation of § 47a-11 and the ability to obtain relief by way of execution of possession; furthermore, the defendant had notice of the plaintiff's claim that he violated § 47a-11 because of his arrest for the sale and possession

of drugs; accordingly, the case was remanded for a new hearing at which the trial court should consider the plaintiff's affidavit of noncompliance in light of this court's conclusions that the defendant was a tenant at sufferance, the requirements of § 47a-11 applied to the defendant, and the serious nuisance issue was properly before the court.

Argued February 1—officially released April 19, 2022

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Britain, Housing Session, where the court, *Shah*, *J.*, granted the parties' motion for a stipulated judgment of possession in favor of the plaintiff subject to a stay of execution, and rendered judgment thereon; thereafter, the court, *Shah*, *J.*, denied the plaintiff's motion for execution and sustained the defendant's objection thereto, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Michael S. Wrona, for the appellant (plaintiff).

Opinion

BEAR, J. In this summary process action brought by the plaintiff, the Housing Authority of the City of New Britain, against the defendant, Calvin W. Neal, the plaintiff appeals from the judgment of the trial court rendered following a hearing, denying its affidavit of noncompliance with stipulation,[1] sustaining the objection of the defendant and requiring the parties to continue to perform their respective obligations pursuant to a stipulated agreement of the parties. On appeal, the plaintiff claims that the trial court erred (1) in finding that the defendant was not a tenant at sufferance, (2) in concluding that the requirements of General Statutes

[1] Practice Book § 17-53, which provides the basis for the use of an affidavit of noncompliance with stipulation, provides in relevant part that "[w]henever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, a hearing shall be required. . . ."

§ 47a-11[2] did not apply to the defendant, and (3) in concluding that the filing of an affidavit of noncompliance was not the proper vehicle for addressing the alleged serious nuisance[3] committed by the defendant after judgment was rendered in favor of the plaintiff, but before the plaintiff obtained possession of the premises occupied by the defendant.[4] We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

[2] General Statues § 47a-11 provides: "A tenant shall: (a) Comply with all obligations primarily imposed upon tenants by applicable provisions of any building, housing or fire code materially affecting health and safety; (b) keep such part of the premises that he occupies and uses as clean and safe as the condition of the premises permit; (c) remove from his dwelling unit all ashes, garbage, rubbish and other waste in a clean and safe manner to the place provided by the landlord pursuant to subdivision (5) of subsection (a) of section 47a-7; (d) keep all plumbing fixtures and appliances in the dwelling unit or used by the tenant as clean as the condition of each such fixture or appliance permits; (e) use all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, in the premises in a reasonable manner; (f) not wilfully or negligently destroy, deface, damage, impair or remove any part of the premises or permit any other person to do so; (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15; and (h) if judgment has entered against a member of the tenant's household pursuant to subsection (c) of section 47a-26h for serious nuisance by using the premises for the illegal sale of drugs, not permit such person to resume occupancy of the dwelling unit, except with the consent of the landlord."

[3] Pursuant to General Statutes § 47a-15, the definition of "serious nuisance" includes "using the premises . . . for . . . the illegal sale of drugs . . . ."

The plaintiff attached to its affidavit a statement that the defendant had been arrested on April 5, 2021, for the possession of a controlled substance and for the sale of a narcotic substance and a copy of the pending case detail from the Judicial Branch website, and, before the court, the plaintiff alleged that the defendant violated his responsibilities pursuant to § 47a-11 and committed a serious nuisance thereby by possessing and selling illegal drugs while on the premises.

[4] The defendant did not file an appellate brief. Therefore, pursuant to Practice Book § 70-4, this appeal will be considered on the basis of the plaintiff's brief, the plaintiff's oral arguments before this court, and the record only.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Pursuant to a lease agreement between the parties, the defendant resided at 67 Martin Luther King Drive, Apartment 504 in New Britain (premises). On January 13, 2020, the plaintiff served on the defendant a notice to quit possession of the premises stating that their lease agreement had been terminated for the following reasons: "(1) [The defendant] failed to keep [the premises] in a safe and sanitary condition. Such unsanitary conditions constitute a violation of [the] [l]ease [a]greement, the [defendant's] responsibilities pursuant to . . . § 47a-11, and constitute a nuisance and/or a serious [nuisance]; [and] (2) [the defendant has] broken a door at the . . . premises, which damage constitutes a violation of [the] lease [agreement] and . . . § 47a-11." On March 2, 2020, the plaintiff filed a complaint alleging that the defendant (1) violated § 47a-11, (2) violated the terms of their lease agreement, (3) committed a nuisance, and (4) committed a serious nuisance, and it sought judgment for immediate possession of the premises.

