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CONNECTICUT REPORTS

Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ANDREW SAMUOLIS
(SC 20299)

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

Syllabus

Pursuant to the emergency exception to the warrant requirement of the fourth amendment to the United States constitution, the police are permitted to enter a home without a warrant when they have an objec-

tively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Convicted of the crimes of murder, assault in the first degree, and attempt to commit assault in the first degree, the defendant appealed to this court, claiming that the trial court improperly had denied his motion to suppress certain evidence seized by the police as a result of their warrantless entry into his home. Prior to the challenged entry, the defendant's neighbor contacted the police because he and other neighbors were concerned that they had not seen the defendant's father, S, who lived with the defendant, in a long time. Thereafter, two police officers were dispatched to the defendant's residence to check on S's well-being. The officers assessed the exterior of the residence, knocked on the doors, and called into open windows but received no response and concluded that no one was home. Immediately after the well-being check, one of the officers was told by his supervising officer that the defendant had, or possibly had, mental health issues. Four days later, the defendant's neighbor again contacted the police and requested another well-being check. The officers conducting the second well-being check were warned that the defendant was possibly a mentally disturbed person. Upon their arrival, the officers spoke with the neighbor, who told them that, after the previous visit by the police, the defendant covered the lower rear windows with chicken wire. The neighbor also indicated that he noticed a mass of flies around the upper rear window of the residence. One of the officers believed, based on his prior experience, that the sheer number of flies indicated that there might be a dead body inside the house. Using a ladder, one of the officers climbed to the upper rear window, which had been propped open slightly with an air freshener. There were flies everywhere but no odor. The officer looked into the window but was unable to see anything noteworthy. Both officers then contacted their supervisor because they believed that entry into the residence might be necessary for the well-being of both S and the defendant. After arriving at the residence and being apprised of the situation, the supervisor concluded that there was a dead body in the home and that they would need to enter the residence to see if anyone inside needed assistance. One of the officers thereafter cut a screen and entered the residence through an open second floor window. After announcing his presence and not receiving a response, the officer went downstairs and opened the front door. The defendant then shot the officer and fled the residence. Soon thereafter, the defendant was apprehended, and the officers entered the home to secure it and to search for any injured persons. Police officers eventually found a badly decomposed body on the second floor. Thereafter, the police obtained a search warrant, and the defendant voluntarily gave a statement to the police in which he admitted that he had shot S several months earlier and that, when S's body started to smell, he sealed the room in which it was located. In denying the defendant's motion to suppress the seizure

of S's dead body, the trial court concluded, inter alia, that the officers' entry into the home was justified under the emergency exception to the warrant requirement because that entry was objectively reasonable under the totality of the circumstances. On appeal, the defendant claimed, inter alia, that the facts did not provide an objectively reasonable basis for the police officers to conclude that there was an emergency justifying a warrantless entry into his residence. *Held* that, under the totality of the circumstances, it was objectively reasonable for the officers to conclude that there was an emergency justifying their initial entry into the defendant's home, and, accordingly, the trial court properly denied the defendant's motion to suppress: the defendant could not prevail on his claim that it was unclear, in light of the United States Supreme Court's decision in *Caniglia* v. *Strom* (141 S. Ct. 1596), whether a warrantless entry into a home is still permitted to assist a person who is injured or facing imminent injury, as this court found no such ambiguity in that decision and observed that other courts have continued to apply the emergency exception post-*Caniglia*; moreover, although the state did not meet its burden of establishing that it was objectively reasonable for the officers to believe that the defendant required emergency assistance, it did meet its burden of establishing that it was objectively reasonable for the officers to believe that S required immediate emergency assistance, as the record indicated that S was an elderly man who had not been seen by any of his neighbors for at least one month, the family's only vehicle had not been moved since S was last seen, S did not respond to the officers' knocks on the door or shouts into the open windows, and there was an extraordinary infestation of flies around the upper rear window of the residence, which led the officers to believe, on the basis of their past experience, that the most likely explanation for the infestation was the presence of a dead body, and which also left open the possibility that an occupant might be injured rather than dead; furthermore, the defendant's mental condition was a relevant factor in the officers' calculation of whether S needed emergency assistance and what actions were necessary to provide that assistance, as the defendant's conduct in attempting to fortify the home against intruders and in refusing to answer the door would have indicated to the officers that they were not going to be able to obtain timely information from the defendant about the whereabouts or condition of S, and the defendant's failure to remediate the fly infestation in plain view reasonably suggested that his mental condition may have impaired his capacity to appreciate the gravity of the conditions that existed and the need to elicit prompt medical assistance; in addition, there was no merit to the defendant's contentions that the officers' actions in driving to the residence without activating their emergency lights or sirens and waiting for their supervisor's approval before entering the residence indicated that they did not perceive the situation as an emergency, and

that the officers failed to consider alternative explanations for the facts presented that would indicate that no emergency existed.

Argued March 24—officially released August 9, 2022

Procedural History

Three substitute informations charging the defendant, in the first case, with two counts of the crime of attempt to commit assault in the first degree and, in the second case, with two counts of the crime of attempt to commit assault in the first degree and one count of the crime of assault in the first degree, and, in the third case, with the crime of murder, brought to the Superior Court in the judicial district of Windham, where the cases were consolidated; thereafter, the court, *J. Fischer*, *J.*, denied the defendant's motion to suppress certain evidence; subsequently, the charge of murder was tried to a three judge panel, *A. Hadden*, *J. Fischer* and *Solomon*, *Js.*, and the remaining charges were tried to the court, *J. Fischer*, *J.*; judgments of guilty of murder and one count each of attempt to commit assault in the first degree and assault in the first degree, from which the defendant appealed to this court. *Affirmed*.

Jeffrey C. Kestenband, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Andrew J. Slitt*, senior assistant state's attorney, and, on the brief, *Anne F. Mahoney*, state's attorney, for the appellee (state).

Opinion

KELLER, J. Following a trial to the court, the defendant, Andrew Samuolis, was convicted of murder in violation of General Statutes § 53a-54a, assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53a-59 (a) (5), and attempt to commit assault in the first degree by means of the discharge of a firearm in violation of General Statutes §§ 53a-49 and 53a-59 (a) (5). In his direct appeal to

this court; see General Statutes § 51-199 (b) (3); the defendant challenges only his murder conviction. The sole issue is whether the trial court properly denied the defendant's motion to suppress evidence seized from his home, specifically, the dead body of the defendant's father, John Samuolis, on the grounds that (1) the police officers' warrantless entry into the Samuolis home was justified under the emergency exception to the warrant requirement of the fourth amendment to the United States constitution, or, alternatively, (2) the defendant's alleged actions in shooting at the officers upon their initial entry attenuated the taint from that unlawful initial entry and justified their subsequent reentries into the home. We affirm the trial court's judgment on the basis of the first ground.

The trial court made the following findings of fact. "On [Friday] June 21, 2013, Willimantic Police Officer[s] [Amy] Hartman [and Elvin Salas were] dispatched to 31 Tunxis Lane [in Willimantic] to check on the well-being of John Samuolis [Samuolis], the owner of the property. Earlier in the day, [Salas] had been on routine patrol on the street and hailed by Mark Curtis, who lived next door to Samuolis. Curtis related that he and the neighbors across the street, [Andy and Shirley Lebiszczak], were concerned that they had not seen [Samuolis], who was referred to as the 'old man,' in a long time. . . .

"At about 7:30 that evening, [while it was still light out] . . . Salas and Hartman arrived . . . at [31] Tunxis Lane, which is a split-level style home [on a cul-de-sac] in a residential neighborhood described as 'quiet.' . . . A car . . . was parked in the driveway. Some of the [second floor] windows of the house were open and part[s] of the lawn had been mowed recently. There was no visible accumulation of trash or mail. The officers walked around the house and knocked on the doors, which were locked. They noticed a cat in the

window. Salas called into the open windows announcing their presence, but they received no response. They concluded that no one was home.

"The officers then spoke with Curtis and the Lebiszczaks and learned that the house was occupied by [Samuolis] and his adult son, [the defendant], and that the [defendant's] mother . . . was deceased. The neighbors also noted that [the defendant] was 'a little weird' and 'not all there' and that he might be in the house. . . . The officers intended to return later that evening to recheck the house but . . . other duties . . . prevented them from returning.

"On [the morning of Monday] June 25, 2013 . . . Curtis called the Willimantic Police [Department] and asked them to recheck the Samuolis house because [of changes since the prior visit, namely] there was now chicken wire covering the lower rear windows of the house and there were a huge number of flies massing at an upper rear window. [Officer Kevin] Winkler was dispatched to the scene, and . . . Salas responded as back up when he recognized the address being broadcast. . . . [N]either officer used [his] lights or sirens on [his] way to 31 Tunxis Lane. . . . Since Salas' earlier visit, the weather had been extremely hot and dry.

"Both officers exited their vehicles and walked around the house. They found the doors were all locked and all the curtains were [now] drawn. The front upper windows of the house were open. Salas saw [that] the car was still parked in the same place and ran the [license] plate. The registration came back to 31 Tunxis Lane. Salas did not check to see if any other vehicles were registered to the house.

"The officers also had a short discussion with Curtis, who told them that [the defendant] had put the chicken wire up after the police had left the home [following]

the previous well-being check.[1] Curtis also pointed out the mass of flies at the upper rear window. Salas told Winkler that neither the wire nor the flies had been there earlier. Salas, based on his experience, thought that the sheer number of flies indicated that there might be a dead body in the house.

"Curtis offered the use of a ladder, and Winkler put it in place and climbed up to look into the upper rear window. The window was propped open slightly by an air freshener. There were flies everywhere, but no odor. Winkler looked in but was unable to see anything. The officers did not have a phone number for the house; nor did they ask Curtis [if he had] any contact information. The officers were now concerned for the well-being of the 'old man,' [Samuolis], and his son, [the defendant], due to his possible 'state of mind.'

"Salas and Winkler thought that an entry into the house might be necessary, so they called their supervisor, Sergeant [Roberto] Rosado, and related what they had found. Rosado came to the scene without using his lights and siren, [arriving a few minutes later] . . . . After being apprised of the current situation and what had transpired on June 21, Rosado concluded that there was a dead body in the house and that they would have to make an entry into the house in order to search for it and anyone else who might need help. . . . [T]hese officers . . . did not believe that criminal activity had occurred. . . . Winkler move[d] [the ladder around the house] to the front upper windows to gain entry [into a better lit room].[2] The officers testified that they would

[1] Curtis unambiguously testified that he never saw anyone actually installing the chicken wire on the window. Winkler testified, however, that he received information from dispatch that "the neighbor had observed [the defendant] leaving the residence after law enforcement . . . left on Friday and then affixing chicken wire to the back windows . . . ."

[2] The officers also chose to enter through that upper floor window because doing so would cause the least amount of damage, only requiring them to cut the screen.

have handled the issues differently if they were not in community caretaking mode.[3] . . .

"Winkler then ascended the ladder [and] cut the window screen . . . . He told Rosado and Salas that he would go down and open the front door and let them in. . . . [After he entered the second floor of the residence] Winkler heard a noise from the basement. Winkler stopped and announced his presence as a police officer and waited, but he heard nothing in response. Winkler then went down the stairs to the front door, which was barred by a heavy metal bar. He removed the bar and tossed it . . . toward the basement . . . . Winkler then opened the front door . . . while keeping an eye on the basement . . . .

"At that point, Winkler saw a rifle barrel stick out around the wall at the bottom of the basement stairs carried by a male who was dressed 'for battle' in camouflaged clothing and a ballistic style vest. The male aimed and fired the weapon at Winkler, hitting him in the elbow. This male was later identified as the defendant . . . ."[4] (Footnotes added.)

The officers then fled from the home. Salas saw the defendant run through the backyard of the house carrying the rifle and disappear into the woods. Rosado radioed police dispatch and reported what had occurred, and, thereafter, other officers arrived at the scene to assist. Detective Lucien Frechette received a text message that a Willimantic police officer had been shot and drove to the police station, where "he gathered information about the residence and the family, including a phone number. Frechette donned protective gear and went to the command center, which had been set

[3] The officers testified that they would have done things differently if they had been responding to an active crime.

[4] Testimony indicates that, at the time of the incident, at least two of the three officers believed that the defendant was the shooter.

up a short distance from 31 Tunxis Lane. Frechette asked for and received permission to call the phone number he had, and then he called it from the command center. No one answered the call, and he left a message on a recording device."

At about 12:53 p.m., the state police reported that they had captured the defendant and that he was in their custody. "As soon as Frechette and the other officers learned that the defendant was in custody, he and other [special operations officers] entered the house to secure it and [to] search for any injured parties. This was at about 1:02 p.m. Frechette observed that the door to the rear second floor bedroom was sealed with tape and plastic and a rope. Suspecting [that] it might be booby-trapped, Frechette ordered everyone out of the house . . . .

"Once outside, Frechette went up a ladder to the rear second floor window and raised the window enough to lean inside. The flies were still thick. Frechette saw a badly decomposed body on the floor directly below the window [wrapped in plastic]. He also visually inspected the room for booby traps, but found nothing. No physical evidence was seized during this protective sweep. The Connecticut State Police then procured a search warrant, which was executed later, and physical evidence [including what was later confirmed to be the dead body of Samuolis] was seized."

While these events were unfolding, the defendant waived his rights and voluntarily gave a statement to Connecticut State Police Detective Adam Pillsbury. Prior to taking the defendant's statement, "Pillsbury did not know that [Samuolis] was dead or that his body was still in the house. The defendant told Pillsbury that the police had come to the house to check on his father. The defendant stated that he had shot his father several months before. He further stated that the body was still in the house, and it had started to smell so he sealed

the room. Pillsbury then called his superiors to tell them that there was a body in the house."

The defendant was charged with murder, assault in the first degree, and several counts of attempt to commit assault in the first degree. The defendant filed a motion to suppress the evidence seized from the warrantless entry into his home. The state objected to the motion on the ground that entry was justified under the emergency doctrine and other theories. During the hearing on the motion, testimony was adduced from a number of police officers and Curtis. The trial court expressly found that all of the witnesses were credible and none of their testimony was in substantial conflict.

Because two matters that were the subject of this testimony have particular significance to this case—the information provided to the officers about the defendant prior to entering the home and the nature of the conditions that the officers encountered—we elaborate on the testimony that supported the trial court's findings as to those two matters.[5] With regard to information about the defendant, the officers initially entering the home were specifically made aware that the defendant had, or possibly had, mental deficiencies. Right after the initial well-being check, Salas was told by his supervising officer, who was familiar with the Samuolis family, that the defendant had "[m]ental health issues." The dispatch to the officers for the second well-being check also was coded to indicate that the defendant was a possible "file 18," a code that meant "a possible mentally disturbed or mentally malfunctioning person."

[5] The trial court made generalized findings as to both of these matters, although the finding regarding the defendant's " 'mental issues' " was embedded in the trial court's legal conclusions. The defense did not attempt to discredit the testimony of any of the state's witnesses but, rather, focused on information that had not been ascertained or alternative explanations that had not been considered by the officers prior to entry into the home.

With regard to the changed conditions that the officers encountered since the first visit, witnesses described the upper rear window of the house as follows: "totally caked with flies," you "[c]ouldn't even see glass" because it was "[l]oaded" with flies, and flies were "pretty much infesting the entire . . . window," appearing to be "both inside and out," "seem[ing] like they were coming through the window and siding . . . ." The window directly below that window was now covered with chicken wire and a small hole had been cut in the blinds, which appeared to have been "staged . . . to be able to look outside . . . almost like a spy hole."

The trial court concluded, on the basis of the preceding facts, that the police entry into the home under the emergency doctrine was "objectively reasonable under the totality of the circumstances." The court pointed to the following circumstances: the police went to the home on both occasions to make a welfare check, not to investigate a crime; the presence of flies indicated to the officers the presence of a dead body; the "bizarre" and "inexplicable" act of covering the windows with chicken wire; the " 'old man' " remained missing; and there was a concern for the defendant's state of mind. The court found that the officers did not know for certain that there was a dead body in the home, or if there was, whose body it was, which left them reasonably concerned for the safety of "either an 'old man' or his son who had 'mental issues.' " The court concluded that, given the unsuccessful efforts of the police to make contact at the home and the circumstances presented, it was unnecessary for the police to obtain a telephone number to call the home or residents prior to their entry. Alternatively, the court determined that, even if the initial entry was unlawful, the defendant's alleged shooting of Winkler sufficiently attenuated that unlawful act from the subsequent lawful search and

seizure of evidence. Accordingly, the trial court denied the defendant's motion to suppress.

At his trial to the court, the defendant raised the affirmative defense of lack of capacity to appreciate the wrongfulness of his conduct or to control his conduct due to mental disease or defect, specifically, autism spectrum disorder. The court found the defendant guilty of murder, assault in the first degree, and attempt to commit assault in the first degree. The court imposed a total effective sentence of forty-five years of imprisonment, followed by eight years of special parole. The defendant's direct appeal to this court, challenging only his murder conviction, followed.

The defendant claims that, even if a warrantless entry into a home is permitted to assist someone who is injured or facing imminent injury, there was no emergency justifying entry into his home. He argues that the objective facts did not provide a reasonable basis to believe that someone in the home was dead or in need of immediate aid, and that recovery of a dead body is not an emergency in any event. The defendant further contends that his alleged criminal conduct did not justify the subsequent entries into the home, which resulted in the illegal seizure.

The state claims that all of the entries were part of the same justifiable emergency. It further contends that, if we conclude that an emergency did not exist when the police initially entered the home, we should conclude that it existed as a consequence of the defendant's shooting at the officers after they entered. Alternatively, the state contends that the evidence seized is admissible under the independent source doctrine because the home would have been searched pursuant to the search warrant issued in connection with the assault, or under the inevitable discovery doctrine, because the defendant independently confessed to the killing.

Our analysis begins with the observation that the defendant does not challenge any of the trial court's factual findings. His challenge instead is to the reasonableness of the conclusion drawn from those facts, namely, that they provided an objectively reasonable basis for the officers to conclude that there was an emergency justifying a warrantless entry into his home. See generally *State* v. *Pompei*, 338 Conn. 749, 756, 259 A.3d 644 (2021) ("[w]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights . . . and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence" (internal quotation marks omitted)). Our review of his claim therefore is plenary. See id.; cf. *United States* v. *Porter*, 594 F.3d 1251, 1256 (10th Cir. 2010) (existence of exigent circumstances is mixed question of law and fact, under which "[t]he ultimate question regarding the reasonableness of the search is a question of law which we review de novo" (internal quotation marks omitted)); *State* v. *Davis*, 331 Conn. 239, 246–47, 203 A.3d 1233 (2019) (de novo review was undertaken when factual findings were not challenged and claim was that those findings did not support conclusion that police had reasonable and articulable suspicion that defendant was engaged in criminal activity).

Settled principles of fourth amendment jurisprudence guide this inquiry. "It is a basic principle of [f]ourth [a]mendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. . . . Entry by the government into a person's home . . . is the chief evil against which the . . . [f]ourth [a]mendment is directed." (Citation omitted; internal quotation marks omitted.) *State* v. *Fausel*, 295

Conn. 785, 793, 993 A.2d 455 (2010). "The warrant requirement protects an individual in his home from official intrusion whether the purpose of the search is to further a criminal investigation or the government's enforcement of an administrative regulation. *Camara* [v. *Municipal Court*, 387 U.S. 523, 530, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)] ('[i]t is surely anomalous to say that the individual and his private property are fully protected by the [f]ourth [a]mendment only when the individual is suspected of criminal behavior . . .')." *State* v. *Vargas*, 213 N.J. 301, 313, 63 A.3d 175 (2013). Thus, "merely because police activities are 'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,' *Cady* [v. *Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)], does not mean that persons have a lesser expectation of privacy in their homes, see *Camara* [v. *Municipal Court*, supra, 534] (concluding administrative searches constituted 'significant intrusions upon the interests protected by the [f]ourth [a]mendment')." *State* v. *Vargas*, supra, 325–26.