On October 22, 2020, the parties entered into a stipulated agreement. Pursuant to this agreement, judgment for possession would enter in favor of the plaintiff with a stay of execution through October 31, 2021, on the conditions that the defendant (1) pay a reasonable use and occupancy fee of $209 to the plaintiff on or before the tenth day of each month, (2) acknowledge owing the plaintiff a total arrearage in the amount of $718.50, and (3) make arrearage installment payments of $59.87 to the plaintiff on or before the tenth day of each month. The stipulated agreement also included the following additional conditions: "The defendant is to keep the [premises] clean and take out the trash [at] regular intervals. The parties agree [that] only the defendant is allowed to occupy the premises. The defendant is to

limit the [number of] individuals [on the premises] to two people at a time unless they are family members or caregivers. The parties agree to allow four inspections [of the premises] throughout the year [on] random dates."

On April 22, 2021, the plaintiff filed an affidavit of noncompliance requesting the issuance of a summary process execution for possession of the premises. In its affidavit, the plaintiff stated that it had not yet received payment from the defendant in accordance with the stipulation, and noted that the defendant was arrested on April 5, 2021, arising from his alleged possession and sale of illegal drugs and narcotics at the premises.[5] On April 26, 2021, the defendant filed an affidavit and objection to the plaintiff's affidavit of noncompliance. On May 13, 2021, the court held a hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto. During the hearing, the court concluded that the plaintiff's affidavit of noncompliance was not the appropriate vehicle for the plaintiff to seek the eviction of the defendant for the alleged serious nuisance that he committed because "[t]he sale of drugs . . . [was not] within the scope of the [original] complaint that [the plaintiff] filed or the stipulation." The court also stated that addressing that issue at the hearing would implicate the due process rights of the defendant because the issue would not be fully heard and addressed by the court. Finally, in concluding that the defendant's due process rights would be implicated, the court also found that the defendant was a tenant. After the hearing, in its order denying the plaintiff's affidavit of noncompliance and sustaining the defendant's objection thereto, the court found "that the plaintiff has not prove[n] the defendant's noncompliance with the terms

[5] Specifically, the defendant was arrested for possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1) and for the sale of a narcotic substance in violation of General Statutes § 21a-278 (b) (1) (A).

of the written stipulation. Therefore, the parties are still obligated to perform their respective obligations under the stipulated [agreement] entered on October 22, 2020."

We begin by setting forth the applicable standard of review. "It is well settled that we review the court's findings of fact under the clearly erroneous standard. We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Internal quotation marks omitted.) *Bozelko* v. *Statewide Construction, Inc.*, 189 Conn. App. 469, 471, 207 A.3d 520, cert. denied, 333 Conn. 901, 214 A.3d 381 (2019). "When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record." (Internal quotation marks omitted.) *ASPIC, LLC* v. *Poitier*, 208 Conn. App. 731, 742, 267 A.3d 197 (2021).

I

We first address the plaintiff's claim that the court erred in finding that the defendant was not a tenant at sufferance. We begin by setting forth the applicable legal principles. "A tenancy at sufferance arises when a person who came into possession of [property] rightfully continues in possession wrongfully after his right thereto has terminated. . . . After a notice to quit has been served . . . a tenant at sufferance no longer has a duty to pay rent. He still, however, is obliged to pay a fair rental value in the form of use and occupancy for the dwelling unit." (Internal quotation marks omitted.) *Brewster Park, LLC* v. *Berger*, 126 Conn. App. 630, 638,

14 A.3d 334 (2011). Accordingly, "use and occupancy payments . . . are paid to a landlord by a tenant at sufferance who occupies the [property] in the absence of a lease agreement. . . . They are most frequently associated with summary process proceedings to evict a tenant because, after a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance." (Citation omitted; internal quotation marks omitted.) *Boardwalk Realty Associates, LLC* v. *M & S Gateway Associates, LLC*, 340 Conn. 115, 122 n.8, 263 A.3d 87 (2021).

In the present case, on January 13, 2020, the plaintiff served on the defendant a notice to quit possession of the premises. The parties subsequently entered into the stipulated agreement on October 22, 2020, pursuant to which they agreed that a judgment of possession in favor of the plaintiff would enter, execution would be stayed, and the defendant would be permitted to reside at the premises so long as he made *use and occupancy payments* to the plaintiff and satisfied several other conditions. Accordingly, the defendant's status as a tenant at sufferance is clearly established by the facts that (1) the plaintiff served on the defendant a notice to quit possession and initiated a summary process action, (2) the defendant continued to reside at the premises after the termination of the lease agreement, and (3) the defendant recognized his change in status by agreeing to make use and occupancy payments instead of rent payments to the plaintiff so long as he continued to occupy the premises. We conclude, therefore, that the trial court's finding that the defendant is not a tenant at sufferance is clearly erroneous because it is unsupported by the facts in the record.