"As a result, [w]arrants are generally required to search a person's home . . . unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the [f]ourth [a]mendment. . . . *Brigham City* v. *Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). Searches conducted pursuant to emergency circumstances are one of the recognized exceptions to the warrant requirement under both the federal and state constitutions. *State* v. *Blades*, 225 Conn. 609, 617–18, 626 A.2d 273 (1993).

"The emergency exception to the warrant requirement allows police to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. *Brigham City* v.

Stuart, supra, 547 U.S. 400. . . . [T]he state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat.[6] . . . The test is not [however] whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 794–95; see also *Michigan* v. *Fisher*, 558 U.S. 45, 47, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009) (addressing "emergency aid" exception).

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. . . . *Mincey* v. *Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 295 Conn. 794; see also *United States* v. *Barone*, 330 F.2d 543, 545 (2d Cir.) ("[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers, and derives from the common law"), cert. denied, 377 U.S. 1004, 84 S. Ct. 1940, 12 L. Ed. 2d 1053 (1964). "The state bears the burden of demonstrating that a warrantless entry falls within the emergency exception." (Internal quotation marks omitted.) *State* v. *Fausel*, supra, 795.

In the present case, the trial court concluded that the police were confronted with an emergency but also

[6] Another requirement of the emergency exception is that "the search's scope and manner were reasonable to meet the need." (Internal quotation marks omitted.) *United States* v. *Ward*, 716 Fed. Appx. 682, 683 (9th Cir. 2018). See generally 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 649 ("[a] warrantless search must be strictly circumscribed by the exigencies that justify its initiation" (internal quotation marks omitted)). The scope of the search is not challenged in the present case.

emphasized the fact that the case had commenced as a well-being check and not as a criminal investigation. Although courts have recognized that the emergency aid doctrine has its roots in the police's caretaking function, as opposed to its law enforcement function,[7] this doctrine must be distinguished from what had been called the "community caretaking" exception to the warrant requirement. Many courts, including our own, have interpreted the United States Supreme Court's decision in *Cady* v. *Dombrowski*, supra, 413 U.S. 433, as recognizing a community caretaking warrant exception. See, e.g., *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 553–54, 556–57 (7th Cir.), cert. denied, 574 U.S. 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014); *State* v. *Pompei*, supra, 338 Conn. 758. The court in *Cady* had sustained the warrantless search of an automobile in police custody that was conducted for a routine public safety purpose, noting that police officers frequently "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, supra, 441. Following *Cady*, courts held that, under the community caretaking doctrine, when the police take actions "not for any criminal law enforce-

[7] See, e.g., *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 558 (7th Cir.) (emergency aid doctrine "recognizes that police play a service and protective role in addition to a law enforcement role"), cert. denied, 574 U.S. 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014); *United States* v. *Najar*, 451 F.3d 710, 714–15 (10th Cir.) ("the emergency aid exigency emerged, informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation"), cert. denied, 549 U.S. 1013, 127 S. Ct. 542, 166 L. Ed. 2d 401 (2006); *State* v. *Kendrick*, 314 Conn. 212, 230, 100 A.3d 821 (2014) ("[t]he emergency doctrine . . . is rooted in the caretaking function of the police"); 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 625 n.7 ("emergency aid exception is one of many community caretaking functions of the police" (internal quotation marks omitted)).

We note that there does not appear to be any material distinction between courts' use of the terms "emergency aid" doctrine or exception and "emergency" doctrine or exception.

ment purpose but, rather, to protect members of the public . . . searches . . . conducted for the latter purpose are deemed exempt from the [f]ourth [a]mendment warrant requirement." *Sutterfield* v. *Milwaukee*, supra, 553–54; see also id., 553 n.5 (acknowledging overlap and distinction between community caretaking exception and emergency aid exception); *Hunsberger* v. *Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (noting overlap and distinction between community caretaking and exigent circumstances doctrines), cert. denied, 559 U.S. 938, 130 S. Ct. 1523, 176 L. Ed. 2d 113 (2010). State and federal courts have divided, however, over whether the community caretaking exception was limited to automobile searches or extended more broadly to include warrantless entry into a home. See *Sutterfield* v. *Milwaukee*, supra, 556–57 (citing cases).

The United States Supreme Court recently made clear that the mere fact that the police are acting solely for community caretaking purposes is not sufficient, in and of itself, to excuse warrant requirements for entry into a home. *Caniglia* v. *Strom*, U.S. , 141 S. Ct. 1596, 1599, 209 L. Ed. 2d 604 (2021); see id., 1598 (*Cady*'s acknowledgment of police's " 'caretaking' duties" did not create "a standalone doctrine that justifies warrantless searches and seizures in the home"). Significantly for our purposes, the court's majority opinion in *Caniglia*, as well as the three concurring opinions, underscored that the court's decision was not intended to undermine settled law holding that no warrant is required to enter a home when there is a "need to assist persons who are seriously injured or threatened with such injury." (Internal quotation marks omitted.) Id., 1600 (Roberts, C. J., with whom Breyer, J., joins, concurring); see also id., 1599 (majority opinion); id., 1601–1602 (Alito, J., concurring);[8] id., 1603–1604 (Kavanaugh,

[8] Although Justice Alito indicated in his concurring opinion in *Caniglia* that the court's exigency case law had not addressed a situation in which no warrant would have been available even if there had been time to get

J., concurring). The majority opinion made a point of noting that the courts below had relied exclusively on the so-called community caretaker warrant exception.[9] Id., 1599.

Although the defendant asserts in his brief to this court that it is unclear, in the wake of *Caniglia*, whether warrantless entry is still permitted to assist someone who is injured or facing imminent injury, we find no such ambiguity in that decision. Other courts have continued to apply the emergency exception post-*Caniglia*; see, e.g., *United States* v. *Sanders*, 4 F.4th 672, 677 (8th Cir. 2021), cert. denied, U.S. , 142 S. Ct. 1161, 212 L. Ed. 2d 36 (2022); *Gaetjens* v. *Loves Park*, 4 F.4th 487, 492–93 (7th Cir. 2021), cert. denied, U.S. , 142 S. Ct. 1675, 212 L. Ed. 2d 582 (2022); *McCarthy* v.

one, such as to check on a missing person's medical condition, he also expressed the view that courts could deem a warrantless entry under such circumstances reasonable under proper circumstances. *Caniglia* v. *Strom*, supra, 141 S. Ct. 1602 (Alito, J., concurring); see id. ("[p]erhaps [s]tates should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic [f]ourth [a]mendment question of reasonableness"); see also *Brigham City* v. *Stuart*, supra, 547 U.S. 403 ("the ultimate touchstone of the [f]ourth [a]mendment is 'reasonableness' ").

[9] In *Caniglia*, the police became involved in the matter after receiving a phone call from the petitioner's wife expressing concern that she had been unable to contact the petitioner at their home, that he possessed handguns, and that he had taken actions the prior evening that indicated that he might be suicidal. *Caniglia* v. *Strom*, supra, 141 S. Ct. 1598. The petitioner was on the porch of his home when the officers arrived to assess the situation. Id. He admitted to the officers that his wife had accurately reported his actions of the prior evening but denied that he was suicidal. Id. He agreed to be transported to a hospital for a psychiatric evaluation, allegedly subject to the officers' promise that they would not confiscate his guns. Id. After the petitioner left, however, the officers allegedly secured the wife's consent to enter the home without relaying the petitioner's wishes and removed two handguns. Id. In the decision that was the subject of the appeal, the United States Court of Appeals for the First Circuit expressed doubt that the emergency doctrine would have applied under these circumstances because of the absence of imminent harm. See *Caniglia* v. *Strom*, 953 F.3d 112, 122 n.5 (1st Cir. 2020), vacated on other grounds, U.S. , 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021).

Commonwealth, 73 Va. App. 630, 642–43, 864 S.E.2d 577 (2021); *State* v. *Ware*, 400 Wis. 2d 118, 127–28, 968 N.W.2d 752 (App. 2021); and the defendant has identified no case in which a court deemed the emergency exception no longer valid.

The issue before us, therefore, is whether there was an objectively reasonable basis for the responding officers to believe that there was a need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury, either the defendant or Samuolis, when Winkler made the initial entry into the home. With regard to the defendant, we disagree that it would have been objectively reasonable for the officers to believe that he needed emergency assistance. There was every reason to believe that, in the days immediately preceding the initial warrantless entry, the defendant had performed tasks around the house. All of the evidence points to the defendant's being present at the home when the police first attempted to make contact with the occupants and thereafter actively seeking to avoid that contact. See *Florida* v. *Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) ("[a]t the . . . very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (internal quotation marks omitted)). Without more, odd behavior that might be symptomatic of some sort of mental disability (placing chicken wire over windows, cutting a spy hole in window blinds, and leaving some parts of the lawn unmowed) does not reasonably indicate a need for *immediate* medical assistance, physical or mental. That the facts suggested that the defendant could be living in a house with a dead or decomposing body raises a concern of a different magnitude, no doubt. It is significant that the state has not claimed that the police had reasonable cause to believe that the defendant suffered from a mental condi-

tion that would have permitted them to take him into custody for an emergency examination pursuant to General Statutes § 17a-503 (a),[10] and no specific findings were made to support the application of that statute.[11] Cf. *Sutterfield* v. *Milwaukee*, supra, 751 F.3d 545–46 (factor in assessing whether officers' entry to respond to concern about suicide threat was reasonable was whether officers had complied with statutory emergency detention procedure to provide involuntary treatment to those at risk of suicide); *State* v. *Hyde*, 899 N.W.2d 671, 676–77 (N.D. 2017) (same). Indeed, there

[10] General Statutes § 17a-503 (a) provides: "Any police officer who has reasonable cause to believe that a person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, and in need of immediate care and treatment, may take such person into custody and take or cause such person to be taken to a general hospital for emergency examination under this section. The officer shall execute a written request for emergency examination detailing the circumstances under which the person was taken into custody, and such request shall be left with the facility. The person shall be examined within twenty-four hours and shall not be held for more than seventy-two hours unless committed under section 17a-502."

[11] The fact that the evidence suggested that the defendant was living in a house with a dead or decomposing body could reasonably indicate that the defendant was suffering from a serious psychological impairment. The question before us, however, is whether immediate warrantless entry into the home was justified to provide emergency aid or to prevent injury. We do not believe that the defendant's perceived condition warranted immediate entry under these parameters. Whether the emergency doctrine should be expanded beyond its current limitations to address the defendant's condition in the present case is a question with profound implications that we need not reach in light of our conclusion regarding Samuolis. See C. Slobogin, "Police as Community Caretakers: *Caniglia* v. *Strom*," 2020–2021 Cato Sup. Ct. Rev. 191, 193–94 (interpreting *Caniglia* to leave open possibility that some tasks that go beyond criminal law enforcement do permit warrantless entry, "even when there is time to get a warrant," but suggesting that, "given the potential for police misuse of force and for pretextual actions by the police, warrantless home entries in the absence of real exigency should never be part of policing's mission, even when a 'caretaking' goal can be articulated"); see also id., 194–95 (arguing that statistics show that having police, who are trained to use deadly force and have means to use it, as primary responder to person experiencing mental health crisis is wrong answer to problem).

is no indication that the officers sought to obtain any information that might better inform them as to the nature of the defendant's mental health issues or any concerns that these issues might present. Nor did they make a reasonable attempt to find less intrusive means to make contact with a possibly mentally impaired person, directly or through a friendly third party, than knocking on his door and then breaking into his home. See *Brigham City* v. *Stuart*, supra, 547 U.S. 403 ("the ultimate touchstone of the [f]ourth [a]mendment is 'reasonableness' "). We therefore conclude that the state did not meet its burden of establishing that immediate entry was necessary because the defendant required *emergency* aid. As we explain subsequently in this opinion, however, this does not mean that the defendant's mental condition was irrelevant to the officers' actions.

With regard to Samuolis, although we share some of the defendant's concerns about shortcomings in the officers' investigation prior to their entry into the home, we conclude that there was a reasonably objective basis for believing that an elderly occupant was in need of immediate medical assistance.[12] The "old man," Samu-

[12] Entry into a home for the purpose of rendering emergency aid has been deemed reasonable in connection with a search for "an occupant *reliably* reported as missing." (Emphasis added.) 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), pp. 638–39; see also *State* v. *Blades*, supra, 225 Conn. 619–20. There was no testimony in the present case indicating whether the officers obtained information from the neighbors reporting Samuolis' absence as to how well they knew Samuolis or the defendant, whether Samuolis had previously been absent for other similar periods of time, or what efforts they had made to make contact with Samuolis or to obtain other information that would validate their concern about his absence. In another case, this lacunae might be fatal. In the present case, it is not, most significantly because of the fly infestation.

We note that the evidence indicates that three neighbors spoke with the police to express concern about Samuolis' absence: Curtis, who lived next door to the Samuolis home, and Shirley Lebiszczak and Andy Lebiszczak, who lived directly across the cul-de-sac from the Samuolis home. Only Curtis testified. He stated that he had lived next door to the Samuolis family for seventeen years at the time of the incident. Curtis indicated that he had minimal direct contact with the family. In the three or four years preceding

olis, had not been seen by any of his neighbors for at least one month, which was unusual enough that his absence was reported to the police. The Samuolis family's only vehicle had not been moved since Samuolis was last seen.[13] Samuolis did not respond to the officers' knocks on the door or shouts into the open windows. None of this would have been sufficient, however, in the absence of the extraordinary infestation of flies amassing around the upper rear window.

Two of the officers testified that, when they previously had encountered similar conditions, a dead body had been found. We need not decide, however, whether the presence of a dead body in a home would constitute an emergency.[14] Although the responding

the incident, following the death of Samuolis' wife, Curtis would see Samuolis driving his car up the road once a week and returning thereafter with a cup of Dunkin' Donuts coffee. Curtis told the officers that he found it odd that the car had not been moved "for some time." It would be reasonable to infer from Curtis' testimony that the car had not been moved in the month or more during which Samuolis had not been seen. It also would be reasonable to infer from the fact that the neighbors were concerned enough about Samuolis' absence to ask the police to investigate that this extended absence was an anomaly.

[13] Winkler testified that one of the neighbors informed the officers that the parked car was the family's only vehicle.

[14] Neither party briefed the issue, before the trial court or this court, of whether a warrant, criminal or administrative, would have been available to retrieve a dead body. We note that there is a statute that provides in relevant part: "The body of each person who dies in this state shall be buried, removed or cremated within a reasonable time after death. The person to whom the custody and control of the remains of any deceased person are granted by law shall see that the certificate of death required by law has been completed and filed in accordance with section 7-62b prior to final disposition of the body. . . . Any person who violates any provision of this section shall be guilty of a class D felony." General Statutes § 7-64. It is unclear whether the criminal penalty applies exclusively to the person assigned custody of the body by law. There is also a statute that provides a penalty for failing to promptly notify the Office of the Chief Medical Examiner of "any death coming to their attention which is subject to investigation by the Chief Medical Examiner under this chapter . . . ." General Statutes § 19a-407; see also General Statutes § 19a-406 (a) (prescribing categories of death that chief medical examiner is required to investigate). The violation of a public health code also could justify issuance of an

officers thought, based on their experience, that the most likely explanation for this fly infestation was the presence of a dead body, they also left open the possibility that an occupant might be injured rather than dead. We cannot say that this supposition was unreasonable. See *State* v. *Scott*, 343 N.C. 313, 329, 471 S.E.2d 605 (1996) (emergency doctrine was applicable when officer investigating missing person report noticed flies accumulating at door to underside of house and smelled odor of decaying flesh, and officer testified that he had previously encountered similar conditions and discovered, upon further investigation, live person with rotting feet). It is well documented that flies can be strongly attracted to uncovered wounds, open sores, and certain bodily excretions.[15] See, e.g., J. Chan & E. Imwinkelried, "The Use of Forensic Entomology in Determining the Time of Death," 45 Crim. L. Bull. 121, 129 (2009); J. Dinulos, Cutaneous Myiasis, (last modified December, 2021), available at https://www.merckmanuals.com/home/skin-disorders/parasitic-skin-infections/cutaneous-myiasis (last visited August 2, 2022). Warrantless entry into the home "has been upheld even when the information reaching the police, if assessed in terms of probabilities, makes it much more probable that the victim is dead than that he is still alive." 3 W. LaFave, Search and Seizure (6th Ed. 2020) § 6.6 (a), p. 633. As long as there is a reasonable possibility that the person remains alive, the situation is an emergency because, in all likelihood, time is of the essence.

administrative warrant to inspect the property under General Statutes § 19a-220. See *State* v. *Saturno*, 322 Conn. 80, 93–94, 139 A.3d 629 (2016).

[15] Examples abound, sadly, in a cursory review of elder and child abuse cases. See, e.g., *Layne* v. *State*, 54 Ala. App. 529, 531, 310 So. 2d 249 (1975); *People* v. *Mattos*, Docket No. C076743, 2016 WL 158014, *1 (Cal. App. January 13, 2016), review denied, California Supreme Court, Docket No. S232311 (March 30, 2016); *Wolf* v. *State*, 246 Ga. App. 616, 616, 540 S.E.2d 707 (2000); *Hug* v. *State*, Docket No. 27A05-1410-CR-478, 2015 WL 1396263, *1 (Ind. App. March 25, 2015) (decision without published opinion, 31 N.E.3d 39); *Johnson* v. *State*, Docket No. W2020-00184-CCA-R3-PC, 2021 WL 4077030, *1–2 (Tenn. App. September 7, 2021).

Courts have concluded that the discovery of other circumstances that may be suggestive of death will not necessarily render the emergency doctrine inapplicable.[16] See, e.g., *People* v. *McGee*, 140 Ill. App. 3d 677, 680–81, 489 N.E.2d 439 (1986) ("In Illinois, appellate decisions have applied the 'emergency' exception to the warrant requirement where [the] police entered a residence without a warrant while investigating a possible missing person and after detecting a stench they believed came from [a] dead body inside . . . and where [the] police investigating a report of a homicide observed from a window flies in one of the rooms. . . . In [one case], the court reasoned that the odor may

[16] There are numerous cases in which courts have recognized that "apparent death may turn out to be barely surviving life, still to be saved." *State* v. *Epperson*, 571 S.W.2d 260, 264 (Mo. 1978), cert. denied, 442 U.S. 909, 99 S. Ct. 2820, 61 L. Ed. 2d 274 (1979); see also *Patrick* v. *State*, 227 A.2d 486, 489 (Del. 1967) ("[f]requently, the report of a death proves inaccurate and a spark of life remains, sufficient to respond to emergency police aid"). These spark of life cases typically involve a report of a dead body from laypersons, who lack medical knowledge to determine whether a person actually is dead or merely appears to be dead but could be revived with prompt medical treatment. See, e.g., *United States* v. *Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005) (911 call of possible dead body); *United States* v. *Richardson*, 208 F.3d 626, 631 (7th Cir.) (911 caller reported that woman had been raped and murdered), cert. denied, 531 U.S. 910, 121 S. Ct. 259, 148 L. Ed. 2d 188 (2000); *State* v. *Kraimer*, 99 Wis. 2d 306, 328, 298 N.W.2d 568 (1980) (although 911 caller reported that he had shot and killed his wife four days earlier, "the police had no way of knowing this as a verity"), cert. denied, 451 U.S. 973, 101 S. Ct. 2053, 68 L. Ed. 2d 353 (1981). An often quoted passage from former United States Supreme Court Chief Justice (then Judge) Burger in his opinion in *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir. 1963), cert. denied, 375 U.S. 860, 84 S. Ct. 125, 11 L. Ed. 2d 86 (1963), explains: "Acting in response to reports of 'dead bodies,' the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response." (Emphasis omitted.) Id., 212. Of course, at some point, hope will be extinguished, and we reserve for another day the issue of whether the emergency doctrine remains applicable once a reasonable police officer would perceive no realistic possibility that the person remains alive.

have been caused by rotting flesh of a living person after severe burns or other injury, and the very uncertainty created by the totality of circumstances created a justification and need for the police to take immediate action. . . . In other jurisdictions, the odor of decomposing flesh or reliable information of death have been held to constitute an emergency situation sufficient to justify an immediate warrantless search of [the] premises because the apparent death may turn out to be a barely surviving life, still to be saved." (Citations omitted.)); *Smock* v. *State*, 766 N.E.2d 401, 404–405 (Ind. App. 2002) (rejecting argument that odor of decay precluded belief that someone was in need of aid because such facts show that fatality had already occurred and thus no exigent circumstances existed because presence of odor, along with other evidence indicating that tenant was missing, supported officers' "reasonable belief that someone may have been in need of immediate assistance"); *Hughes* v. *Commonwealth*, 87 S.W.3d 850, 852 (Ky. 2002) (rejecting argument that officer "should have known when he smelled the odor of decomposing human remains that the victim was no longer in need of assistance"); *People* v. *Molnar*, 288 App. Div. 2d 911, 911–12, 732 N.Y.S.2d 788 (2001) (warrantless entry into defendant's apartment was justified under emergency exception when police detected foul odor, and, even though officers did not immediately recognize odor as that of decomposing body ultimately discovered, they forcibly entered apartment "to discover the source of the odor and to render aid if necessary"), aff'd, 98 N.Y.2d 328, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002); *Rauscher* v. *State*, 129 S.W.3d 714, 723 (Tex. App. 2004) ("even if [the officer] believed the foul odor to be that of a decomposing body, under the circumstances, [the officer] could have reasonably believed that [the victim] might still be alive, but in need of immediate emergency aid").

Although the defendant's mental condition did not indicate his need for emergency assistance, that condition nonetheless would have been a relevant factor in the officers' reasonable calculation of whether Samuolis needed such aid and what actions were necessary to provide that aid. The defendant's conduct in attempting to fortify the home against intruders and refusing to answer the door would have indicated to the officers that they were not going to be able to obtain timely information from the defendant about Samuolis' whereabouts or condition. The defendant's failure to remediate the fly infestation in plain view reasonably suggested that his mental disabilities may have impaired his capacity to appreciate the gravity of the conditions that existed and the need to elicit prompt medical assistance, if such assistance was required.

The defendant's mental condition also bears on the defendant's complaint that the officers' actions—driving to the scene without activating lights or sirens, and waiting for supervisor approval to conduct a warrantless search before entering the home—indicated that they did not perceive the situation as an emergency.[17] The officers clearly recognized the possibility,

[17] Rosado testified that the responding officers were required under Willimantic Police Department policy to obtain their supervisor's approval before entering a home. The facts to which the defendant points involve a delay of a few minutes; Rosado testified that it took him three or four minutes to drive to the scene. Testimony from the officers acknowledging that swifter action might have been taken had they believed that there was an active crime also does not negate the perceived emergency. During an active crime, the police may be seeking to protect someone from sustaining injury, or further injury, not to provide aid for an injury already sustained. As one court explained: "Not all emergencies are the same. In some, a person's life may hinge on the passage of mere seconds, demanding immediate police action. In others, police must act with reasonable swiftness but their response need not be calculated in seconds." *People* v. *Molnar*, 98 N.Y.2d 328, 333, 774 N.E.2d 738, 746 N.Y.S.2d 673 (2002); see also id., 334 ("It would be an ironic result were we to 'punish' the constabulary by suppressing the evidence merely because they took the time to exercise judgment and circumspection before resorting to force. The appropriately measured response of the police should not be declared illegal merely because they thoughtfully delayed entry for a relatively brief time.").

or even the likelihood, that entry into the home could lead to an encounter with a mentally ill individual who did not want them there. The fact that the responding officers waited a few minutes for their supervisor to arrive before entering must be viewed with that factor in mind. See *United States* v. *Jones*, 635 F.2d 1357, 1362 (8th Cir. 1980) ("[w]hen the police have a reasonable suspicion that someone is injured or that the public safety is in jeopardy, but refrain from taking immediate action in an effort to confirm or deny that suspicion, and then act once they have received no indication that the danger has dissipated, the waiting period does not defeat the applicable exception to the warrant rule"); see also id., 1361 ("[a]ny delay that occurred was primarily the result of careful police work").

The defendant nonetheless contends that the officers did not consider the "totality of circumstances," as they were required to do, because they failed to consider alternative explanations for the facts presented that would indicate that no emergency existed.[18] We dis-

[18] The defendant also points to the fact that the officers did not attempt to obtain a telephone number for Samuolis and to call him before initially entering the home. One of the officers reasonably testified that they did not expect to get a response to a call into the house because no one responded to knocking or the officers' announcement of their presence. Although there is evidence that Frechette was able to locate a ten year old telephone number associated with the Samuolis family in the police database, he did not know whether the number was for a landline or a cell phone. Cf. *State* v. *DeMarco*, 311 Conn. 510, 527, 88 A.3d 491 (2014) (citing evidence that defendant's cell phone number was known to animal control officer, but officer did not have number with him when he called police headquarters to request backup to enter house). There was no evidence presented as to how readily that information could be accessed. Frechette could not have provided that information to the officers prior to the initial entry because he was not present at the police station when the officers entered the Samuolis home. Frechette received no answer when he repeatedly called that number following the officers' initial entry into the home. Although the better practice would have been for the officers dispatched for the well-being check to ask the neighbors whether they had a cell phone number for Samuolis, it is fair to infer that the neighbors did not because, if they had, they would have called it prior to reporting him missing and would have informed the police that he had not answered the call.

agree with the significance that the defendant ascribes to the "primary" facts that the officers did not consider—when Winkler climbed the ladder and looked in the window, he did not see anything amiss inside the house or smell an odor of decomposition. Winkler testified that it was difficult to see into the rear bedroom because it was so dark. Although Winkler was never asked whether he detected any odor, he testified that he never put any part of his body (presumably face included) into the window opening. The air freshener wedged in the small opening may have done its job of masking any odor emanating from inside the room. In fact, it was only after the third entry, when one of the officers was able to insert his upper torso into that room, that an odor of decomposition was detected.

The defendant also suggests that there were other reasonable explanations for the fly infestation: a dead animal (e.g., the cat that had been seen in the front window on the prior visit) or rotting food or garbage. The officers indicated in their testimony that they did not consider either scenario as a possible cause of the fly infestation because those explanations did not jibe with the conditions and the officers' past experience. We note that one would similarly expect an odor to be emitted from a dead animal or rotting food or garbage on a hot summer day. The defendant does not explain why it would have been reasonable for the officers to credit either of those explanations when they did not detect an odor but it was unreasonable for the officers to believe that there was an injured or dead person because they did not detect an odor of decomposition.

It defies common sense to conclude that, if there is any plausible, nonemergency explanation for the facts presented, no entry can be made until there is definitive proof that a person is present who is in need of emergency aid. The standard "must be applied by reference to the circumstances then confronting the officer,

including the need for prompt assessment of sometimes ambiguous information concerning potentially serious consequences. As one court usefully put it, the question is whether the officers would have been derelict in their duty had they acted otherwise. This means, of course, that it is of no moment that it turns out there was in fact no emergency." (Footnotes omitted; internal quotation marks omitted.) 3 W. LaFave, supra, § 6.6 (a), pp. 629–31; see also *Michigan* v. *Fisher*, supra, 558 U.S. 49 ("[o]nly when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances"); *United States* v. *Cooks*, 920 F.3d 735, 743 (11th Cir.) ("we must be mindful that the police must act quickly, based on hurried and incomplete information" (internal quotation marks omitted)), cert. denied, U.S. , 140 S. Ct. 218, 205 L. Ed. 2d 137 (2019). The defendant's position could prove especially deadly when an elderly person is the potential victim. See R. Gurley et al., "Persons Found in Their Home Helpless or Dead," 334 New. Eng. J. Med. 1710, 1710 (June, 1996) (study of patients found in their homes helpless determined that such circumstances increased with age and that total mortality was 67 percent for patients who were estimated to have been helpless for more than seventy-two hours, as compared with 12 percent for those who had been helpless for less than one hour).

We conclude that, under the totality of the circumstances, it was objectively reasonable for the officers to conclude that there was an emergency justifying their initial entry into the defendant's home. In light of this conclusion, the subsequent entries were similarly justified. We therefore need not consider the state's alternative arguments that the defendant's criminal conduct subsequent to the initial entry established an emergency that justified the subsequent entries or that the search

and seizure were proper under the inevitable discovery or the independent source doctrines.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ONAJE RODNEY SMITH (SC 20600)

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

Syllabus

Convicted of various crimes, including first degree robbery, first degree assault, second degree arson, and attempt to commit murder, charged in five cases that were joined for trial, the defendant appealed to this court. The defendant, along with G, P, and another individual, all of whom were fellow gang members, had agreed to rob a food deliveryman. When the deliveryman, H, arrived at the requested location, two men wearing dark clothing and ski masks approached him. One of the men pointed a gun at H's chest and demanded his wallet. After taking the wallet and the food, the two returned to a red hatchback and drove away. Five days after that incident, G's cell phone was used to place a delivery order at a restaurant. When the deliveryman, C, arrived at the requested location, he was approached by two men wearing ski masks and hoodies, one of whom was armed. The armed assailant shot C's phone out of his hand, and, when C requested that the men leave behind his wallet after they took his money, the armed assailant shot C in the leg. Both men then entered C's Toyota Camry and drove away. The red hatchback in which the men arrived followed the Camry. Later that night, the police responded to a report of a burning vehicle described as a burgundy Subaru Forester. A subsequent investigation revealed security camera footage from a nearby gas station showing both the Forester and the stolen Camry pulling into the gas station approximately one-half hour before the police received the report of the burning vehicle. The footage showed the driver of the Camry purchasing gas and then pumping it directly into the backseat of the Forester. Five days later, the defendant was driving with G, P, and another individual in the Camry when they saw F, a rival gang member. The defendant lowered the vehicle's front passenger window and fired a gun toward F, who ran away uninjured. The defendant later spotted F again, and, while wearing a ski mask, the defendant followed F into a convenience store and shot him in the head. The defendant then returned to the Camry, and the group drove away. Six days later, the police observed the Camry and,

after learning that it had been stolen, conducted a stop of the vehicle. Both the defendant and G were apprehended while trying to flee the vehicle. At the time of his arrest, the police seized a cell phone from the defendant. The defendant filed a pretrial motion to suppress the evidence obtained pursuant to both a warrant issued for the search of his cell phone and a warrant issued to his cell phone's service provider for his phone records and cell site location information (CSLI). The trial court denied the motion. On direct appeal from the judgments of conviction, *held*:

1. The trial court improperly denied the defendant's motion to suppress the evidence obtained from the search of his cell phone because the applicable search warrant was not supported by probable cause and did not particularly describe the places to be searched and the things to be seized: the application for the warrant indicated that the defendant's cell phone constituted evidence that a particular person participated in aggravated assault, and the facts contained in the affidavit attached to the application were not sufficient to allow the judge issuing the warrant reasonably to conclude that there was probable cause to believe that evidence of the crime of aggravated assault would be found on the defendant's cell phone because, although the affidavit described in detail the robbery of H, the robbery and shooting of C, the theft of the Camry, the car arson, the shootings involving F, and G's role in those events, it did not mention the defendant's involvement in or connection to those events, and the defendant's cell phone was likewise never tied to the crime of aggravated assault; moreover, even if sufficient probable cause existed, the warrant would fail for lack of particularity insofar as it did not sufficiently limit the search of the contents of the cell phone by a description of the areas within the phone to be searched or by a time frame reasonably related to the crimes.

2. The trial court improperly denied the defendant's motion to suppress the evidence obtained from his cell phone's service provider because the applicable search warrant was not supported by probable cause: the warrant indicated that the defendant's cell phone had been or could have been used as a means of committing the offense of attempt to commit murder, and the issuing judge reasonably could not have concluded that there was a substantial chance that evidence of the shooting of F would be found in the defendant's cell phone records, as nothing in the affidavit submitted in connection with the warrant connected the defendant to the attempt to murder F or demonstrated that his cell phone was either used during the commission of that crime or otherwise contained evidence of it; moreover, the state could not prevail on its claim that, because the affidavit referred to the defendant's arrest warrant that was issued on facts sufficient to constitute probable cause that the defendant was involved in the shooting of F, the judge issuing the search warrant was entitled to rely on the arrest warrant to establish probable cause, as a determination of probable cause for an arrest

requires different findings than a determination of probable cause for a search warrant, and the search warrant affidavit did not contain the factual allegations and evidence that led to the defendant's arrest, which would have enabled the issuing judge to determine whether those allegations established probable cause to believe that evidence of the attempt to murder F existed in the cell phone carrier records at issue; furthermore, this court determined that there was insufficient information to assess the validity of the defendant's claim that the search warrant for the defendant's cell phone records lacked particularity, because, although the warrant identified a specific list of items to be searched and seized, and sought records only for a limited duration that were reasonably connected with the attempt to murder F, there was a lack of information in the affidavit relating to the defendant's role in that crime or the connection between the defendant's cell phone and the crime.

3. Any error in denying the defendant's motion to suppress the evidence obtained pursuant to the two search warrants was harmless with respect to the charges relating to the robbery of H, the shootings involving F, and the defendant's attempt to flee from the Camry to avoid arrest, but was harmful with respect to the charges relating to the robbery and shooting of C, the larceny of the Camry, and the car arson: the evidence against the defendant with respect to the robbery of H was principally derived from P's testimony, and there was no data from the cell phone or the defendant's cell phone service provider relating to that incident; moreover, the state established a motive for the shootings involving F, and video surveillance footage corroborated P's testimony relating to one of the shootings; furthermore, it was highly unlikely that the CSLI from the defendant's phone, which placed him in the area where the stolen Camry was stopped by the police, affected the jury's decision with respect to the charge of interfering with an officer, as the police apprehended the defendant after he attempted to flee from that vehicle and his fingerprints were discovered inside the vehicle; nevertheless, the CSLI was the most concrete and direct evidence placing the defendant at the scene of the robbery and assault of C, where the Camry was also stolen, and the omission of the CSLI would have reduced the certainty that the defendant was involved in the burning of the Forester; accordingly, this court affirmed the defendant's convictions relating to the robbery of H, the shooting of F, and his flight from the police but reversed the defendant's convictions relating to the robbery and shooting of C, the theft of the Camry, and the burning of the Forester.

Argued March 22—officially released August 9, 2022

Procedural History

Substitute information, in the first case, charging the defendant with one count each of the crimes of acces-

sory to robbery in the first degree and conspiracy to commit robbery in the first degree, substitute information, in the second case, charging the defendant with one count each of the crimes of accessory to robbery in the first degree, conspiracy to commit robbery in the first degree, and accessory to assault in the first degree, substitute information, in the third case, charging the defendant with one count each of the crimes of accessory to arson in the second degree and conspiracy to commit arson in the second degree, substitute information, in the fourth case, charging the defendant with two counts of the crime of attempt to commit murder and one count of the crime of conspiracy to commit murder, and substitute information, in the fifth case, charging the defendant with one count each of the crimes of larceny in the third degree and interfering with an officer, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the cases were consolidated; thereafter, the court, *White, J.*, denied the defendant's motion to suppress certain evidence; subsequently, the cases were tried to the jury before *Blawie, J.*; verdicts and judgments of guilty, from which the defendant appealed. *Affirmed in part; reversed in part; new trial.*

Jennifer B. Smith, assistant public defender, with whom, on the brief, was *Mark Rademacher*, senior assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom were *Thadius L. Bochain*, deputy assistant state's attorney, and, on the brief, *Paul J. Ferencek*, state's attorney, and *Michelle Manning*, senior assistant state's attorney, for the appellee (state).

Robert C. Santoro filed a brief for Grayshift, LLC, as amicus curiae.

Marisol Orihuela and *Jim Davy*, pro hac vice, filed a brief for Upturn, Inc., as amicus curiae.

Opinion

KAHN, J. The defendant, Onaje Rodney Smith, appeals directly to this court from the judgments of the trial court convicting him of various crimes arising from five consolidated cases, the most serious of which included first degree robbery, second degree arson, and attempt to commit murder.[1] On appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence discovered during a search of his cell phone and evidence obtained from T-Mobile, his cell phone service provider, because the warrants authorizing those searches were not supported by probable cause and lacked sufficient particularity to comport with the fourth amendment to the United States constitution.[2] The state disagrees with each of these

[1] The judgments of conviction in the present case arose from a consolidated trial of five related criminal proceedings against the defendant. In the first case, which arose out of a robbery in Norwalk on January 9, 2017, the defendant was convicted of robbery in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4). In the second case, which related to a second robbery in Norwalk on January 14, 2017, the defendant was convicted of robbery in the first degree in violation of §§ 53a-8 (a) and 53a-134 (a) (1), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (1), and assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (1). In the third case, which followed the discovery of a burned-out motor vehicle in Stamford shortly after the second robbery, the defendant was convicted of arson in the second degree in violation of General Statutes §§ 53a-8 (a) and 53a-112 (a) (1) (B) and conspiracy to commit arson in the second degree in violation of §§ 53a-48 (a) and 53a-112 (a) (1) (B). In the fourth case, which arose out of the shootings in Stamford on January 19, 2017, the defendant was convicted of two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, and one count of conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a. Finally, in the fifth case, which related to the defendant's presence in a stolen vehicle and subsequent flight from the police in Bridgeport on January 25, 2017, the defendant was convicted of larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a (a).

[2] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects,

claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree with the defendant that the trial court erred in denying his motion to suppress the information obtained from the execution of both warrants. We further conclude, however, that this error was harmless with respect to some, but not all, of the crimes alleged. As a result, we affirm in part and reverse in part.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, and procedural history are relevant to our review of the defendant's claims. On January 9, 2017, Tyreik Gantt, Jeremy Middleton, Jaiden Parker, and the defendant, all members of the Milla Death Row gang,[3] went for a drive in Norwalk inside of a stolen red hatchback. During that drive, the group agreed to rob a food deliveryman. At approximately 6:34 p.m., an internet search for "China Moon Norwalk, CT" was conducted on an iPhone owned by Gantt. Parker then used Gantt's pay-as-you-go Tracfone to place an order for food from China Moon Restaurant.

Wuquiang Huang, the deliveryman for China Moon Restaurant, testified that he arrived at 4 Rolling Lane in Norwalk at approximately 7 p.m. to deliver the food. When Huang exited his vehicle to make the delivery, he was approached by two men wearing dark clothing and ski masks. One of the men brandished a black handgun, held it "[a]bout an inch" from Huang's chest,

against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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

[3] The Milla Death Row gang is a self-identifying faction within the larger Bloods enterprise.

and demanded Huang's wallet. The armed man then took Huang's wallet, which contained a souvenir Chinese bill, while the other masked man took the food that Huang had brought with him. The two men then entered the car they had arrived in, which Huang described as a red vehicle with four doors and "no trunk in the back."[4] A third man, who had been in the driver's seat of the vehicle, then drove away.