II

Having concluded that the defendant is a tenant at sufferance, we turn now to the plaintiff's claim that the

court erred in concluding that the requirements of § 47a-11 do not apply to the defendant. We begin by setting forth the applicable legal principles. "A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property [that] he occupie[s] in the form of use and occupancy payments . . . and to *fulfill all statutory obligations*." (Emphasis added; internal quotation marks omitted.) Id.

In the present case, the court held that the requirements of § 47a-11[6] do not apply to the defendant because the stipulated agreement does not include an express condition to that effect. This holding, however, is clearly at odds with the principle, as set forth by our Supreme Court in *Boardwalk Realty Associates, LLC*, that, even in the absence of language in a stipulation, a tenant at sufferance must still fulfill all of the statutory obligations applicable to a tenant. Id.; see also *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 473 n.18, 974 A.2d 626 (2009) ("[A]fter a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance. . . . A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property which he occupied in the form of use and occupancy payments . . . and to fulfill all statutory obligations." (Internal quotation marks omitted.)). Accordingly, we conclude that the court erred in holding that the requirements of § 47a-11 did not apply to the defendant.

III

Finally, we address the plaintiff's claim that the court erred in concluding that an affidavit of noncompliance, filed pursuant to Practice Book § 17-53, was not the proper method for the plaintiff to seek the issuance of

[6] See footnote 2 of this opinion.

an execution based on the alleged serious nuisance committed by the defendant in this case because such a proceeding would not allow for the defendant to be fully heard on that issue. The plaintiff argues that its affidavit of noncompliance was the appropriate means of addressing the alleged serious nuisance committed by the defendant because "[t]he service of the first notice to quit terminate[d] [the] existing rental agreement and . . . any subsequent notice to quit . . . cannot survive a motion to dismiss for lack of subject matter jurisdiction." (Citation omitted.) We agree with the plaintiff.

A

After concluding that the plaintiff could not use an affidavit of noncompliance to address the alleged serious nuisance created by the defendant's possession and sale of drugs, the court determined that a second summary process action was the plaintiff's only recourse to obtain a judgment of possession based on that statutory violation. Pursuant to § 47a-15, the plaintiff would have been required to serve on the defendant a second notice to quit and a new complaint.

We first address the plaintiff's argument that it could not serve the defendant a second notice to quit on the basis of such serious nuisance. We begin by setting forth the applicable legal principles. It is well established that where a notice to quit complies with all statutory requirements, it "serve[s] as the [landlord's] unequivocal act notifying the [tenant] of the termination of the lease." (Internal quotation marks omitted.) *Lyons* v. *Citron*, 182 Conn. App. 725, 734, 191 A.3d 239 (2018). Furthermore, when a notice to quit effectively terminates a lease agreement between parties, "a second notice to quit . . . cannot survive a motion to dismiss for lack of subject matter jurisdiction." *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, 133 Conn. App. 1,

24, 33 A.3d 848 (2012). The defendant has not challenged the validity of the January 13, 2020 notice to quit, so there is no need, or jurisdiction, for the plaintiff to serve on the defendant a second notice to quit.[7]

In the present case, during the hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto, the court erroneously concluded that the plaintiff could obtain an execution based on the alleged serious nuisance committed by the defendant only by instituting a second summary process action against the defendant pursuant to § 47a-15. Section 47a-15 provides in relevant part that, "[p]rior to the commencement of a summary process action . . . to evict based on . . . conduct by the tenant which constitutes a serious nuisance . . . the landlord shall deliver a written notice to the tenant specifying the acts . . . constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. . . ." This requirement, how-

[7] In *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 401–402, 158 A.3d 772 (2017), our Supreme Court explained that a notice to quit that is invalid because of a legal defect is ineffective to terminate a lease, in which case a second notice to quit could be served on a defendant: "Summary process is a statutory remedy which enables a landlord to recover possession of rental premises from the tenant upon termination of a lease. . . . It is preceded by giving the statutorily required notice to quit possession to the tenant. . . . Service of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease. The lease is neither voided nor rescinded until the landlord performs this act and, upon service of a notice to quit possession, a tenancy at will is converted to a tenancy at sufferance." (Internal quotation marks omitted.) "A legally invalid notice to quit is, however, considered 'equivocal' because of [a] legal defect and, therefore, does not operate to terminate a lease." *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, supra, 292 Conn. 473 n.18; see also *Bargain Mart, Inc.* v. *Lipkis*, 212 Conn. 120, 134, 561 A.2d 1365 (2009) ("it is self-evident that if the notice is invalid, then the legal consequence of 'termination' arising from the service of a valid notice [to quit] does not result"); *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 584, 548 A.2d 744 (first notice to quit was invalid as untimely served, thus requiring service of second notice to quit), cert. denied, 209 Conn. 826, 552 A.2d 432 (1988).

ever, has already been satisfied in the present case because the plaintiff, on January 13, 2020, served on the defendant a valid notice to quit. See *Lyons* v. *Citron*, supra, 182 Conn. App. 734 (effective notice to quit notifies tenant of termination of lease). Because the plaintiff terminated the lease agreement on January 13, 2020, making the defendant a tenant at sufferance who is occupying and using the premises without the existence of a lease agreement, and because of the court's rendering of judgment in this case in favor of the plaintiff, the plaintiff cannot bring a second summary process action against the defendant. See, e.g., *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 24 (if first notice to quit is valid and effective, second notice to quit cannot survive motion to dismiss for lack of subject matter jurisdiction).

The court, therefore, erroneously concluded that, although the lease agreement had been terminated and judgment of possession had entered in favor of the plaintiff by agreement of the parties, a second summary process action was required to obtain an execution against the defendant for his alleged commission of a serious nuisance while the effect of the judgment was stayed by agreement so long as the defendant performed his obligations pursuant to the stipulation.

B

Having concluded that the plaintiff cannot properly bring a second summary process action against the defendant, we turn now to the language of Practice Book § 17-53, which provides in relevant part: "Whenever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, a hearing shall be required. If the violation consists of nonpayment of a sum certain, an affidavit with service certified in accordance with Sections 10-12 through

10-17 shall be accepted in lieu of a hearing unless an objection to the execution is filed by the defendant prior to the issuance of the execution. The execution shall issue on the third business day after the filing of the affidavit. . . .''

At the hearing on the plaintiff's affidavit of noncompliance and the defendant's objection thereto, the court expressed concern that allowing the plaintiff to use its affidavit of noncompliance, filed pursuant to Practice Book § 17-53, to address the alleged serious nuisance committed by the defendant would implicate the due process rights of the defendant. Specifically, the court stated: ''I absolutely understand the seriousness of the alleged criminal conduct. This is not a criminal trial, however. This is the eviction court and there needs to be proper notice and, I mean, there's many cases that I've written about a stipulation needing to have the exact terms that need to be follow[ed]. And if there isn't proper notice or a provision provided in the stipulation, then it's not the proper basis of an eviction action to go forward, especially when the underlying action didn't concern any allegations of drugs or serious nuisance based on that claim. . . . It's about due process and whether these issues are fully heard or not. So, if [the] serious nuisance claim is based on one issue and the stipulation doesn't incorporate the specific conduct that you're alleging is violated, then you're kind of skirting the entire eviction process by then bringing up some new issue.'' In response, the plaintiff's counsel argued: ''I think there is due process, Your Honor. [The defendant] has his due process today. And certainly he's known what the issue is [before the court] today. He's had a copy of the police report. Certainly he knows that the sale of drugs is illegal, and [that he] shouldn't be doing it. I don't think it needs to be in a [stipulation] . . . .''

The plaintiff also argues in its appellate brief that the court's concerns for the defendant's due process rights

are unfounded because "an affidavit of noncompliance . . . is an action . . . that requires the court to hold a hearing in which the right to possession is to be determined . . . [and therefore] provides . . . [the tenant] with the necessary procedural and substantive due process protections." (Citation omitted; internal quotation marks omitted.) We agree with the plaintiff.

Practice Book § 17-53 clearly provides that "[w]henever a summary process execution is requested because of a violation of a term in a judgment by stipulation or a judgment with a stay of execution beyond the statutory stay, *a hearing shall be required*. . . ." (Emphasis added.) That hearing can include evidence pertaining to the defendant's violations of § 47a-11 and/or the stipulation because of the separate obligations imposed on him pursuant to the stipulation and § 47a-11. This court has long held that "[t]he statutory obligations of the landlord and tenant continue even when there is no longer a rental agreement between them. . . . A landlord also is required to fulfill his statutory obligations, even after a notice to quit has been served on the tenant and a summary process case is begun." (Citation omitted.) *Rivera* v. *Santiago*, 4 Conn. App. 608, 610, 495 A.2d 1122 (1985). By filing an affidavit of noncompliance, the plaintiff was seeking an execution as a result of the defendant's breach of his duties pursuant to either the stipulation and each applicable statute or both.