On January 14, 2017, at approximately 6:09 p.m., Gantt's iPhone was used to search "China Town Express Norwalk, CT" and two phone calls to that restaurant then were made on his Tracfone. Fen Yen Chen, the deliveryman for China Town Express, drove a 2011 black Toyota Camry with New York license plates to make that delivery at 19 Derby Road in Norwalk. When Chen was unable to locate the address, he called the number listed on the receipt for the order, which was associated with Gantt's Tracfone, and was told by the man who answered that the address was "a house right across from the red car."

Chen parked the Camry near the red car and left it with the engine running. Chen then saw two men wearing ski masks, hoodies, and gloves get out of the passenger side of the red car and approach him. Chen pretended to call 911 when one of those men brandished a gun, but the armed assailant subsequently shot the phone out of his hand. Chen then asked the men to take his money but to leave his wallet. In response, the unarmed assailant told his companion to shoot Chen. The armed assailant then shot Chen in the thigh. Chen fell to the ground and handed the men money from his pocket. Both men then got into Chen's Camry and drove away. The red car in which they had come followed.

[4] The homeowner of 3 Rolling Lane in Norwalk testified that, at approximately 7 p.m. on January 9, 2017, she observed a "red Subaru Forester" parked near her house.

During the ensuing investigation into the crimes against Chen, the police found two .25 caliber shell casings. Forensic testing later determined that those two shell casings were fired from the same gun.

Around 8:15 p.m. that same evening, police officers responded to reports of a burning vehicle on Oakwood Place, a street in Stamford. One of the responding officers described that vehicle as a burgundy Subaru Forester. In the investigation that followed, police officers determined that someone had intentionally lit a fire in the rear passenger seat of that vehicle using gasoline as an accelerant.

Police officers subsequently viewed security camera footage from a Shell gas station located at 243 West Avenue in Stamford from the day of the Chen robbery and vehicle fire. That footage showed the red Subaru Forester pulling into the gas station with the stolen black Camry at approximately 7:44 p.m. on January 14. That same footage showed the driver of the Camry entering the store to purchase gas while a passenger remained in the back seat. After purchasing the gas, the driver of the Camry exited the store and proceeded to pump gas directly into the backseat of the Forester while the Forester's driver stood watch. At trial, Parker identified Gantt as the driver of the Camry who purchased and pumped the gas.

Parker testified that, on January 19, 2017, Gantt and the defendant drove the stolen Camry to pick up Parker and another friend, Shahym Ranero, from their respective residences in Stamford. While driving around Stamford, the group was looking for Gregory Flemming, a rival gang member[5] they "had a beef with." According to Parker, their intention was to "[l]ikely shoot at [Flemming]" or otherwise "deal with [him]." Parker stated

[5] Flemming was a member of the High Street gang, also known as the Project Boys, which is aligned with the Crypts.

that the group eventually spotted Flemming, who had dreadlocks and was wearing florescent striped pants, while they were driving down High Street in the Camry. The defendant then allegedly lowered the window of the front passenger seat and fired a .25 caliber handgun toward Flemming. Flemming, uninjured, then took off running toward West Main Street.[6]

Following the shooting, the group drove to a plaza on West Main Street where Gantt, Parker, and Ranero smoked marijuana. About ten minutes later, the group drove to a convenience store on West Main Street. As they proceeded to the store, the defendant again spotted Flemming and allegedly said, "I'm going to clean [Flemming] up . . . ."

Parker testified that the defendant proceeded to enter the store wearing a face mask and carrying the same .25 caliber gun he had used on High Street. Parker testified that he saw the defendant "put the gun to [Flemming's] head . . . and [pull] the trigger." Although Parker himself witnessed only one shot, he testified that, after the defendant returned to the vehicle, he admitted to "let[ting] off a couple more." The group then drove away in the black Camry.

The police received a call at approximately 7:04 p.m. reporting that a black male with dreadlocks had been shot in the head at a store located at 417 West Main Street in Stamford. Responding emergency personnel observed that Flemming had been shot twice—once in the head and once in the leg. A subsequent review of the store's surveillance footage showed Flemming walking into the store, followed moments later by a

[6] At approximately 6:45 p.m., Stamford police responded to 34 High Street after reports of "shots fired, with a black male running, with dreads . . . south on High Street across West Main Street." Further, video surveillance footage of the vicinity of 34 High Street captured "a four door dark colored sedan" with "an orange plate, believed to be a New York plate" moments before the shooting.

gunman who had emerged from a dark colored four door sedan. The gunman can be seen shooting Flemming in the head and then leaving in the same sedan. The store's surveillance footage showed that the shooter was wearing a black jacket, black shoes, black gloves, dark colored pants, and a mask. Video surveillance footage from an apartment building on Bedford Street approximately one hour before the shooting showed the defendant wearing clothing matching that of the shooter captured on the store's video. Bullet casings from a .25 caliber gun subsequently recovered by the police inside of the store were later matched to the same gun that had been used to shoot Chen.

On January 25, 2017, Keith Hanson, a Bridgeport police officer, observed a four door black Toyota Camry with New York license plates parked in the Beechwood Avenue area of Bridgeport. Hanson asked dispatch about the Camry and learned that it was stolen and had been "used in a carjacking and robbery" in Norwalk. After Hanson radioed for backup, an officer in a marked police vehicle conducted a stop of the Camry. Gantt, the operator of the Camry, tried to drive away but failed after colliding with a pole. Gantt tried to escape on foot but was apprehended. The defendant, a passenger in the Camry, also attempted to flee on foot but was apprehended. As part of a search incident to the arrest, police officers seized two cell phones from the defendant's person, as well as a "dark gray knit hat/face mask."

While searching the Camry later, investigators located the defendant's fingerprints on the right passenger door of the Camry and on a cigar wrapper found inside the car. The investigators also found a phone owned by Gantt, which had a souvenir Chinese bill between the phone and its protective cover. At trial, Huang identified that bill as the one stolen from him on January 9, 2017.

The defendant was charged in five different files. In the first case, the defendant was charged with robbery

in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4) for the robbery of Huang on January 9, 2017, in Norwalk. In the second case, the defendant was charged with robbery in the first degree in violation of §§ 53a-8 (a) and 53a-134 (a) (1), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (1), and assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (1) for the crimes against Chen on January 14, 2017, in Norwalk. In the third case, the defendant was charged with arson in the second degree in violation of General Statutes §§ 53a-8 (a) and 53a-112 (a) (1) (B) and conspiracy to commit arson in the second degree in violation of §§ 53a-48 (a) and 53a-112 (a) (1) (B) for the burning of the Forester on January 14, 2017, in Stamford. In the fourth case, the defendant was charged with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, and one count of conspiracy to commit murder in violation of §§ 53a-48 (a) and 53a-54a for the drive-by shooting and the shooting of Flemming on January 19, 2017, in Stamford. Finally, in the fifth case, the defendant was charged with larceny in the third degree in violation of General Statutes §§ 53a-8 (a) and 53a-124 (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a (a) for being found in the stolen Camry and attempting to evade police capture in Bridgeport on January 25, 2017. The defendant elected to have his cases tried before a jury, and the court, *Blawie*, *J.*, granted the state's motion to join all five of the defendant's files for trial.

On December 19, 2018, the defendant filed a pretrial motion to suppress evidence obtained in connection with two search warrants—one issued on February 16, 2017, for a search of a cell phone seized from the defen-

dant when he was arrested, and another issued on September 19, 2018, for phone records and cell site location information (CSLI) obtained from that cell phone's service provider, T-Mobile. The court, *White*, *J.*, heard argument on the defendant's motion to suppress and denied it in an oral decision.

The jury ultimately returned a verdict finding the defendant guilty on all counts. He was sentenced to a total effective term of imprisonment of thirty-five years, with ten years of special parole.[7] This direct appeal followed. Additional facts and procedural history will be set forth as necessary.

In the present appeal, the defendant claims that the trial court improperly denied his motion to suppress evidence obtained pursuant to (1) the February 16, 2017 search warrant for data on his cell phone, and (2) the September 19, 2018 search warrant for his T-Mobile phone records. Specifically, the defendant claims that both warrants were not supported by probable cause and lacked sufficient particularity. The state disagrees and, in the alternative, argues that any error with respect to the denial of the defendant's motion to suppress was harmless beyond a reasonable doubt. We address the defendant's claims with respect to the validity of these two warrants, respectively, in parts I and

[7] The sentence broke down as follows: (1) twenty years for each of the attempt to commit murder counts and twenty years for the conspiracy to commit murder count, to run concurrently with each other; (2) ten years followed by ten years of special parole for the assault of Chen, and ten years for the robbery and conspiracy to commit robbery of Chen, to run concurrently with the assault sentence but to run consecutively to the sentence imposed for the attempt to commit murder counts; (3) five years for the larceny of the Camry and one year for interfering with an officer, to run concurrently with each other and concurrently with the other sentences imposed; (4) five years each for the robbery and conspiracy to commit robbery of Huang, to run concurrently with each other but consecutively to the sentences previously imposed; and (5) ten years each for arson and conspiracy to commit arson, to run concurrently with each other and concurrently with the other sentences imposed.

II of this opinion. We then address the state's claim of harmless error in part III of this opinion.

I

We begin with the defendant's first claim that the trial court improperly denied his motion to suppress evidence obtained from the search of his Samsung cell phone because the search warrant was not supported by probable cause and did not particularly describe the place to be searched and the things to be seized. For the following reasons, we agree with the defendant on both points.

The following additional undisputed facts and procedural history are relevant to our consideration of this claim. On February 16, 2017, Stamford police officers applied for a search warrant for a white Samsung phone and a black Alcatel flip phone found on the defendant when he was arrested.[8] Specifically, the officers requested permission to "do a data extraction" on the phones and described them by their make, color, and serial number. The application further indicated that the cell phones "constitute[d] evidence . . . that a particular person participated in" aggravated assault in violation of § 53a-59.

The affidavit attached to the application made the following factual assertions. During their investigation into the January 14, 2017 arson of the red Subaru Forester, Stamford police officers learned that the Forester had been stolen during a carjacking in Bridgeport on January 8. The Stamford officers then learned from Norwalk police officers that multiple suspects had used a red Subaru Forester to facilitate an armed robbery of a food deliveryman in Norwalk, who was shot twice and who had his Toyota Camry with New York license plates stolen by the suspects on January 14. Investiga-

[8] Only the search of the white Samsung phone is at issue in this appeal.

tors located two .25 caliber shell casings at the scene of the Norwalk robbery.

The affidavit then discussed how further investigation revealed that, on January 14, 2017, the stolen Camry and Forester were seen on surveillance cameras pulling into a gas station in Stamford together at approximately 7:44 p.m. That footage showed Gantt, who was operating the Camry, exiting that vehicle and pumping gas directly into the backseat of the Forester, while the driver of the Forester stood next to him. Both vehicles left the gas station together and, then, at approximately 7:50 p.m., the Forester was discovered burning nearby.

The affidavit then described the January 19, 2017 drive-by shooting and the subsequent shooting of Flemming. Specifically, the affidavit stated that a "dark colored vehicle . . . with possible New York plates" was used in both shootings. Investigators located multiple .25 caliber shell casings at the scenes of both shootings, all of which were fired from the same gun, which was also the same gun used in the shooting of the food deliveryman on January 14. A reliable, confidential informant then implicated Gantt in the shooting of Flemming.

The defendant in the present case is first mentioned in paragraph seventeen of nineteen paragraphs of the warrant affidavit. It avers that, on January 25, 2017, Bridgeport police officers stopped the stolen Camry and arrested Gantt, the defendant, who was a front passenger in the vehicle, and a third individual, all of whom were subsequently charged with larceny in the second degree and interfering with a police officer. The only other paragraph that mentions the defendant is the final paragraph, which reiterates that, on "January 25, 2017, Bridgeport police stopped a stolen motor vehicle and arrested the occupants, one of [whom] was [the defendant]. . . . [The defendant] was in possession of

two cell phones that were taken as evidence. Stamford police were aware of a 'Facebook' Live video that showed . . . Gantt and [the defendant] talking with each other. Bridgeport police turned over the two cell phones to Stamford police to assist in [their] investigation. [The] Stamford Police Forensic Unit would like to do a data extraction on both cell phones." Other than the reference to Stamford police officers being aware that the defendant and Gantt had appeared together on a Facebook Live video,[9] the affidavit does not describe the date, time, location, device used to record, content of that particular posting, or its relationship to the underlying offense under investigation.

A

We begin by setting forth the applicable standard of review of a trial court's decision on a motion to suppress. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial

[9] "Facebook Live is a feature of Facebook, an online social networking platform, that allows users to '[g]o live on Facebook to broadcast a conversation, performance, Q & A or virtual event.' " *State* v. *Segrain*, 243 A.3d 1055, 1059 n.8 (R.I. 2021), quoting Meta, Facebook Live, available at https://www.facebook.com/formedia/solutions/facebook-live (last visited July 29, 2022). This feature allows users to livestream directly to the social network platform and allows viewers to comment or otherwise react to the stream. A recording of the video will be posted to the user's page or profile and can be viewed later. See *United States* v. *Westley*, Docket No. 3:17-CR-171 (MPS), 2018 WL 3448161, *4 n.2 (D. Conn. July 17, 2018) ("Facebook Live is a feature provided by Facebook that allows users to share live video with their followers and friends on Facebook. After the live video ends, the video is published to the user's profile so that the user's Facebook friends can watch it at a later time.").

court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 331 Conn. 258, 271–72, 202 A.3d 1003 (2019). Additionally, "[w]hether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on [that] issue, therefore, is subject to plenary review on appeal." (Internal quotation marks omitted.) *State* v. *Buddhu*, 264 Conn. 449, 459, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004).

Furthermore, the governing law guiding our probable cause analysis is well established. "Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prohibit the issuance of a search warrant in the absence of probable cause. . . . Probable cause to search is established if there is probable cause to believe that (1) . . . the particular items sought to be seized are connected with criminal activity or will assist in a particular . . . conviction . . . and (2) . . . the items sought to be seized will be found in the place to be searched. . . . There is no uniform formula to determine probable cause—it is not readily, or even usefully, reduced to a neat set of legal rules—rather, it turns on the assessment of probabilities in particular factual contexts . . . . Probable cause requires less than proof by a preponderance of the evidence . . . . There need be only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause . . . . [T]he relevant

inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. . . . The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (Citations omitted; internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 37–38, 225 A.3d 668 (2020).

"In our review of whether there was probable cause to support the warrant, we may consider only the information that was actually before the issuing judge . . . and the reasonable inferences to be drawn therefrom. . . . The judge is entitled to rely on his own common sense and the dictates of common experience, although the standard for determining probable cause is an objective one. . . . We review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . and . . . uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the [judge's] conclusion that probable cause existed." (Citations omitted; internal quotation marks omitted.) Id., 38.

The question before us is whether, based on the totality of the circumstances described in the affidavit and the reasonable inferences drawn therefrom, the issuing judge reasonably could have concluded that there was probable cause to believe that evidence of aggravated assault would be found in the defendant's cell phone. We do not believe that the affidavit reasonably supports such a conclusion.

The trial court determined that there was adequate probable cause because the defendant was arrested along with Gantt when officers apprehended them in the stolen Camry that was taken during the Norwalk

robbery of Chen and that was used during the arson of the Forester and the shootings of Flemming in Stamford, both on High Street and in the West Main Street store. The trial court also based its conclusion on the fact that the same gun had been used during all of these incidents. Finally, the trial court referenced the Stamford Police Department's knowledge that the defendant and Gantt had engaged in a discussion with one another on Facebook Live.

We conclude that the trial court incorrectly determined that the warrant affidavit contained sufficient facts on which to base a finding of probable cause to search the defendant's cell phone. The facts contained in the warrant affidavit were not sufficient to allow the judge issuing the warrant reasonably to conclude that probable cause existed to believe that evidence of the crime of aggravated assault, which occurred during a robbery on January 14, 2017, would be found on the defendant's cell phone seized on January 25.

First, we note that the facts relating to the defendant in the affidavit are sparse. The averments contained therein show only that the defendant happened to be inside of a stolen vehicle with Gantt, in a different city, several days after the crimes against both Chen and Flemming. Although the warrant affidavit describes in detail the robbery of Huang, the robbery and shooting of Chen, the theft of the Camry, the arson of the Forester, the shootings of Flemming, and Gantt's role in those crimes, it did not mention the defendant's involvement in or connection to those offenses. The only mention of the defendant in the affidavit was in two paragraphs at the end, which stated that he was arrested as the front passenger in the vehicle stolen during the Chen robbery and shooting, and that he was charged with larceny and interfering with an officer. The last paragraph notes that the defendant was in possession of two cell phones, which were taken into evidence,

and that he had been seen on a posted Facebook Live video having a conversation with Gantt at some unknown time and location prior to his arrest in Bridgeport. There was no information in the warrant about the content of that Facebook Live video and its connection or relationship to any of the events leading up to the defendant's arrest.[10] Unlike the information contained in the warrant describing the video of Gantt pumping gas into the Forester and a reliable confidential informant's identification of Gantt from that video, there is no mention or description of the defendant or his connection to those offenses. These facts, in and of themselves, fail to establish a nexus between the defendant and the alleged crime of aggravated assault. See *Warden* v. *Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (there must be a "nexus . . . between the item to be seized and criminal behavior").

Moreover, the defendant's Samsung cell phone was likewise never tied to the crime of aggravated assault. There must be more than just probable cause that a crime has been committed; there must also be, within the four corners of the affidavit, facts adequate for a judicial officer to form a reasonable belief that evidence of that crime will be found in a particular place. See, e.g., *State* v. *Colon*, 230 Conn. 24, 34, 644 A.2d 877 (1994)

[10] A recorded Facebook Live video of Gantt and the defendant was introduced at trial. Because the warrant lacks any detail about the Facebook Live video, it is not clear whether the warrant referred to the same video that was ultimately admitted into evidence. At trial, the state offered a recording of a Facebook Live video posted on Gantt's Facebook page, which depicts Gantt and the defendant walking together in Bridgeport within an hour of the shooting of Flemming. In that video, Gantt and the defendant are singing and speaking to a virtual audience. Officer Nicholas Gentz, who was monitoring Gantt's Facebook account shortly after the shooting of Flemming, testified about the content of the posting and his knowledge of the feud between the victim and the defendant's group. On the basis of his expertise and knowledge, he explained that Gantt and the defendant were talking about having been with the opposing group, or their "ops," and having done something to them.

("the information to establish probable cause must be found within the affidavit's four corners"). Other than his presence in the stolen Camry eleven days after the crime, nothing in the warrant affidavit suggested that the defendant was present during the robbery and shooting of Chen, that he used the cell phone during the planning or commission of the aggravated assault, or that he possessed the cell phone at the time of the offense. The warrant application asserts that the Samsung cell phone "constitute[d] evidence" of aggravated assault, but the affidavit attached to it gives no description of how that cell phone was itself evidence of the crime, connected to the crime, or otherwise contained evidence of the crime.[11] For the foregoing reasons, we conclude that the warrant to search the defendant's cell phone was not supported by probable cause.

B

Even if we were to determine that sufficient probable cause existed to search the defendant's cell phone, we would also agree with the defendant that the cell phone warrant would fail for lack of particularity of the places to be searched and the things to be seized.