Although the language of Practice Book § 17-53 does not specifically refer to a scenario in which a landlord seeks an execution based on a serious nuisance involving conduct included in a statute but not included in a stipulation, we note that the Superior Court has previously applied Practice Book § 17-53 to a violation of § 47a-11 based on the alleged sale of drugs by a tenant. See *Housing Authority* v. *Russotto*, Superior Court, judicial district of Hartford, Docket No. HDSP-133755

(March 23, 2006) (41 Conn. L. Rptr. 56).[8] In *Russotto*, as in the present case, no statute was referred to in the stipulation between the parties, but the court, citing this court's holding in *Rivera* v. *Santiago*, supra, 4 Conn. App. 610, recognized the defendant's obligations pursuant to statute, even if those obligations were not delineated in the judgment or stipulation.[9] *Housing Authority* v. *Russotto*, supra, 59.

Additionally, our rules of practice should be "interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice." Practice Book § 1-8. In the present case, application of a narrow interpretation of the language of Practice Book § 17-53 would result in an injustice to the plaintiff because, pursuant to the court's ruling, the plaintiff would have no means of addressing the alleged serious nuisance committed by the defendant after the defendant had stipulated to a judgment of possession. The plaintiff would be left with no relief for the defendant's alleged violation because it would be unable to

[8] Although not binding on this court, we have on occasion considered Superior Court decisions that deal with the specific issues before us. See, e.g., *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 23.

[9] Specifically, the court in *Russotto* stated: "In deciding the proper procedure to address this matter, the court must consider the interplay between Practice Book [§] 17-53 and General Statutes [§§] 47a-11 and 47a-1. As previously stated, the language of [§] 47a-11 applies to a tenant at sufferance. [Section] 47a-1 (a) defines an 'action' under the Landlord Tenant Act as follows: '[a]ction includes . . . any . . . proceeding in which rights are determined, including an action for possession.' By filing an affidavit of noncompliance pursuant to Practice Book [§] 17-53, the [l]andlord is requesting a determination of rights as to whether an execution should issue. Under the circumstances, this matter is an 'action' under the Landlord Tenant Act that requires the court to hold a hearing 'in which rights [to possession] are determined.' . . . When an execution is requested because of a violation of an express term in a judgment or a statutory obligation of a tenant, Practice Book [§] 17-53 provides the tenant with the necessary procedural and substantive due process protections." (Citation omitted.) *Housing Authority* v. *Russotto*, supra, 41 Conn. L. Rptr. 59.

seek an execution because there is no reference in the stipulation to the possession or sale of illegal drugs or to Practice Book § 17-53, and the plaintiff also would be unable to initiate a second summary process action based on the alleged serious nuisance because the court would not have jurisdiction over such an action. See *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 23–24 (if first notice to quit is valid and terminates lease, second notice to quit cannot survive motion to dismiss for lack of subject matter jurisdiction). Furthermore, the court did not recognize that Practice Book § 17-53 guarantees a tenant the same opportunity to be heard in the Practice Book § 17-53 proceeding that the tenant would receive in a summary process action instituted pursuant to § 47a-15. We also note that, as the plaintiff's counsel pointed out to the court, the defendant had notice of the plaintiff's claim that he had violated § 47a-11 because of his arrest for the sale and possession of illegal drugs.

Because (1) the court's interpretation and misapplication of § 47a-11 and Practice Book § 17-53 to the facts of this case denies the plaintiff recourse to address the serious nuisance allegedly committed by the defendant on the premises in violation of § 47a-11 and the ability to obtain relief by way of execution of possession, (2) Practice Book § 17-53 provides for a hearing that safeguards the due process rights of the defendant, and (3) the defendant had notice of his alleged statutory violations, we conclude that the serious nuisance allegedly committed by the defendant was properly before the court and should have been considered at the hearing on the plaintiff's affidavit of noncompliance. Accordingly, the case must be remanded for a new hearing, in which the court should consider the plaintiff's affidavit of noncompliance in light of our conclusions that the defendant is a tenant at sufferance, that the requirements of § 47a-11 apply to the defendant,

and that the serious nuisance issue was properly before the court.

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

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 211

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
v. LIZA CROSS ET AL.
(AC 44499)

Alvord, Prescott and Suarez, Js.

Submitted on briefs April 6—officially released April 19, 2022

Appeal by the named defendant from the Superior Court in the judicial district of Stamford-Norwalk, *Kavanewsky, J.*

Per Curiam. The judgment is affirmed.

SHERRI TRAKHTENBERG *v.* FELIKS TRAKHTENBERG
(AC 43855)

Alvord, Prescott and Suarez, Js.

Argued April 6—officially released April 19, 2022

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Olear, J.*

Per Curiam. The judgment is affirmed.

CHESWOLD (TL), LLC, BMO HARRIS BANK, N.A.
v. MATTHEW J. KWONG ET AL.
(AC 44847)

Alvord, Moll and Cradle, Js.

Argued April 7—officially released April 19, 2022

Appeal by the named defendant from the Superior Court in the judicial district of Danbury, *Kowalski*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

NATALE MANAGEMENT ENTERPRISES, LLC
v. VINCENT LIGHTBOURNE ET AL.
(AC 44779)

Alvord, Moll and Cradle, Js.

Argued April 7—officially released April 19, 2022

Appeal by the named defendant from the Superior Court in the judicial district of New Haven, Housing Session, *Baio*, *J.*

Per Curiam. The judgment is affirmed.

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In re Lucia C. 275

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-T: Substance Use Disorder (SUD) Services – Rehabilitative Services Provided in Outpatient and Residential Levels of Care

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 May 1, 2022, SPA 22-T will amend Attachments 3.1-A, 3.1-B, and 4.19-B of the Medicaid State Plan to establish coverage and reimbursement for SUD services under the rehabilitative services benefit category pursuant to section 1905(a)(13)(C) of the Social Security Act and as defined in federal regulation at 42 C.F.R. § 440.130(d), provided in outpatient and residential levels of care, as detailed below.

This SPA adds coverage and payment for SUD residential and outpatient services to the Medicaid State Plan in conjunction with the state's implementation of its SUD demonstration waiver (Demonstration) pursuant to section 1115 of the Social Security Act, which, as of the submission of this public notice to the Connecticut Law Journal, is expected to be approved shortly by CMS. Specifically, as required as a condition of the Demonstration, this SPA enables the state to implement coverage and payment for SUD services across the full continuum of the outpatient and residential levels of care set forth in the American Society of Addiction Medicine (ASAM) 3rd edition clinical criteria. The Demonstration is also important for this SPA because, once approved by CMS, the Demonstration enables the state to claim for federal financial participation (FFP) for residents of facilities that meet the federal definition of an institution for mental diseases (IMD), which is otherwise not authorized under federal law.

The purpose of this SPA is to improve and expand SUD services covered by Medicaid in alignment with the Demonstration, including to help accomplish the milestones, goals, and objectives set forth in the Demonstration and related materials. More broadly, this SPA, together with the Demonstration and other state initiatives, is part of the state's efforts to address the opioid epidemic and to help individuals with opioid use disorder and other SUDs.

The coverage portions of this SPA detail the various elements of the new services to be provided. The service components include assessment and individualized plan development, therapy, health services and medication management, peer support services, service coordination, and skill building and psycho-education services. Each level of care (LOC) aligns with the ASAM guidelines levels of care for outpatient and residential settings and include:

- Level 0.5: Early Intervention Services

- Level 1: Outpatient services,
- Level 1WM: Ambulatory Withdrawal Management (WM) without Extended On-Site Monitoring Services,
- Level 2.1: Intensive Outpatient Treatment,
- Level 2.5: Partial Hospitalization services,
- Level 2-WM: Ambulatory Withdrawal Management with Extended On-Site Monitoring Services,
- Level 3.1: Clinically Managed Low-Intensity Residential Services,
- Level 3.2-WM: Clinically Managed Residential Withdrawal Management Services,
- Level 3.3: Clinically Managed Population-Specific High-Intensity Residential Services,
- Level 3.5: Clinically Managed Medium Intensity for Adolescents/High-Intensity for Adults Residential Services,
- Level 3.7: Medically Monitored Intensive Inpatient Services, and
- Level 3.7-WM: Medically Monitored High Intensity Inpatient Services, Withdrawal Management.

The provider qualifications detail the requirements for applicable licensure and certification for the provider entities and provider staff/practitioners, including required supervision, as applicable.

The reimbursement portion of the SPA provides that outpatient and residential SUD rehabilitative services are paid based on a fee schedule. American Society of Addiction Medicine (ASAM) level of care 0.5 Early Intervention Services and ASAM level of care 1 Outpatient Services fees are set based on the rates for comparable services provided by behavioral health clinics. All covered Levels of Care other than ASAM Level 0.5 Early Intervention Services and ASAM Level 1 Outpatient Services, as defined in Attachment 3.1-A, are paid using fees established by the state after analyzing the costs to provide each service using the unit of service defined according to the Healthcare Common Procedure Coding System (HCPCS) approved code set. The specific proposed rates are as follows.