[11] Such affidavits should generally contain, at a minimum, a description of the device's role in the offense and a summary of the relevant technology. See, e.g., Regional Computer Forensic Laboratory, Cellphone (Mobile Device) Search Warrant Affidavit (July 17, 2018) pp. 2, 4–5, available at https://www.rcfl.gov/north-texas/documents-forms/sample_app_mobile_device.pdf (last visited July 29, 2022). That statement would necessarily describe whether the electronic device was evidence of a crime, contraband, or an instrumentality of the crime in and of itself, and/or whether it contained data falling within one of those descriptions. Id., pp. 4–5. When appropriate and accurate, a law enforcement officer may state that such devices are frequently used by persons engaged in the particular type of criminal conduct alleged. Id., p. 5; see also, e.g., *State* v. *Sayles*, 202 Conn. App. 736, 764, 246 A.3d 1010 (probable cause to seize cell phone was partially based on police officer's general knowledge that coconspirators "often communicate with one another via cell phone, and that these devices may contain evidence that can connect a person to a crime, such as call logs, text messages and GPS data"), cert. granted, 336 Conn. 929, 247 A.3d 578 (2021).

The standard of review for whether a warrant satisfies the particularity requirement of the fourth amendment to the United States constitution is well established. "Whether a warrant is sufficiently particular to pass constitutional scrutiny presents a question of law that we decide de novo." (Internal quotation marks omitted.) *State* v. *Buddhu*, supra, 264 Conn. 467. A search warrant satisfies the fourth amendment's particularity requirement "if it identifies the place or thing for which there is probable cause to search with sufficient definiteness to preclude indiscriminate searches." Id., 458–59. Further, "[t]he particularity requirement has three components. First, a warrant must identify the specific offense for which the police have established probable cause. . . . Second, a warrant must describe the place to be searched. . . . Third, the warrant must specify the items to be seized by their relation to the designated crimes." (Citations omitted; footnote omitted; internal quotation marks omitted.) *United States* v. *Galpin*, 720 F.3d 436, 445–46 (2d Cir. 2013).

In the present case, the trial court found that the cell phone warrant was particular because it was "as specific as it could be" when it asked for a full data extraction and identified the cell phone to be searched as a "Samsung color white" with the associated serial number. We disagree that this was enough to satisfy the fourth amendment's particularity requirement.

The United States Supreme Court has stated that "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley* v. *California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Indeed, the court in *Riley* noted that "nearly [three quarters] of smart phone users report being within five feet of their phones most of the time, with 12 [percent] admitting that they even use their phones in the shower. . . . [I]t is no exaggeration to say that many of the more

than 90 [percent] of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." (Citations omitted.) Id., 395. The court in *Riley* further described how the quantitative and qualitative differences in electronic devices include the "immense storage capacity" of cell phones; id., 393; their "ability to store many different types of information"; id., 394; their functioning as "a digital record of nearly every aspect of their [owners'] lives"; id., 395; and their ability to "access data located elsewhere . . . ." Id., 397. Industry studies conducted by the Cellular Telecommunications Industry Association (CTIA) indicate that reliance on wireless technology, including mobile devices, increases yearly.[12] Given the privacy interests at stake in a search of a cell phone, as acknowledged in *Riley* and confirmed by the CTIA annual survey, the fourth amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone. Accordingly, we conclude that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.

In this case, the cell phone warrant was defective for failing to meet the particularity requirement of the

[12] According to the CTIA's 2021 annual survey, the trend of pervasive cell phone use continues to increase. Indeed, "American consumers have continued to use wireless networks to stay connected, especially while social distancing—we exchanged over 119 billion more messages last year, for a total of 2.2 trillion SMS and MMS messages, driven by a 28 [percent] increase in GIFs, memes, videos, and other MMS messages. Voice traffic saw 2.9 trillion minutes of use." CTIA, 2021 Annual Survey Highlights (July 27, 2021), available at https://www.ctia.org/news/2021-annual-survey-highlights (last visited July 29, 2022). The same report also noted that "[m]obile wireless data traffic had another record year, topping 42 trillion [megabytes]—a 208 [percent] increase since 2016. Over the past decade, Americans have driven a 108 [times] increase in mobile data traffic." Id.

fourth amendment. The warrant not only failed to connect the defendant to the crime of aggravated assault and to establish the probable cause to believe that his cell phone would contain evidence of that crime, it also failed to provide the type of information sought by its authorization. The warrant authorized a search of a "data extraction," which allowed for a search of the entire contents of the cell phone. The warrant failed to list types of data this particular device or cell phones in general contain, and the types of data on the phone the affiants sought to search and seize, such as cell phone call logs, text messages, voice messages, photographs, videos, communications via social media, or other evidence of the crime of aggravated assault.[13]

[13] During oral argument, the state acknowledged that a team had been developing protocols to provide law enforcement with guidance on particularity requirements for cell phone warrants. Additional guidance available to law enforcement recommends that warrants contain information about the "exact brand and model of the device," if they are known, and "tailor a description of its specific capabilities," and indicates that such "information is [often] available from the manufacturer or [online]." See, e.g., Regional Computer Forensic Laboratory, Cellphone (Mobile Device) Search Warrant Affidavit (July 17, 2018) p. 2, available at https://www.rcfl.gov/north-texas/documents-forms/sample_app_mobile_device.pdf (last visited July 29, 2022). If the specific identity of the cellular device is not available, there are generic descriptions that can be used to describe the typical capabilities of cell phones. See id., pp. 2–3 (The use of the following generic description is suggested "as necessary depending on [the] target of warrant . . . [for a cell phone] . . . . A [cell phone] or mobile telephone is a handheld wireless device used primarily for voice communication through radio signals. These telephones send signals through networks of transmitter/receivers called 'cells,' enabling communication with other [cell phones] or traditional 'land line' telephones. A [cell phone] usually includes a 'call log,' which records the telephone number, date, and time of calls made to and from the phone. . . . In addition to enabling voice communications, [cell phones] now offer a broad range of capabilities. These capabilities include, but are not limited to: storing names and phone numbers in electronic 'address books;' sending, receiving, and storing text messages and [e-mail]; taking, sending, receiving, and storing still photographs and moving video; storing and playing back audio files; storing dates, appointments, and other information on personal calendars; and accessing and downloading information from the Internet. [Cell phones] may also include global positioning system . . . technology for determining the location of the device.").

Further, it included no time parameters to cabin the scope of the search but, rather, allowed for the entire contents of the phone to be searched for all time. See, e.g., *United States* v. *Wey*, 256 F. Supp. 3d 355, 387–88 (S.D.N.Y. 2017) (warrants failed, in part, because they did not contain "any relevant [time frame] or dates of interest"). Thus, we conclude that the search warrant did not comply with the particularity requirement because it did not sufficiently limit the search of the contents of the cell phone by description of the areas within the cell phone to be searched, or by a time frame reasonably related to the crimes. Therefore, the trial court improperly denied the defendant's motion to suppress the evidence obtained with respect to the cell phone search warrant.

II

We turn now to the defendant's second claim that the trial court improperly denied his motion to suppress evidence obtained pursuant to a search warrant of his T-Mobile phone records because the warrant was not supported by probable cause and did not particularly describe the places to be searched and the things to be seized. As with the first warrant, we agree with the defendant that this second warrant also was not supported by probable cause, but we lack sufficient information to determine whether the second warrant was sufficiently particular.

The following additional undisputed facts and procedural history are relevant to our consideration of this claim. On September 19, 2018, the court issued a search warrant for various records from T-Mobile, the mobile service provider associated with the defendant's Samsung phone. This warrant was served on and records were obtained from T-Mobile.

Pursuant to this warrant, Stamford police officers requested to search and seize phone records associated

with the defendant's "white Samsung cell phone" between January 7, 2017, at 11:59 p.m., and January 25, 2017, at 11:59 p.m. The warrant identified various categories of information sought, including "subscriber information, [cell phone] information, including call records of incoming and outgoing calls, SMS text messages, [e-mail] information and messages, social media messages, video recordings, digital images, voice mail recordings, GPS data, [g]eo-locator, and any other data/information stored on the [device], internal memory or removable storage media, and/or any data the [device] has access to through a cellular [n]etwork/[Wi-fi]/Bluetooth connection." The warrant further provided that the phone "is possessed, controlled, designed or intended for use or which is or has been or may be used as the means of committing the criminal offense of: [c]riminal [a]ttempt [at] [m]urder [§§] 53a-49/53a-54a."

The affidavit accompanying the warrant made the following factual assertions. During their investigation of the arson of the Forester, Stamford police officers learned that it had been stolen during a robbery in Bridgeport six days earlier. The affidavit then described how Stamford police officers were dispatched to a shooting at a convenience store on West Main Street where they found Flemming with a gunshot wound to his head. The affidavit further alleged that, "during the investigation of [those] crimes, [Gantt] and [the defendant] were developed as potential suspects" and were arrested in Bridgeport on January 25, 2017, "for unrelated crimes," larceny and interfering with a police officer by resisting arrest, resulting in the seizure of the defendant's cell phone. Next, the affidavit stated that, on February 17, 2017, "after an extensive investigation [that] included multiple search warrants and interviews, arrest warrants were applied for and eventually granted for both [Gantt and the defendant] for the shooting of [Flemming] on January 14, 2017." The affidavit then

provided that "the data requested may be of evidentiary value as it may assist with identifying the person/persons who shot [Flemming], the location of [the defendant] at the time of the shooting, and other crimes."

In denying the defendant's motion to suppress the evidence obtained from T-Mobile, the trial court concluded that the warrant affidavit set forth probable cause based on the defendant's and Gantt's being arrested together on January 25, 2017, the defendant's possession of two cell phones at that time, and the fact that the Camry and Forester were "connected with the Norwalk robbery and the Stamford shooting and robbery . . . ." With respect to particularity, the court noted that it was "specific as to the phone, phone number, dates . . . and the contents to be searched."

A

The applicable standard of review and governing law related to a probable cause analysis are the same as we iterated in part I A of this opinion. Therefore, we must determine whether, on the basis of the totality of the circumstances described in the affidavit and the reasonable inferences drawn therefrom, the issuing judge reasonably could have concluded that there was a substantial chance that evidence of the shooting of Flemming would be found in the defendant's phone records. We hold that the affidavit does not reasonably support such a conclusion.

We note that the warrant "must establish probable cause to believe" not only that an item of evidence "is likely to be found at the place to be searched"; *Groh* v. *Ramirez*, 540 U.S. 551, 568, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting); but also that there is "a nexus . . . between the item to be seized and [the] criminal behavior." *Warden* v. *Hayden*, supra, 387 U.S. 307. As with the first warrant, nothing within the four corners of this affidavit connects the

defendant to the crime mentioned, attempted murder, or shows that his cell phone was either used during the commission of that crime or otherwise contained evidence of it. The affidavit fails to tie the defendant to the crime or even mention that multiple suspects were involved in the commission of the crime.

The trial court found probable cause on the basis of the defendant's arrest with Gantt, the defendant's possession of two cell phones during his arrest, and the fact that the "Toyota and the Subaru were connected with the Norwalk robbery and the Stamford shooting and robbery . . . ." However, this particular affidavit, unlike the affidavit filed in support of the first warrant, did not contain any information about the robberies of Huang or Chen. The eight paragraphs of the warrant on a single page referenced a vehicle fire and a carjacking but not the details contained in the first warrant. It also did not mention the fact that the defendant and Gantt were arrested together in possession of the stolen Camry. With regard to the offense for which the warrant was sought, the attempted murder of Flemming, the warrant contained a single paragraph indicating that the police had reported to a shooting in Stamford and the identity of the victim. Other than a conclusory statement that Gantt and the defendant were developed as suspects for the "said crimes" and that a judge had signed arrest warrants for both men in connection with the shooting of Flemming, there was no factual description of the defendant's role in or connection to the offenses that formed the basis for the arrest warrants. Although the affidavit contained information that the defendant was in possession of a Samsung cell phone with a T-Mobile phone number at the time of his arrest on January 25, 2017, it did not mention how that device was connected to, or otherwise contained evidence of, the offense of attempt to commit murder.

The state argues that, because the warrant affidavit refers to the signed arrest warrant of the defendant that was issued on facts sufficient to constitute probable cause that the defendant was involved in the shooting of Flemming, the judge issuing the search warrant was entitled to rely on the arrest warrant to establish probable cause. We disagree.

A determination of probable cause for an arrest requires different findings than a determination of probable cause for a search warrant. An arrest warrant requires a finding of probable cause that an offense was committed and that the defendant committed the offense. A search warrant requires a finding of probable cause that the particular items sought to be seized are connected to criminal activity or will assist in a particular conviction and that the items sought to be seized will be found in the place to be searched. "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go [to] the connection of the items sought with crime and to their present location. This distinction is a critical one, and is particularly significant in search warrant cases, for it means that the probable cause determination in that context is a much more complex matter; the need to determine the probable present location of certain items, for example, gives rise to a question concerning the timeliness of the information which is not ordinarily a matter of concern in arrest cases." (Internal quotation marks omitted.) *State* v. *DeChamplain*, 179 Conn. 522, 529–30, 427 A.2d 1338 (1980); see also *State* v. *Heinz*, 193 Conn. 612, 624, 480 A.2d 452 (1984) ("[B]ecause arrests are inherently less apt to be intrusive than are searches, there is a difference in the constitutional standards by which probable cause to arrest and probable cause to search are measured. The probable cause determination in the context of arrest warrants requires inquiries that are less complex consti-

tutionally than are those that pertain to search warrants.") As we noted previously, "the information to establish probable cause must be found within the affidavit's four corners." *State* v. *Colon*, supra, 230 Conn. 34. The facts related to the defendant's arrest for attempted murder were not included in the search warrant affidavit; nor were the contents of the arrest warrant itself. As such, the search warrant did not contain the factual allegations and evidence that led to the defendant's arrest, which would have enabled the reviewing judge to determine whether those factual allegations would establish probable cause to believe that evidence of an attempted murder existed in the T-Mobile records relating to the defendant's Samsung cell phone. We conclude that the search warrant affidavit did not, on its own, contain enough information for the trial court to determine that probable cause existed for the search.

B

Next, even if probable cause had been established, the defendant contends that the T-Mobile records search warrant lacked particularity. Although this warrant is markedly different from the Samsung cell phone warrant, for the reasons stated hereinafter, we lack sufficient information to assess the validity of this claim.

The standard of review and governing law for the particularity of a search warrant are detailed previously in part I B of this opinion. Unlike the first warrant, the T-Mobile search warrant particularly described the types of places to be searched and, more specifically, the phone records associated with a "white Samsung cell phone" with the defendant's phone number. Both the warrant and the incorporated affidavit list the crime under investigation—the attempted murder of Flemming—and that the sought after data would assist the investigation.

Importantly, the search warrant requested records only for a limited duration that were reasonably connected to the attempted murder on January 19, 2017. Specifically, the warrant requested such records for between January 7, 2017, at 11:59 p.m., and January 25, 2017, at 11:59 p.m. These dates correlate to approximately one day before the Huang robbery up until the date the defendant was arrested. Additionally, the warrant identified a specific list of items to be searched and seized, including "call records of incoming and outgoing calls, SMS text messages, [e-mail] information and messages, social media messages, video recordings, digital images, voice mail recordings, GPS data, [g]eolocator, and any other data/information stored on the [device], [i]nternal memory or removable storage media, and/or any data the [device] has access to through a cellular [n]etwork/[Wi-Fi]/Bluetooth connection." These descriptions and time limitation are more likely to satisfy the fourth amendment's particularly requirement. However, given the lack of information in the affidavit relating to the defendant's role in the offense and the device's role in the commission of the offense to establish probable cause to believe that the T-Mobile records would contain evidence of the crime, we are unable to assess the sufficiency of the particularity requirement as it relates to this warrant.

III

The state next argues that, even if both warrants were improper, any resulting error was harmless. We agree with the state that any error was harmless with respect to the charges concerning the robbery of Huang, the shooting of Flemming, and interfering with an officer. We also conclude, however, that the error was harmful with respect to the charges concerning the robbery and shooting of Chen, the related larceny of the Camry, and the charges related to the arson of the Forester.

We begin with the applicable standard of review. "It is well settled that constitutional search and seizure violations are not structural improprieties requiring reversal, but rather, are subject to harmless error analysis. . . . The harmlessness of an error depends [on] its impact on the trier and the result . . . and the test is whether there is a reasonable possibility that the improperly admitted evidence contributed to the conviction. . . . In determining whether illegally obtained evidence is likely to have contributed to the defendant's conviction, we review the record to determine, for example, whether properly admitted evidence is overwhelming or whether the illegally obtained evidence is cumulative of properly admitted evidence. . . . Simply stated, we look to see whether it is clear beyond a reasonable doubt that the outcome would not have been altered had the illegally obtained evidence not been admitted." (Citations omitted; internal quotation marks omitted.) *State* v. *Esarey*, 308 Conn. 819, 832, 67 A.3d 1001 (2013).

The following evidence was introduced at trial from the Samsung cell phone data extraction search warrant: (1) an extraction summary generated by Cellebrite[14] revealing information such as the cell phone's number and the Facebook account linked to the cell phone;[15] (2) a multimedia message service (MMS) message sent by Gantt to the defendant at 3:11 p.m. on January 22, 2017, which contained an attached photograph of Gantt inside the Shell gas station that the Norwalk police had disseminated to the public in an effort to identify Chen's assailant and the person who set fire to the Forester; (3) a text message sent on January 16, 2017, from the

[14] Cellebrite software was used to extract data from the defendant's cell phone and categorized it into separate "container file[s]" by placing, for example, text messages into a text messages folder and call logs into a call logs folder. Once the data is categorized, the police can then search the files to "see what's on the phone."

[15] A Facebook account for "Shellz Row" was linked to the phone.

defendant to Gantt in which the defendant told Gantt to watch a report on the news about a robbery and shooting on Rolling Lane (the scene of the Chen shooting); and (4) a text message conversation between the defendant and Gantt that occurred between 6:58 a.m. and 3:52 p.m. on January 14, 2017. In the January 14 conversation, the defendant and Gantt expressed their admiration for one another, and the defendant asked Gantt to "beat the life" out of someone. Gantt also stated, "I'm going to jail," and Gantt made a reference to being in the Milla Death Row gang.

With respect to the search warrant for the records from T-Mobile, the evidence introduced at trial comprised records from T-Mobile that included the dates and times of calls and text messages made from or received by the defendant's cell phone, and the locations of the cell towers utilized by the cell phone. The call records from the defendant's cell phone were provided to James Wines, a special agent within the Federal Bureau of Investigation. Through historical cell site analysis, Wines created a report plotting the approximate location of cell towers and the defendant's cell phone around the times of the various crimes. Wines' report revealed that the defendant's cell phone activated near the scene of the Chen robbery and shooting in Norwalk, the drive-by shooting and attempted murder of Flemming in Stamford, and the flight from the police officers in Bridgeport. The cell phone did not, however, activate near the scenes of either the Huang robbery in Norwalk or the arson of the Forester in Stamford.

In determining whether an error is harmless beyond a reasonable doubt, various factors are considered, including the importance of the evidence, whether such evidence was cumulative of other evidence, the extent of cross-examination addressing such evidence, and the overall strength of the state's case. See, e.g., *State* v.

Armadore, 338 Conn. 407, 437, 258 A.3d 601 (2021). To determine whether the evidence obtained from the warrants was cumulative and to evaluate the strength of the state's case against the defendant, we must examine the other evidence admitted at trial.