LOC: ASAM Level of Care
R: Residential
RE: Residential Enhanced
WM: Withdrawal Management
PPW: Pregnant and Parenting Women

SUD ASAM Residential Fees by Level of Care (Single Unit)

	Total Bed Capacity for Level of Care						
LOC	**0-13 Beds**	**14-24 Beds**	**25-44 Beds**	**45-64 Beds**	**65-94 Beds**	**95-149 Beds**	**150-200 Beds**
3.1	$342.21	$194.73	$161.82	$152.88	$152.88	$152.88	$152.88
3.3	$381.31	$233.87	$196.04	$196.04	$196.04	$196.04	$196.04
3.5	$456.21	$267.75	$226.28	$210.76	$202.83	$200.80	$192.12
3.5 PPW	$456.21	$267.75	$226.28	$210.76	$202.83	$200.80	$192.12
3.7R	$492.16	$409.38	$319.39	$319.39	$319.39	$319.39	$319.39
3.7RE	$485.00	$485.00	$485.00	$485.00	$485.00	$485.00	$485.00
3.2WM	$252.52	$252.52	$252.52	$252.52	$252.52	$252.52	$252.52
3.7WM	$512.90	$512.90	$451.20	$451.20	$451.20	$451.20	$451.20

SUD ASAM Residential Fees by Level of Care and Total Beds at Address (Flex Beds)

	Total Bed Capacity for Level of Care						
	LOC	**0-13 Beds**	**14-24 Beds**	**25-44 Beds**	**45-64 Beds**	**65-94 Beds**	**95-149 Beds**
3.1	$342.21	$194.73	$161.82	$152.88	$152.88	$152.88	$152.88
3.3	$381.31	$233.87	$196.04	$196.04	$196.04	$196.04	$196.04
3.5	$456.21	$267.75	$226.28	$210.76	$202.83	$200.80	$192.12
3.5 PPW	$456.21	$267.75	$226.28	$210.76	$202.83	$200.80	$192.12
3.7R	$492.16	$409.38	$319.39	$319.39	$319.39	$319.39	$319.39
3.7RE	$485.00	$485.00	$485.00	$485.00	$485.00	$485.00	$485.00
3.2WM	$252.52	$252.52	$252.52	$252.52	$252.52	$252.52	$252.52
3.7WM	$512.90	$512.90	$451.20	$451.20	$451.20	$451.20	$451.20

SUD Outpatient Services

Service	**Rate Type**	**Fee**
ASAM 2.1 - Intensive Outpatient Program (IOP)	Per Diem	$173.62
ASAM 2.5 - Partial Hospitalization Program (PHP)	Per Diem	$184.82

SUD Outpatient Services - Withdrawal Management (WM)

Service	**Rate Type**	**Fee**
ASAM 2 WM - between 4 and up to 24 hours	Per Diem	$442.70
ASAM 1 WM - up to four hours	Hourly	$110.67

Fee schedules are posted to https://www.ctdssmap.com. From this web page, go to ''Provider'' then to ''Provider Fee Schedule Download'', then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate Medicaid expenditures by approximately $75,305,156 in Federal Fiscal Year (FFY) 2022 and $189,769,205 in FFY 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 22-T: Substance Use Disorder (SUD) Services – Rehabilitative Services Provided in Outpatient and Residential Levels of Care''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than May 4, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-U: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults to Add Medicaid Coverage of Substance Use Disorder (SUD) Services – Rehabilitative Services Provided in Outpatient and Residential Levels of Care

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), which will amend the Alternative Benefit Plan (ABP) at Attachment 3.1-L of the Medicaid State Plan.

The ABP is the benefit package that is provided to the Medicaid low-income adult population under section 1902(a)(10)(A)(i)(VIII) of the Social Security Act (also known as HUSKY D). Pursuant to section 2001 of the Affordable Care Act, effective January 1, 2014, Connecticut expanded Medicaid eligibility to low-income adults with incomes up to and including 133% of the federal poverty level. The expanded coverage group is referred to as Medicaid Coverage for the Lowest-Income Populations.

Changes to Medicaid State Plan

Effective on or after January 1, 2022, SPA 22-U will amend the ABP (Attachment 3.1-L of the Medicaid State Plan) in order to add coverage for SUD services under the rehabilitative services benefit category pursuant to section 1905(a)(13)(C) of the Social Security Act and as defined in federal regulation at 42 C.F.R. § 440.130(d), provided in outpatient and residential levels of care.

Specifically, this SPA adds coverage for SUD residential and outpatient services to the ABP in conjunction with the state's implementation of its SUD demonstration waiver (Demonstration) pursuant to section 1115 of the Social Security Act, which, as of the submission of this public notice to the Connecticut Law Journal, is expected to be approved shortly by CMS. As required as a condition of the Demonstration, this SPA enables the state to implement coverage and payment for SUD services

across the full continuum of the outpatient and residential levels of care set forth in the American Society of Addiction Medicine (ASAM) 3rd edition clinical criteria. The Demonstration is also important for this SPA because, once approved by CMS, the Demonstration enables the state to claim for federal financial participation (FFP) for residents of facilities that meet the federal definition of an institution for mental diseases (IMD), which is otherwise not authorized under federal law.

The purpose of this SPA is to improve and expand SUD services covered by Medicaid under the ABP for HUSKY D in alignment with the Demonstration, including to help accomplish the milestones, goals, and objectives set forth in the Demonstration and related materials. More broadly, this SPA, together with the Demonstration and other state initiatives, is part of the state's efforts to address the opioid epidemic and to help individuals with opioid use disorder and other SUDs.

This SPA corresponds to SPA 22-U, which adds Medicaid coverage and payment for these services to the underlying Medicaid State Plan (Attachments 3.1-A, 3.1-B, and 4.19-B). This SPA cross-references to the description of the coverage in the Attachment 3.1-A pages for SPA 22-U, including the service components, provider qualifications, levels of care, and other details.

This SPA will not make any other changes to the ABP than as described above, which will continue to reflect the same coverage in the ABP for HUSKY D Medicaid members as in the underlying Medicaid State Plan. Accordingly, the ABP will continue to provide full access to Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services to beneficiaries under age twenty-one. This includes informing beneficiaries that EPSDT services are available and to inform beneficiaries about the need for age-appropriate immunizations. The ABP also provides or arranges for the provision of screening services for all children and for corrective treatment as determined by child health screenings. These EPSDT services are provided by the DSS fee-for-service provider network. EPSDT clients are also able to receive any additional health care services that are coverable under the Medicaid program and found to be medically necessary to treat, correct or reduce illnesses and conditions discovered regardless of whether the service is covered in Connecticut's Medicaid State Plan.

Likewise, this SPA will not make any changes to cost sharing for the services provided under the ABP. Connecticut does not currently impose cost sharing on Medicaid beneficiaries. Because there are no Medicaid cost sharing requirements for Connecticut beneficiaries, no exemptions are necessary in order to comply with the cost sharing protections for Native Americans found in section 5006(e) of the American Recovery and Reinvestment Act of 2009.

Fiscal Impact

DSS estimates this SPA will not change annual aggregate expenditures in Federal Fiscal Year (FFY) 2022 and FFY 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 22-U: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults to Add Medicaid Coverage of Substance Use Disorder (SUD) Services – Rehabilitative Services Provided in Outpatient and Residential Levels of Care.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than May 19, 2022.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-I: Reimbursing Federally Qualified Health Centers (FQHCs) for the Cost of Long-Acting Reversible Contraceptive (LARC) Devices Separately from their Medical Encounter Rate

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 May 1, 2022, SPA 22-I will amend Attachment 4.19-B of the Medicaid State Plan to reimbursing federally qualified health centers (FQHCs) separately for the cost of long-acting reversible contraceptive (LARC) devices from their medical encounter rate. DSS is proposing this SPA because it is designed to improve access and reduce unnecessary costs by helping to facilitate the prevention of unwanted pregnancies by: (1) removing the costs associated with purchasing LARCs as a barrier to access to LARCs in the FQHC setting and (2) helping to facilitate same-day access to LARCs in the FQHC setting.

Specifically, FQHCs will be reimbursed for the cost of LARCs based on the applicable pricing for the FQHC under section 340B of the Public Health Service Act (340B rate), in addition to the FQHC's medical encounter rate. For informational purposes and context, below is a chart listing each LARC with its current 340B rate for the FQHCs using for each applicable Healthcare Common Procedure Coding System (HCPCS) billing code; note that these rates and codes are subject to change:

HCPCS Code	Description	Current 340B Rate
J7296	Kyleena 19.5 mg	$249.00
J7297	Liletta 52 mg	$100.00
J7298	Mirena 52 mg	$329.00
J7300	Intraut copper contraceptive	$283.32
J7301	Skyla 13.5 mg	$490.00
J7307	Etonogestrel implant system	$399.00

This change in reimbursement methodology for LARC devices provided by FQHCs applies to all HUSKY A, B, C, and D eligibility groups and the Family Planning Limited Benefit program.

Fiscal Impact

DSS estimates that this change will increase annual aggregate Medicaid expenditures by approximately $5,137 in State Fiscal Year (SFY) 2022 and $63,494 in 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 22-I: Reimbursing Federally Qualified Health Centers for the Cost of Long-Acting Reversible Contraceptive Devices Separately from their Medical Encounter Rate''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than May 4, 2022.

NOTICE

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of March 8, 2022:

Stephanie S.	DelPonte Unilever

Certified as of March 11, 2022:

Amy J. Patel	ReneSola Ltd.

Certified as of March 21, 2022:

Heidi Garfield	Priceline.com LLC
Chris A. R. Unseth	Yale University

Certified as of March 24, 2022:

Gregory C. Cheyne	Amphenol Corporation
Morgan O. Mirvis	ITV America

Hon. Patrick L. Carroll III
Chief Court Administrator