The state called a cooperating witness, Parker, who testified that he personally observed and participated in the Huang robbery in Norwalk, the drive-by shooting, and the subsequent shooting of Flemming in the convenience store. Parker, however, was not present at and did not testify about the Chen robbery or the arson of the Forester. Parker identified the defendant's role in the robberies and the shootings for which Parker was present. Parker testified that he had served as the getaway driver during the Huang robbery, while Gantt and the defendant committed the robbery, as the defendant was holding a .25 caliber gun. Parker also described the drive-by shooting targeting Flemming and identified the defendant as the one who shot Flemming. He testified that the defendant used the same .25 caliber gun that he had used to commit the robbery of Huang in both of the shooting incidents involving Flemming.

The state also introduced evidence of video footage from the evening Flemming was shot, in which Parker identifed the participants. One video from an apartment complex in Stamford shows Gantt, Parker, Ranero, and the defendant riding together in an elevator approximately one hour before the shooting of Flemming. In that video, the defendant can be seen wearing black shoes, black pants, a black hoodie, a black jacket that appears to have a zippered pocket on the left sleeve, and black gloves. The defendant is also wearing a black "skully,"[16] which was consistent with the black face

[16] Parker testified that a "skully" is a ski mask, which would cover the wearer's face, that can be rolled up into a hat that would not obscure the wearer's face. In the video footage from the elevator, the defendant is wearing his skully rolled up into a hat.

mask found on the defendant when he was arrested. The other people in the elevator were wearing clothing distinctive from that worn by the defendant. A second video introduced by the state depicts the West Main Street store where Flemming was shot. In that video, Flemming can be seen standing by the counter of the store and wearing pants with reflective stripes on them, which are also visible in a video the state introduced of Flemming running away from the drive-by shooting. The video depicts a man wearing black shoes, black pants, a black hoodie, a black jacket that appears to have a zippered pocket on the left sleeve, black gloves, and a black ski mask approaching Flemming and shooting him multiple times. In addition to Parker's testimony about the defendant's role as the shooter, the jury was presented with and able to compare the video of the defendant on the elevator with Parker and Gantt about one hour before the shooting with the video of the shooting of Flemming inside the store.

Finally, the state also introduced forensic evidence indicating that .25 caliber shell casings recovered from the scenes of the High Street and 417 West Main Street store shootings in Stamford were fired from the same firearm as shell casings recovered from the January 14, 2017 shooting of Chen in Norwalk.

To begin our analysis, we note that the evidence adduced by the state against the defendant with respect to the Huang robbery was principally derived from Parker's testimony. Neither the CSLI evidence from the defendant's cell phone service provider nor the data recovered from the search of the defendant's phone itself related to that particular offense. As such, we conclude that any error relating to the admission of that evidence was harmless with respect to the charges arising out of that incident.

Second, the video footage from the elevator and the shooting at the store corroborate Parker's testimony

related to the shooting of Flemming. See, e.g., *State* v. *Armadore*, supra, 338 Conn. 455–56 (witness' testimony was bolstered by corroborating evidence). The clothing the defendant wore in the elevator was identical to the clothing worn by Flemming's shooter only one hour later. Parker's testimony was further corroborated by the video of Flemming running away from the drive-by shooting. Parker testified that he and the other occupants of the Camry were able to identify Flemming the night of the shooting by the "reflectors on his sweatpants . . . ." The video evidence clearly shows Flemming wearing clothing matching that description, giving credence to Parker's testimony about the events that evening.

Further, the state established a motive for the shootings by introducing evidence that the Milla Death Row gang, of which the defendant was a member, had a "beef" with Flemming. Therefore, we conclude that the state has met its burden of establishing that the trial court's admission of the evidence obtained from the two search warrants, including the CSLI and the data extracted from the cell phone, was harmless beyond a reasonable doubt with respect to the shootings of Flemming.

Third, the charge of interfering with an officer, in connection with events that had occurred on January 25, 2017, was clearly unaffected by the search warrants because Stamford police officers discovered the defendant as a passenger in the stolen Camry and witnessed him attempt to evade police capture. Moreover, the defendant's fingerprints were discovered on the right rear passenger door of the Camry. It is highly unlikely that the defendant's CSLI putting him in the area where the stolen Camry was stopped would have affected the jury's decision with respect to the charge of interfering with an officer in light of the fact that the police apprehended him after he exited that car.

On the other hand, we find that, insofar as the CSLI was the only evidence placing the defendant at the scene of the Chen robbery and assault, the state has not met its burden of proving that the admission of that evidence was harmless beyond a reasonable doubt with respect to those crimes. Parker testified that he was not at the scene of the Chen robbery on January 14, 2017, and, thus, gave no account of who was present or what occurred. The CSLI is the key, if not the only evidence, placing the defendant at the scene of the Chen robbery, assault, and the subsequent arson of the Forester. The state claims that other evidence serves to prove that the defendant was involved in that scheme, including an argument that the scheme was almost identical to the Huang robbery, Chen's testimony that two perpetrators were involved, the fact that the shell casings were identical to those found at the scene of the Flemming shooting, and the fact that the defendant was found with Gantt in the stolen Camry. Although those pieces of evidence could have influenced the jury's findings, the defendant's CSLI was the most concrete and direct evidence placing the defendant at the scene of those crimes. Accordingly, we cannot conclude that the jury's determination of guilt with respect to either the robbery and assault of Chen, or the subsequent larceny of the Camry, was uninfluenced by the CSLI evidence.

This same logic extends to the arson of the Forester. The evidence offered by the state at trial tends to show that the perpetrators of the crimes against Chen drove directly to the Shell gas station, then set the Forester ablaze. Although Parker was able to identify Gantt in the gas station video footage, there was no identification of the defendant in that video. The omission of the defendant's CSLI from the state's case significantly weakens the evidence tending to show that the defendant was at the scene of the Chen robbery and, thus,

also reduces the certainty that he was involved in the subsequent arson relating to the Forester.

For the foregoing reasons, we affirm the defendant's conviction of (1) robbery in the first degree and conspiracy to commit robbery in the first degree for the robbery of Huang in Norwalk on January 9, 2017, (2) two counts of attempt to commit murder and one count of conspiracy to commit murder for the January 19, 2017 shooting incidents in Stamford involving Flemming, and (3) interfering with an officer in connection with the defendant's flight from the police on January 25, 2017.

We also conclude, however, that the CSLI evidence from the service provider warrant was harmful with respect to the defendant's conviction of (1) robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree for the robbery and shooting of Chen in Norwalk, (2) larceny in the third degree for the related theft of the Camry, and (3) arson in the second degree and conspiracy to commit arson in the second degree for the defendant's involvement with setting the Forester on fire.[17]

[17] In its brief, the state asserts that the present case should be remanded for a hearing on the inevitable discovery and independent source exceptions to the exclusionary rule. We disagree. Although it may be true that "much of the challenged information could have been obtained through search warrants for the codefendants' phones," that argument cannot logically be extended to the defendant's own CSLI. There was no testimony from Parker or other witnesses that placed the defendant with the codefendants on the date of or at the scene of the Chen robbery and assault, or the arson. Cf. *State* v. *Tyus*, 342 Conn. 784, 805, 272 A.3d 132 (2022) (CSLI of codefendant was admitted into evidence when defendant and codefendant admitted to being together entire evening during which crime was committed). The state's assertion that the Norwalk Police Department would have, at some indeterminate point in the future, obtained a lawful warrant in the course of its own investigation is likewise unavailing. Accepting such a bare argument, without more, would render the protections afforded by the warrant requirement largely illusory.

This court has, on occasion, remanded a case for a hearing related to the application of these exceptions in cases in which the trial court or the parties could not have raised a claim under those doctrines and they are raised for the first time on appeal. See, e.g., *State* v. *Correa*, 340 Conn. 619,

The judgment of conviction of robbery in the first degree, conspiracy to commit robbery in the first degree, and assault in the first degree in the case involving the robbery and shooting of Chen, and the judgment of conviction of arson in the second degree and conspiracy to commit arson in the second degree in the case involving the burning of the Forester are reversed, the judgment of conviction in the case involving the events of January 25, 2017, is reversed with respect to the conviction of larceny in the third degree, and the case is remanded for a new trial with respect to only those offenses; the judgment of conviction of two counts of attempt to commit murder and one count of conspiracy to commit murder in the case involving the shootings of Flemming and the judgment of conviction of robbery in the first degree and conspiracy to commit robbery in the first degree in the case involving the robbery of Huang are affirmed, and the judgment of conviction in the case involving the events of January 25, 2017, is affirmed with respect to the conviction of interfering with an officer.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DEONDRE BOWDEN (SC 20488)

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

Syllabus

Convicted of numerous crimes, including felony murder, in connection with the shooting death of the victim, the defendant appealed to this court.

635–36, 639, 264 A.3d 894 (2021). The claim the state now raises, however, does not fall under the auspices of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The state had an adequate opportunity to assert a factual basis for the applicability of these doctrines in responding to the defendant's motion to suppress the evidence that was obtained pursuant to the warrants. Its decision to forgo that opportunity obviates the need for a more limited remand.

Six days after the victim was found dead in a park with a gunshot wound to his head, the police stopped the defendant, who was driving the victim's missing vehicle, and found two of the victim's credit cards in the defendant's pocket. The defendant was arrested, and the police interviewed him and seized his cell phone. While incarcerated, the defendant asked his mother to dispose of the clothes that he was wearing on the night of the murder and asked his sister to dispose of a revolver that was stored at his grandmother's house. The police subsequently executed search warrants at the defendant's residence and his grandmother's house, where they recovered the clothing and the revolver, respectively. The police also obtained a search warrant to extract and search the data on the defendant's cell phone. Prior to trial, the defendant filed a motion to suppress the evidence obtained pursuant to that warrant. The trial court denied that motion, and, at trial, the state admitted evidence of call logs and text messages between the defendant and the victim, call logs and text messages between the defendant and another individual, B, and a photograph of a revolver. The defendant testified in his own defense, denying his involvement in the crimes and stating that, although he had been at the park with the victim, another individual, S, had shot the victim. S denied knowing the victim or being present at the park but testified that, because he did not own a cell phone, B occasionally let him use her phone. From the judgment of conviction, the defendant appealed to this court, claiming that the trial court improperly had denied his motion to suppress because the warrant authorizing the police to extract and search the contents of his cell phone lacked a particular description of the things to be seized and was not supported by probable cause. *Held* that the state satisfied its burden of demonstrating that any error with respect to the trial court's failure to suppress the evidence obtained pursuant to the search warrant was harmless, as such evidence either was not used by the state to implicate the defendant or was cumulative of other evidence, and, accordingly, this court affirmed the judgment of conviction: evidence regarding the phone calls and text messages between the victim's and the defendant's cell phones was otherwise available through the victim's cell phone records, which the police had obtained prior to interviewing the defendant, and the defendant admitted that those records accurately reflected the communications between them; moreover, even without those text messages, there was abundant video and testimonial evidence demonstrating that the defendant and the victim were together on the evening in question; furthermore, B's testimony about receiving certain text messages and phone calls from the defendant on the day in question rendered the evidence of those calls and messages cumulative, and the photograph of the revolver obtained from the defendant's cell phone was cumulative insofar as the revolver itself was introduced at trial; in addition, there was overwhelming evidence of the defendant's guilt, as the defendant was found driving the victim's car and in possession of his credit cards,

which the defendant had been using since the victim's murder, video and testimonial evidence established that the defendant and the victim were together on the evening of the murder, the defendant requested that his sister and mother dispose of incriminating physical evidence, which demonstrated the defendant's consciousness of guilt and undercut his assertion that he was not involved in the charged crimes, and the defendant displayed a consistent lack of credibility by providing several contradictory versions of the events and by acknowledging that he had lied to the police.

Argued February 16—officially released August 9, 2022

Procedural History

Substitute information, in the first case, charging the defendant with the crime of larceny in the third degree, and substitute information, in the second case, charging the defendant with the crimes of murder, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Fairfield, where the court, *E. Richards*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the cases were tried to the jury; verdicts of guilty of larceny in the third degree, the lesser included offense of manslaughter in the first degree with a firearm, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver; subsequently, the court vacated the findings of guilty of manslaughter in the first degree with a firearm and larceny in the third degree and rendered judgment of guilty in the second case of felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver, from which the defendant appealed to this court. *Affirmed*.

Adele V. Patterson, senior assistant public defender, with whom was *Shanna P. Hugle*, assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Deondre Bowden, appeals from the judgment of the trial court convicting him of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), carrying a pistol without a permit in violation of General Statutes § 29-35, stealing a firearm in violation of General Statutes § 53a-212 (a), and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). On appeal, the defendant claims that the trial court's denial of his motion to suppress certain evidence from a search of his cell phone violated his rights under the fourth amendment to the United States constitution because (1) the application for the warrant authorizing that search lacked a particular description of the things to be seized,[1] and (2) the affidavit supporting that application failed to establish probable cause. The state disagrees with each of these claims and asserts, in the alternative, that any error was harmless. For the reasons that follow, we agree with the state that any error in the trial court's failure to suppress evidence obtained from the search warrant was harmless.[2] Accordingly, we affirm the judgment of the trial court.

[1] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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

[2] We note that this appeal raises the same issue regarding the particularity of cell phone warrants that was raised in *State* v. *Smith*, 344 Conn. 229, A.3d (2022), which we also decide today.

The following facts, which the jury reasonably could have found from the evidence admitted at trial, are relevant to our review of the defendant's claims. At approximately 9:25 p.m. on May 24, 2017, the police responded to a dispatch reporting "a victim [lying] in a roadway with blood everywhere" in the vicinity of Went Field Park in Bridgeport. The victim, who was later identified as LaWane Toles, was found with "a . . . large gunshot wound to his head" and was pronounced dead at the scene at 9:30 p.m.

During a subsequent investigation, the police determined that the victim's red Hyundai Sonata was missing and instructed officers to be on the lookout for that vehicle. At around 12:30 a.m. on May 30, 2017, Officer Victor Rodriguez noticed the Sonata being driven on Main Street in Bridgeport with its headlights turned off. Rodriguez called for backup and followed the Sonata until it stopped at an apartment building on Morgan Avenue. The defendant, the sole occupant of the Sonata, exited the vehicle and was placed under arrest for possessing a stolen motor vehicle. The defendant identified himself as Deondre Bowden.

Rodriguez searched the defendant following his arrest and found keys, a wallet, and two credit cards in his pocket. The wallet contained several items bearing the defendant's name, including his short-form birth certificate, social security card, health insurance card, official Connecticut state identification card, and bank card. The two credit cards in the defendant's pocket, however, bore the victim's name. When he saw the credit cards in the victim's name, Officer Robert Pascone, who had arrived at the scene as one of the backup officers, stated, "well, this isn't you." In response, the defendant stated, "I know this looks bad."

Rodriguez testified that, while he was transporting the defendant to the police department, the defendant

began to ramble, stating that he had received the car from his cousin, Dyshawn White, whom he said he had just dropped off at the train station. Police officers, upon investigation, were unable to locate any such individual. At the police department, the defendant gave a two and one-half hour long video recorded statement to the police, during which he offered several inconsistent accounts about both his familiarity with the victim and his whereabouts at the time of the crimes alleged.[3] At the end of this interview, the police seized the defendant's cell phone.

While the defendant was incarcerated at Bridgeport Correctional Center, his communications were monitored. Correctional authorities intercepted a letter in which the defendant informed his sister that "the thing [he] asked of [her] was/or is at [his grandmother's home] in [a] suitcase . . . ."[4] He also indicated in the letter that the suitcase was "[r]ed and [black]" and that "[t]he object [was] at the bottom in a [g]reen and white bag" and that he needed her to "check [out] that object . . . ." The police subsequently obtained a search warrant for the home of the defendant's grandmother in Norwalk and found a .44 Magnum Smith & Wesson revolver and two rounds of ammunition in two white and green plastic bags inside of a red and black suitcase.[5] During a subsequent investigation of the revolver, the police determined that it had been stolen from its original owner during a burglary on March 13, 2008.

[3] For example, the defendant gave several different versions of how he obtained possession of the Sonata, whether and how he knew the victim, and his whereabouts on the night of the murder. In addition, he first told the police that he did not know the victim, eventually admitted to knowing the victim for almost a decade, and finally admitted to being with the victim in Went Field Park immediately prior to the murder.

[4] During a phone call from jail, the defendant asked his mother not to disclose his grandmother's address to the police.

[5] An investigation into the revolver revealed that it was operable and had previously been fired.

Further investigation revealed that the defendant did not possess a pistol permit, despite having that revolver in his possession.

Dollett T. White, the medical examiner responsible for the victim's autopsy, discovered three bullet fragments in the victim's head. The bullet fragments contained two gray lead fragments from the bullet itself and a fragment from a copper jacket. At trial, Marshall Robinson, a firearm and tool mark examiner, testified that the fragments found in the victim's skull were insufficient to permit him to make a comparison and to determine whether those fragments were consistent with a bullet fired from the revolver found in the defendant's suitcase at his grandmother's house. There were no shell casings recovered from the scene of the shooting. The jury was also presented with evidence that one of two bullets discovered in the revolver that was found inside of the defendant's suitcase was a lead bullet with a copper jacket. Marshall Robinson also testified that bullets with copper jackets are commonly available.

During his incarceration, the defendant spoke to his mother on the phone, and, during that phone call, she told the defendant that the police were searching for his grey sweatpants and white T-shirt, the clothing the defendant had been wearing on the night of the victim's murder. In response, the defendant said "remember my . . . sweatpants . . . you know what the garbage can looks like," and "you know how to use it, right?" He then told his mother to "do that tomorrow." The police executed a search warrant at the defendant's residence on Morgan Avenue in Bridgeport and discovered a bag containing the defendant's clothing, as well as a debit card bearing the victim's name.

During the course of their investigation, the police also obtained a search warrant allowing them to conduct a data extraction to search all of the defendant's

cell phone data. The cell phone data revealed call logs andtext messages between the defendant's and the victim's phones, as well as call logs and text messages between the defendant and an individual named Antanesha Brantley. Finally, the cell phone data also contained a photograph showing the .44 Magnum Smith & Wesson revolver.

The defendant was ultimately charged with, among other crimes, murder in violation of General Statutes § 53a-54a (a), felony murder in violation of § 53a-54c, robbery in the first degree in violation of § 53a-134 (a) (2), carrying a pistol without a permit in violation of § 29-35, stealing a firearm in violation of § 53a-212 (a), and criminal possession of a pistol or revolver in violation of § 53a-217c (a) (1).

The defendant filed a pretrial motion to suppress evidence obtained in connection with the search warrant that authorized the police to extract and search the data on his cell phone. The warrant affidavit contained multiple paragraphs detailing the evidence against the defendant, including the facts that he was found inside of the victim's stolen car after the murder, was found with several of the victim's credit cards, and gave multiple, conflicting stories to the police with respect to how and when he obtained possession of the stolen car. The affidavit also averred that the defendant told the police he had been with the victim at Went Field Park on the evening of the murder and how he had communicated with the victim via his cell phone just prior to the murder. The warrant contained a request for data extraction of the cell phone, including "incoming and outgoing calls, text messages, communicating applications, call identifier lists, contact lists, address book, pictures, videos and any information relative to the user's location during calls." The trial court heard argument on the defendant's motion to suppress and denied it in an oral decision.

At trial, Michael Summers identified himself in a still photograph taken from private video surveillance footage on Morgan Avenue approximately fifteen minutes after the victim was shot. That image shows Summers and the defendant standing together outside of the victim's car. Summers testified that he had been with the defendant for only a short time that evening to smoke marijuana at the defendant's home. Summers stated that he did not know the victim and that he had not been to Went Field Park that evening. Summers also testified that he did not have a cell phone at the time but that, sometimes, Brantley, a friend of Summers, would let him use her phone.

After the close of the state's case-in-chief, the defendant testified in his own defense. He indicated that he spent time with the victim two to three times per week and that the victim was his drug dealer. The defendant stated that he had told Summers that he had a connection who could provide drugs and that Summers had indicated his desire to be informed the next time the victim was in town.

The defendant further testified that, on the day of the murder, the victim picked him up at around 4:45 p.m. According to the defendant, after a few hours, the two of them went to visit the victim's friends and family on Olive Street in Bridgeport. Video surveillance footage obtained from a nearby location depicted the defendant and the victim exiting the victim's car at approximately 8 p.m. The defendant testified that he eventually encountered Summers on Olive Street and that he, Summers, and the victim later left the area together in the victim's car.

The defendant testified that he, Summers, and the victim traveled to Went Field Park together and that, after they got there, he saw the victim get out of the car. The defendant told the jury that, as he was gathering

his own belongings to leave, he overheard Summers saying, "[y]o, one of your pockets," indicating that it was a robbery. The defendant testified that he then heard a gunshot, saw the victim lying in the road, and that Summers then said, "oh, shit . . . the shit just went off." The defendant said he saw a black and silver .380 Cobra gun in Summers' hand. The defendant stated that he and Summers then got into the victim's car and drove off. After returning to his home on the evening of the murder, the defendant removed his belongings from the Sonata before driving it to a nearby housing project, where he parked the car and wiped it down. Over the next few days, he went back to the housing project and continued using the car. He discovered the victim's credit cards in the car and used them to buy liquor and other goods. The defendant denied that the gun found in the suitcase at his grandmother's home had been used to kill the victim or that he was involved in either the robbery or the victim's death. Rather, he continued to maintain that Summers had shot the victim and that he had no involvement in the crimes.

Following trial, the jury found the defendant not guilty of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm. See General Statutes § 53a-55a. The jury also found the defendant guilty of, among other crimes, felony murder, robbery in the first degree, carrying a pistol without a permit, stealing a firearm, and criminal possession of a pistol or revolver.[6] The trial court subsequently rendered judgment of conviction and imposed a total effective sentence of fifty-five years of incarceration.

The defendant raises two claims in the present appeal, both related to the validity of the search warrant

[6] The trial court vacated the jury's finding of guilt on the charges of manslaughter in the first degree with a firearm and larceny in the third degree pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), and sentenced the defendant on the remaining counts of conviction.

authorizing the police to extract and search the contents of his cell phone. First, he claims that the trial court erred in denying his motion to suppress the evidence obtained pursuant to the warrant because the warrant lacked a particular description of the things to be seized. Second, he claims that the trial court also erred in denying his motion to suppress that same evidence because the warrant was not supported by probable cause. The state argues that there was no error in the denial of the defendant's motion to suppress and, in the alternative, that any error was harmless beyond a reasonable doubt. Because we ultimately agree with the state that the admission of the evidence from the cell phone was harmless beyond a reasonable doubt, we need not decide whether the trial court committed error. Although we need not reach the issue of the challenge to the particularity of the cell phone warrant in the present case, we recognize that this claim raises an important issue that was also raised in *State* v. *Smith*, 344 Conn. 229, A.3d (2022), which we also decide today.

We begin with the applicable standard of review. "Whether any error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless [beyond a reasonable doubt]." (Internal quotation marks omitted.) *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021). Thus, we begin

our analysis of harmlessness by placing the pieces of inadmissible evidence obtained from the defendant's cell phone in the context of the other evidence properly admitted at trial.

The evidence obtained from the defendant's cell phone data falls into five general categories. First, the state admitted evidence of twenty-two phone calls exchanged between the victim and the defendant. Second, there were approximately one hundred text messages exchanged between the victim's and the defendant's cell phones. Third, there were eleven phone calls exchanged between Brantley's and the defendant's cell phones. Fourth, there were thirty-one text messages exchanged between Brantley's and the defendant's cell phones. Finally, there was a photograph introduced into evidence from the defendant's cell phone, showing the .44 Magnum Smith & Wesson revolver. We address each of these in turn.

We first consider the log showing twenty-two phone calls made between the victim's and the defendant's cell phones. Even if the record of those phone calls may have had an impact on the jury, the police had already obtained the victim's cell phone records by the time the defendant was interviewed by the police. From the victim's records, the police had access to the call logs made between the victim's and defendant's phones. See *State* v. *Correa*, 340 Conn. 619, 667–68, 264 A.3d 894 (2021) ("[i]ndependent source . . . means that the tainted evidence was obtained, in fact, by a search untainted by illegal police activity" (internal quotation marks omitted)). The police showed the defendant the victim's call log records when they interviewed him. The defendant identified his cell phone number and admitted to the accuracy of the communications between himself and the victim. Thus, even if the defendant's cell phone records were excluded from evidence, the jury still would have heard evidence about the same

communications that were recovered from the victim's cell phone and the admissions of the defendant. Further, the same records were available from, and admissible through, the victim's cell phone records. Cf. *State* v. *Armadore*, supra, 338 Conn. 447 (defendant lacked standing to challenge evidence obtained from another individual's cell phone records).

The state's use of the text messages between the victim and the defendant was limited. The prosecutor asked the defendant about the text messages while he was testifying, particularly about certain references to drugs. The prosecutor also inquired about a series of text messages that seemed to indicate that the victim was picking up the defendant from his home on the day of the murder. Even without these communications, however, there was already abundant video and testimonial evidence showing that the defendant and the victim were together that evening. Specifically, video surveillance footage from Olive Street showed the defendant and the victim arriving together in the red Sonata to the gathering on that street on the evening of the murder. Further, two witnesses, who were in attendance at that gathering, testified that the defendant and the victim arrived together and stayed for less than one hour. The defendant also told the police, before they seized his cell phone, that he was with the victim at Went Field Park shortly before the victim was murdered. In addition, the content of the text messages suggested that the defendant and the victim had a positive relationship. Rather than being harmful to the defendant's case, the defense, in closing, actually used these text messages to establish that the defendant and victim were friends in order to suggest a lack of motive.

The state also introduced evidence from the defendant's cell phone showing eleven phone calls and thirty-one text messages between Brantley and the defendant. At trial, Brantley testified that she, at times, permitted

Summers to use her phone and that people would sometimes contact her to reach him. She also testified, however, that the last time she had seen Summers on the day of the victim's murder was around 2 p.m. Brantley testified about various phone calls and text messages that she exchanged with the defendant between 5 and 6 p.m. that day, during which the defendant asked Brantley to tell Summers that the defendant was with the victim.[7] Again, the defendant's proximity to the victim at the time of his death was undisputed at trial. Moreover, even if the records of those communications, which were stored on the defendant's cell phone, were excluded from evidence, Brantley was aware of the substance of those conversations and testified at trial about receiving those messages and calls from the defendant.

Finally, the state introduced a photograph of the .44 Magnum Smith & Wesson revolver obtained from the defendant's cell phone. The police had already found that specific firearm at the home of the defendant's grandmother after the defendant called his sister from prison and asked her to dispose of it. As such, the revolver itself was introduced at trial. As a result, that particular photograph was, in all relevant respects, clearly cumulative of other evidence presented at trial.

The cumulative and relatively insignificant nature of the evidence obtained from the defendant's cell phone must be viewed in contrast to all of the properly admitted evidence, which established a very strong case against him. The defendant was found inside of the victim's car and in possession of two of the victim's credit cards, which he had been using since the victim's murder. A subsequent search of the defendant's residence revealed an additional credit card bearing the

[7] Brantley testified that she never saw Summers that evening and that she did not deliver that message.

victim's name. Videos and testimony offered by the state at trial, including the defendant's own testimony, firmly established that the defendant and the victim were together on the evening of the murder. These facts are compelling, particularly when viewed in combination with the defendant's requests that his sister and mother dispose of various items of incriminating physical evidence—including the likely murder weapon stored at his grandmother's home.

The defendant's assertion that he was not involved in the crimes against the victim was also powerfully undercut by evidence demonstrating his consciousness of guilt. Most prominent, the defendant encouraged both his mother and his sister to throw away the clothing he had worn on the night of the victim's murder and to dispose of the revolver stored at his grandmother's home. See, e.g., *State* v. *Sivri*, 231 Conn. 115, 130, 646 A.2d 169 (1994) (attempted destruction of evidence showed consciousness of guilt). Further, the revolver that was recovered was the type of weapon that did not eject shell casings,[8] which was consistent with the lack of shell casings at the scene of the crime.

Finally, the defendant displayed a consistent lack of credibility by giving several contradictory versions of what happened on the evening in question. Initially, the defendant denied even knowing the victim, but, after giving many different versions of the events, he admitted that he was with the victim in Went Field Park on the evening of the murder. Although the defendant provided an account of the shooting that implicated Summers, the jury heard evidence of his prior inconsis-

[8] During his testimony, the defendant noted that a .380 Cobra pistol, like the one he claimed that Summers had used to shoot the victim, would have ejected a casing when fired. He acknowledged that a revolver, such as the one that was found in the suitcase at his grandmother's home, would not have ejected a casing when fired. We note that no casing or other ballistics evidence was found at the scene of the victim's murder.

tent statements. During his testimony, the defendant repeatedly acknowledged that he lied to the police.[9] By its verdict, the jury clearly did not credit the defendant's testimony denying involvement in the crimes.

The phone calls, text messages, and the photograph of the revolver were either not used by the state to implicate the defendant or were cumulative of other evidence, and, because the state presented overwhelming evidence demonstrating the defendant's guilt, we conclude that the state has met its burden of showing that any error by the trial court in denying the defendant's motion to suppress was harmless beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* HAROLD PATTERSON (SC 20349)

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

Syllabus

Convicted of two counts of the crime of murder, the defendant appealed to this court. The defendant was a passenger in a car when the driver stopped to speak to two women on a street in the city of Hartford. When one of two men who had been walking behind the women told the occupants of the car to leave, the defendant shot both men. The police recovered spent cartridge casings at the scene, and, prior to trial, the state filed a motion seeking to present evidence of uncharged misconduct relating to two prior shootings on two different streets in Hartford in support of its claim that the defendant had possessed the means to cause the victims' deaths. Defense counsel objected, claiming that such evidence was inadmissible because it was irrelevant and more prejudicial than probative. The court ruled that the uncharged misconduct evidence was admissible to prove means and identity, but it limited the scope of the evidence to facts that connected the firearm used in

[9] The defendant candidly remarked during trial that it was not his "job" to tell the truth, especially when "it's going to harm [him] . . . ."

the prior shootings to the firearm used during the shooting of the two victims. At trial, the state presented the testimony of S and D, the officers who collected the fired bullets and cartridge casings following the prior shootings that formed the basis of the uncharged misconduct evidence, the testimony of L and W, friends of the defendant who identified him as the shooter in those prior shootings, and J, a firearms expert who testified, to a reasonable degree of scientific certainty, that the cartridge casings from the prior shootings and the murders of the victims were all from the same firearm. The court instructed the jury five times during the trial that the uncharged misconduct evidence was being admitted for the limited purposes of establishing that the defendant had the means to murder the victims and establishing the identity of the shooter of the victims. On appeal, the defendant claimed that the trial court improperly had admitted the evidence of uncharged misconduct because J's testimony was not relevant or material to identity, insofar as J's methodology was not scientifically reliable, and because the prejudicial effect of the prior misconduct evidence outweighed its probative value. *Held* that the trial court did not abuse its discretion in admitting the evidence of uncharged misconduct tying the firearm used in the prior shootings to the firearm used in the murders of the victims to prove that the defendant was the individual who shot the victims: the defendant's claim challenging the relevance of J's testimony in light of its lack of scientific reliability was unavailing, as the defendant's failure to request a hearing pursuant to *State* v. *Porter* (241 Conn. 57) deprived the trial court of the opportunity to assess J's methodology and, thus, the reliability of J's testimony, the defendant's claim on appeal represented an inappropriate effort to avoid the requirement that a challenge to scientific methodology must be raised at trial during a *Porter* hearing, and, in view of the broad definition of relevance, the trial court did not abuse its discretion in admitting J's ballistics evidence tying the prior shootings to the shooting of the victims to prove the identity of the shooter; moreover, any prejudicial effect from the uncharged misconduct evidence was outweighed by its probative value, as the facts of the prior shootings, which were clearly probative of means and identity, were less severe than the facts of the shooting of the victims, and the court limited the extent of the testimony of S and D to their response to the prior shootings and their collection of projectiles at the scene of those shootings, and the testimony of L and W to their witnessing of the defendant shoot a firearm at those locations, so as to ensure that the relevant facts were shorn of prejudicial and irrelevant detail and that the jury was not distracted by matters that were not pertinent to the charges; furthermore, the prior misconduct evidence was not merely cumulative of other evidence but highly probative, as it was the only evidence connecting the defendant directly to the firearm used to shoot the victims, and L's and W's testimony was critical to establishing the shooter's identity; in addition, the fact that the prior shootings occurred less than three months before

the shooting of the victims contributed to the probative value of the uncharged misconduct evidence, and the court instructed the jury no fewer than five times throughout the course of the trial regarding the limited purpose for which the uncharged misconduct evidence could be used.

Argued March 24—officially released August 9, 2022

Procedural History

Substitute information charging the defendant with two counts of the crime of murder, brought to the Superior Court in the judicial district of Hartford, where the court, *D'Addabbo*, *J.*, granted in part the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *Graham*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David L. Zagaja* and *John F. Fahey*, supervisory assistant state's attorneys, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Harold Patterson, directly appeals from the judgment of conviction, rendered after a jury trial, of two counts of murder in violation of General Statutes § 53a-54a. He claims that the trial court abused its discretion in admitting evidence of uncharged misconduct, namely, two prior shootings involving the alleged murder weapon, to prove identity and means. We conclude that the trial court did not abuse its discretion by admitting the uncharged misconduct. Accordingly, we affirm the judgment of conviction.

The jury reasonably could have found the following facts. Early in the morning on August 25, 2008, the defendant and two friends, Willie Walker and Mark Mitchell, were driving in a white Nissan Maxima on Edwards Street in Hartford. Mitchell was driving, with the defendant in the front passenger seat and Walker sitting behind the defendant. The defendant and his friends saw two women walking on the street with two men trailing behind the women. Mitchell then pulled over to speak to the women. One of the men then walked up to the passenger window of the car and told the defendant and his friends to "get the fuck out of here." The defendant replied, "what you mean get the fuck out of here," pulled out a gun, and fired at the men. Mitchell immediately drove away and brought the defendant home.

At approximately 3:15 a.m., Hartford police responded to an emergency call reporting the shooting. Officers who arrived found the bodies of two victims, Carlos Ortiz and Lamar Gresham. Detective Argeo Diaz processed the scene and seized five spent nine millimeter cartridge casings and a copper bullet jacket. Diaz attended the victims' autopsies, where he took possession of a bullet fragment removed from the leg of one of the victims, a bullet removed from the same victim's arm, and a bullet removed from the second victim's chest. Both victims died of gunshot wounds to the chest, lung, and heart. The case went cold for a number of years until a new lead was brought to the attention of detectives with the cold case unit of the Division of Criminal Justice. The defendant was arrested and charged with the crimes in 2016.

Prior to trial, the state filed a motion seeking to present evidence of two prior shootings in Hartford. The state sought to admit evidence of a June 5, 2008 shooting on Acton Street, which resulted in the death of Raymond Hite, as well as evidence of a June 16, 2008 shoot-

ing on Mather Street, which resulted in bullets striking a building and a vehicle. Eyewitnesses from each shooting identified the defendant as the shooter, and an analysis of the casings collected from each shooting revealed that they were fired from the same gun used in the present case. The state offered these prior incidents to support its claim that the defendant possessed the instrumentality or means, as well as the specific intent, to cause the deaths of Ortiz and Gresham.[1]

Defense counsel timely objected to the state's motion, arguing that the trial court should preclude evidence of the uncharged misconduct. Specifically, counsel argued that the prior incidents "are not relevant or material to the issues of intent or means to the case at bar," that "the probative value of the evidence is substantially outweighed by the danger of undue prejudice," and that "admission of the evidence would be unduly cumulative, confusing and time-consuming, and would create distracting side issues that will complicate the main issues in the case at hand." Relying on *State* v. *Raynor*, 181 Conn. App. 760, 189 A.3d 652 (2018), rev'd, *State* v. *Raynor*, 337 Conn. 527, 254 A.3d 874 (2020), the defendant argued that, "[i]n . . . light of recent research on the validity of [ballistics] science, it is no longer appropriate to make absolute, unquestioned statements about what the ballistics findings were," and, therefore, admitting evidence of the prior shootings would be improper.

The trial court, *D'Addabbo*, *J.*, heard oral arguments and issued a preliminary ruling allowing evidence of

[1] Prior to trial, defense counsel alerted the trial court to a third prior shooting that occurred on August 9, 2008, involving the same gun. Two people were shot in the third prior shooting, neither of whom identified the defendant as the shooter. The state limited its direct examination of its firearms expert, Edward Jachimowicz, to the shootings on Mather Street and Acton Street, as those were the two shootings with eyewitnesses identifying the defendant as the shooter. Defense counsel cross-examined Jachimowicz on the third incident.

both prior shootings. The court ruled that the evidence was admissible to prove means and identity but inadmissible to prove intent. The court further limited the scope of the evidence of both shootings to facts "tying the gun to the case at hand." As to the Acton Street shooting, the court precluded testimony that the defendant shot and killed Hite. The court similarly limited evidence of the Mather Street shooting to show only "that a witness observed the defendant in possession of the firearm on that date and that he fired the firearm . . . ." The court also ruled that expert testimony that tied the casings from the prior shootings to the casings found at the Edwards Street shooting was admissible contingent on the state's introducing other evidence that tied the defendant to the prior shootings. The court stated that it would give limiting instructions to the jury when the state offered the uncharged misconduct evidence and that it would "revisit its ruling at the time of the offer and assess it in light of the evidence admitted and the positions of the part[ies]."

At trial, when it planned to offer evidence of the Mather Street shooting, the state asked the trial court, *Graham*, *J.*, to issue a final ruling on the uncharged misconduct evidence. Defense counsel objected to the "whole line of inquiry . . . ." The court adopted Judge D'Addabbo's preliminary ruling that evidence of the uncharged misconduct was admissible to prove means and identity, with the same limitations on the scope of the admissible evidence. Further, the court ruled that, until the state tied the casings from the prior shootings to the same gun that ejected the casings found on Edwards Street, the purpose of the evidence would be limited to proving means.

Prior to the state's offer of evidence of the Mather Street shooting, the trial court instructed the jury: "I anticipate [that] you will hear testimony to the effect that the defendant possessed and fired a firearm on

June 16, 2008, on Mather Street in Hartford. And, as to that evidence, the evidence is being admitted at this time solely to the extent it bears [on the defendant's] having [had] the means to commit the crimes on trial before you. That conduct . . . is not the subject of any criminal charge in this case, and it is not being admitted to prove the bad character of the defendant or any propensity by him to commit crimes. And you may not consider that evidence as establishing a predisposition on the part of [the defendant] to commit crimes or to demonstrate a criminal propensity to commit the crimes charged here."[2]

As to the Mather Street shooting, the state offered the testimony of Officer Brian Sulliman and Stephon Long, a friend of the defendant. Sulliman testified that, on June 16, 2008, at about 2:50 a.m., he responded to an emergency call regarding gunshots fired at a multiunit building on the corner of Mather and Brook Streets. From the scene, Sulliman collected one fired bullet from inside of a car parked in front of the building, one fired bullet from a bedroom in one of the units, and seven spent nine millimeter shell casings from outside of the building. Long testified that, on June 16, 2008, he drove the defendant's Dodge Durango to a building located on the corner of Mather and Brook Streets, where the defendant instructed him to stop. Long saw the defendant fire two or three gunshots at the building. Long believed that the gun was a semiautomatic but could not describe a specific model or the color of the gun. Immediately after Long testified, the trial court again instructed the jury that the evidence "was admitted solely to the extent it bears [on] the [defendant's] having [had] the means to commit the crimes on trial before you."

[2] Each of the trial court's limiting instructions was largely the same as this first instruction.

As to the Acton Street shooting, the state offered the testimony of Diaz and Walker. Diaz testified that, on June 5, 2008, he responded to an emergency call on Acton Street, where he located and seized two fired bullets, a copper bullet jacket, and three spent nine millimeter shell casings. Walker testified that, on June 5, 2008, he drove the defendant's Dodge Durango to Acton Street, where the defendant exited the vehicle and fired a gun. Walker did not know what type of gun the defendant fired but remembered that it was dark in color. Immediately after Walker's testimony, the trial court instructed the jury a third time that the evidence pertaining to the Acton Street shooting was "admitted solely to the extent it bears [on the defendant's] having [had] the means to commit the crimes on trial before you."

Edward Jachimowicz, the state's firearms expert, testified regarding the connection between the bullet casings found at all three shootings. Jachimowicz testified that, based on a microscopic examination and comparison, he concluded that all of the shell casings, bullets, and bullet fragments found at the Edwards Street shooting, where the victims in the present case were found, had been fired from the same semiautomatic weapon. Jachimowicz testified that he entered the shell casings into the NIBIN system,[3] which showed a suspected correlation to casings collected in three prior shootings. Jachimowicz compared the physical evidence from the prior shootings to the casings from the Edwards Street

[3] NIBIN stands for National Integrated Ballistic Information Network. NIBIN is a nationwide investigative system operated by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives that tracks firearms by the "microscopic marks that are left on bullets and fired cartridge cases." Jachimowicz explained that, when a casing is entered into the database, the program reads the marks on the fired cartridge case and assigns it a numerical value. When a similar casing comes in, the database checks it against the old casings and provides a suggestion to compare the casings.

shooting to verify the connection.[4] His opinion, to a reasonable degree of scientific certainty, was that all of the cartridge cases from the previous shootings and Edwards Street were from the same firearm. After Jachimowicz' testimony concluded, the court instructed the jury that the evidence matching the casings from the Edwards Street shooting to the Acton Street and Mather Street shootings was "admitted solely to the extent it bears [on] the identity of the person who committed the Edwards Street shootings." In its final charge, the court again instructed the jury that evidence of the Acton Street and Mather Street shootings was admitted "solely to the extent [the evidence] bear[s] [on the defendant's] having [had] the means to commit the crimes . . . and to the extent [the evidence] bear[s] [on] the identity of the person who shot [the victims]."[5]

[4] At the time of trial in 2018, the projectiles from the Mather Street shooting had been destroyed. The trial court overruled the defendant's objection to Jachimowicz' testimony that relied on these projectiles. The defendant does not raise any issue with this ruling on appeal.

[5] The trial court's entire instruction to the jury about evidence that had been admitted for a particular purpose or pertaining to the defendant's prior conduct was as follows: "Any testimony or evidence which I identified as being limited to a purpose, you will consider only as it relates to the limited purpose for which it was allowed, and you shall not consider such testimony and evidence in finding any other facts as to any other issue.

"The alleged conduct of the defendant on June 5, 2008, on Acton Street in Hartford and June 16, 2008, on Mather Street in Hartford [was] admitted for limited purposes, specifically, solely to the extent they bear [on] the [defendant's] having [had] the means to commit the crimes on trial before you and to the extent they bear [on] the identity of the person who shot Ortiz and Gresham. The court instructed you at that time, and does so again, that you could use that evidence to the extent that you find it should be given weight, only as to those issues and for no other purpose.

"The events of June 5 and June 16, 2008, are not the subject of any criminal charge in this case. This other conduct evidence is not being admitted to prove the bad character of the defendant or any propensity or criminal tendencies of the defendant. You may not consider this evidence as establishing a predisposition on the part of the defendant to commit crimes or a propensity to commit the crimes charged.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issue of the identity

The jury returned a verdict of guilty on both counts, and the court sentenced the defendant to consecutive terms of fifty years of imprisonment on each count for a total effective sentence of 100 years.

On appeal, the defendant claims that the trial court abused its discretion by admitting evidence of uncharged misconduct. Specifically, he argues that (1) Jachimowicz' expert testimony was not relevant or material to identity, and (2) the probative value of the evidence was "vastly" outweighed by its prejudicial effect. The state responds that the defendant's relevancy claim was not preserved and is therefore unreviewable, and that the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect.

"[A]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 561, 254 A.3d 874 (2020). This evidence may be admissible, however, for other purposes. "The well established exceptions to the general prohibition against the admission of uncharged misconduct are set forth in § 4-5 [c] of the Connecticut Code of Evidence, which provides in relevant part that [e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice,

of the person who committed the crimes charged here and/or as it may bear on the issue that the [defendant] had the means to commit the crimes charged here. . . .

"You may not consider evidence of such conduct of the defendant for any purpose other than the ones I've told you because it may predispose your mind uncritically to believe that the defendant may be guilty of the offenses here charged merely because of the alleged other conduct. For this reason, you may consider this evidence only on the issues indicated and for no other purpose."

motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Internal quotation marks omitted.) Id., 561–62.

"We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions [set forth in § 4-5 (c) of the Connecticut Code of Evidence]. . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Footnote omitted; internal quotation marks omitted.) Id., 562.

The defendant argues that Jachimowicz' testimony connecting the Acton Street and Mather Street shootings to the Edwards Street shooting is not "unassailably relevant" to prove identity.[6] (Emphasis omitted.) Specifically, he argues that, because Jachimowicz' methodology was not scientifically reliable, his testimony failed to connect the two prior shootings to the shooting at issue to establish identity, and, thus, the prior shootings were irrelevant. The defendant concedes that whether Jachimowicz should have been able to testify as an expert in this case is not reviewable by this court, as he did not request a hearing at trial pursuant to *State* v. *Porter*, 241 Conn. 57, 81–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645

[6] The defendant does not challenge the relevance of the testimony of the four other witnesses who testified about the prior shootings. The defendant similarly does not challenge the trial court's admission of the evidence of prior misconduct as relevant to prove means.

(1998), and acknowledges that a *Porter* hearing "is the proper way to challenge the admissibility of an expert's opinion based on the validity of the methodology underlying that opinion." Instead, through his relevancy objection to the prior misconduct evidence, the defendant attempts to challenge on appeal Jachimowicz' testimony connecting the Mather Street and Acton Street shootings to the Edwards Street shooting.[7] Specifically, he asks this court to assess the relevancy of Jachimowicz' expert testimony in light of its lack of scientific reliability. This request represents an inappropriate effort to avoid the requirement that a challenge to scientific methodology must be raised at trial via a *Porter* hearing.

This court in *Porter* "followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible

[7] In its brief, the state argues that the defense never objected at trial to Jachimowicz' firearm identification testimony on the ground that it was not relevant to prove means or identity because the scientific validity of firearms identification was in doubt. We disagree. In his memorandum of law in opposition to the state's motion to admit prior misconduct evidence, the defendant argued that "the declaration that the prior incidents are relevant to show means and instrumentality may require much more evidence than the ballistics [expert's] simply stating it was the same firearm." The defendant relied on *State* v. *Raynor*, supra, 181 Conn. App. 760, and research challenging the validity of ballistics science to support his argument. At trial, prior to the admission of any evidence of prior misconduct, defense counsel renewed his objection to the "whole line of inquiry" into prior misconduct. Defense counsel again objected to the introduction of any evidence, including the analysis of the casings, related to the Mather Street shooting prior to Jachimowicz' testimony. Each time the state offered ballistics evidence as full exhibits, defense counsel responded that he had no objection that had not already been raised. Although we cannot now on appeal address any issues related to the scientific basis underlying Jachimowicz' expert opinion due to the defendant's failure to request a *Porter* hearing, the defendant did preserve his objection to the relevance of the ballistics testimony as it concerned uncharged misconduct.

test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124, 156 A.3d 506 (2017).

As this court has made clear, a party's failure to request a *Porter* hearing "results in waiver of that claim and it will not be considered for the first time on appeal." (Internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 678, 224 A.3d 129 (2020). It is improper for the defense to challenge the scientific methodology underlying an expert witness' opinion on appeal without a trial court's having ruled on the same matter, as a "trial judge . . . [should] serve as a 'gatekeeper' and make a preliminary assessment of the validity of scientific testimony . . . ." *State* v. *Porter*, supra, 241 Conn. 68. The question of whether evidence "casts sufficient doubt on the reliability of the methodology employed by the . . . expert [witness] . . . must be vested, in the first instance, in the sound discretion of the trial court." *State* v. *Raynor*, supra, 337 Conn. 542 n.7.[8] Because the defendant never asked for a *Porter*

[8] Nevertheless, the defendant improperly relies on our decision in *Raynor* to challenge whether Jachimowicz' testimony was relevant to the identity of the shooter in light of what he deems "new law" that "undermines the relevance that firearm and toolmark opinions may bear on establishing a shooter's identity." In *Raynor*, we held that the trial court abused its discretion by "deny[ing] the defendant's motion for a *Porter* hearing without considering the proffered evidence challenging the methodology supporting

hearing, the trial court did not have the opportunity to assess the expert's methodology and, therefore, its reliability. As such, the defendant cannot now on appeal succeed on a relevance challenge based on his contention that the evidence lacks scientific reliability to establish a link to the murder weapon.

Having concluded that it is improper for this court to assess the scientific reliability of Jachimowicz' testimony for the first time on appeal, we now turn to the general relevance of his testimony. When assessing the relevance of an expert witness' testimony, "[a] trial court retains broad discretion . . . ." (Internal quotation marks omitted.) Id., 554. "[S]uch testimony is admissible if the trial court determines that the expert is qualified and that the proffered testimony is relevant and would aid the jury." (Internal quotation marks omitted.) Id. "Within the law of evidence, relevance is a very broad concept. Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination

toolmark and firearm analysis . . . ." *State* v. *Raynor*, supra, 337 Conn. 544. In doing so, we recognized, as the defendant notes, that "[s]cience . . . is not static . . . [and] [m]ethodologies are continually challenged and improved . . . ." Id., 543. This court did not, however, as the defendant contends, "undermine" the general relevance of firearm analysis. Our holding was limited to the trial court's denial of the defendant's request in *Raynor* that it conduct a *Porter* hearing. See id., 543–44. Because the defendant in the present case did not request a *Porter* hearing, his reliance on *Raynor* is misplaced.

Additionally, Jachimowicz did not, as the defendant argues, "make absolute, unquestioned statements" about his findings. Rather, Jachimowicz properly testified that his opinion was based on "a reasonable degree of scientific certainty . . . ." Although Jachimowicz' testimony may not have been dispositive of the shooter's identity, that is an issue "of degree rather than kind" and in no way makes his testimony inadmissible. *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Emphasis altered; internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

Given the broad definition of relevance, we conclude that the trial court did not abuse its discretion in admitting the ballistics evidence tying the prior shootings to the Edwards Street shooting to prove the identity of the shooter in this case. Indeed, in *Collins*, this court surveyed the decisions of a number of federal and state courts and found that a majority of them "rejected challenges . . . to the use of uncharged misconduct evidence in cases wherein the charged offenses were committed using the same gun that the defendant had utilized in prior shootings." Id., 590.

Having concluded that the trial court did not abuse its discretion in determining that Jachimowicz' testimony was relevant, we turn to the defendant's argument that the prejudicial effect of the evidence of prior misconduct outweighed its probative value. The defendant challenges all testimony related to the prior shootings, not only the expert testimony. He contends that the uncharged misconduct evidence admitted at trial was equally, if not more, severe than the charged crimes because, even though the jury did not hear that one of the prior shootings resulted in Hite's death, the uncharged misconduct still left the jury with the impression that the defendant drove around at night and shot at build-

ings unprovoked.[9] We disagree and conclude that any prejudicial effect of the uncharged misconduct was outweighed by the probative value of the evidence.

"In determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id., 586–87.

We find significant the degree to which the trial court exercised its discretion to limit the extent of the evidence of the prior shootings it admitted. As to the Mather Street shooting, the court permitted Sulliman to testify only that he responded to a shots fired call on the corner of Mather and Brook Streets at about 2:50 a.m., where he collected one fired bullet from inside of a car parked in front of the building, one fired bullet in a bedroom of one of the units, and seven spent nine

[9] The defendant also argues that, because Jachimowicz' methodology lacked scientific validity, the state could not prove that the firearm involved in the uncharged shootings was the same firearm involved in the present case, thus making the prior misconduct evidence more prejudicial than probative given the tenuous tie between the shootings. As discussed, however, the defendant waived any *Porter* claim, and, thus, to the extent his unpreserved *Porter* claim masquerades as a claim of undue prejudice, we do not review it. Additionally, to the extent the defendant argues that the expert's testimony, even if relevant, was insufficient to establish a link between the shootings, our case law has established that the state does not have to connect the weapon directly to the defendant and the crime charged with absolute certainty. Rather, all that is necessary for the evidence to have probative value is that the state introduces some evidence to link the weapon to the defendant and the charged offense. See, e.g., *State* v. *Edwards*, supra, 325 Conn. 144–45.

millimeter shell casings outside of the building. The court did not permit Sulliman to testify whether anyone was in the bedroom or car where the bullets were found, or if anyone was injured in the shooting. Similarly, Long's testimony was limited to his having driven the defendant to a building on the corner of Mather and Brook Streets, where he witnessed the defendant fire two or three gunshots at the building. Long did not testify about the motive for the shooting or whether the defendant was shooting at a particular individual. Thus, the court took care to limit the impact of the prior misconduct testimony on the emotions of the jurors.

The court also limited evidence of the Acton Street shooting. Diaz' testimony was limited to his having responded to a shots fired call and having collected projectiles at the scene. Walker testified that he drove the defendant to Acton Street, where he witnessed the defendant exit the vehicle and fire a gun dark in color. The trial court did not allow Walker to testify about why he drove the defendant to Acton Street, which would have required a convoluted narrative involving more than five different individuals and multiple locations that would have likely confused the jury and distracted it from the main issue in the case. Most significantly, the court did not allow the state to introduce evidence that Hite was murdered in the Acton Street shooting, recognizing that such testimony could unfairly impact the emotions of the jurors. In limiting the evidence of the prior shootings, the court ensured that the relevant facts were shorn of prejudicial and irrelevant detail and that the jury was not distracted by the need to hold mini-trials regarding matters that were not pertinent to this case.[10]

[10] Additionally, the state repackaged the items of evidence from the Acton Street shooting in new bags because the labels on the original evidence bags identified them as homicide evidence. Although the state did not do this at the trial court's behest, it is a critical factor in assessing actual prejudice to the defendant.

The trial court's actions are significant because "the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect militates against a finding of abuse of discretion." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 406, 963 A.2d 956 (2009); see id., 406, 408 (by excluding "most egregious and prejudicial uncharged misconduct," trial court did not abuse its discretion when it admitted uncharged misconduct evidence); see also *State* v. *Blango*, 103 Conn. App. 100, 111, 927 A.2d 964 (trial court did not abuse its discretion by admitting uncharged misconduct evidence because evidence was limited to showing only that defendant displayed gun in separate incidents), cert. denied, 284 Conn. 919, 933 A.2d 721 (2007).

Because of the trial court's careful limits on the testimony, the evidence the jury heard about the Acton Street and Mather Street shootings, which was clearly probative of means and identity, was much less severe than the evidence of the Edwards Street murders. This court repeatedly has held that "[t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative 'viciousness' in comparison with the charged conduct." *State* v. *Campbell*, 328 Conn. 444, 522–23, 180 A.3d 882 (2018). "The rationale behind this proposition is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point." *State* v. *Raynor*, supra, 337 Conn. 563. In the present case, the jury heard that the defendant fired only three to four bullets in each of the prior shootings and heard no evidence that individuals were injured or killed. Comparatively, the defendant was charged with shooting and killing two people on Edwards Street. The facts of the two prior shootings are less severe, making it less likely that they aroused

the emotions of the jurors. See, e.g., *State* v. *Beavers*, supra, 290 Conn. 405 ("prior misconduct evidence admitted involved only the defendant's actual, claimed or threatened damage of property for personal gain, as compared to the charged crime in the . . . case, which contemplated [an] intentional killing"); *State* v. *Mooney*, 218 Conn. 85, 131, 588 A.2d 145 (seriousness of subsequent crime, larceny, paled in comparison to robbery and felony murder charges for which defendant was standing trial), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

The defendant also argues that the uncharged misconduct evidence was highly prejudicial because of the similarities between the prior shootings and the Edwards Street shooting.[11] He contends that, because each shooting occurred at night, involved the defendant pulling up in a vehicle and firing multiple gunshots either out of the window or after getting out of the vehicle, and ended when he fled in the vehicle, the prior misconduct evidence was too similar to the charged conduct and, therefore, highly prejudicial. We conclude that the uncharged misconduct was not so similar as to have increased any prejudice to the point that it outweighed the probative value of the evidence. The jury heard testimony that the defendant shot at a building on Mather Street and fired gunshots on Acton Street but that, in the present case, two victims on Edwards Street were shot and killed.

The defendant nevertheless contends that the present case is analogous to *Raynor*, in which the defendant

[11] The defendant argues in part that the Acton Street shooting and the shooting in the present case are the same in that he "supposedly drove around and started firing his gun out on the street like a maniac." He attempts to support this contention with a quotation from the prosecutor's rebuttal closing argument to the jury characterizing the defendant as a "hothead . . . ." This argument does not hold water, as the prosecutor, in his rebuttal, was referring to the defendant's motive in the Edwards Street shooting at issue, not the prior misconduct.

was tried and convicted of murder. *State* v. *Raynor*, supra, 337 Conn. 529. At trial, the state offered evidence of a subsequent shooting in which the defendant allegedly used the same weapon. See id., 557–58. Specifically, the subsequent shooting and the charged crime in *Raynor* involved two victims, one male and one female who had been, or currently were, romantically involved and were shot at outside of their own homes at night, with dozens of gunshots having been fired. Id., 563. Unlike the situation in the present case, the subsequent shooting in *Raynor* was more similar to the charged crime with respect to location and the profile of the victims. Additionally, in *Raynor*, evidence of the uncharged shooting was introduced through the victim, who testified beyond the facts of the shooting itself. Id., 564. The victim of the uncharged shooting testified in detail about her feelings of fear during the shooting and her efforts to follow up with the police, in addition to facts outside the scope of the shooting that connected her son and the defendant. Id. This court emphasized how the victim's testimony greatly prejudiced the defendant. See id. Thus, *Raynor* is distinguishable from the present case.

"The question of whether the evidence is unduly prejudicial, however, does not turn solely on the relative severity of the uncharged misconduct. Instead, prejudice is assessed on a continuum—on which severity is a factor—but whether that prejudice is undue can only be determined when it is weighed against the probative value of the evidence." Id., 563. The evidence of the two prior shootings was highly probative in this case. The uncharged misconduct evidence was the only evidence connecting the defendant directly to the firearm used on Edwards Street. Walker's and Long's testimony tied the defendant to the two prior shootings, and Jachimowicz tied the gun from the prior shootings to the charged crimes. The firearm was never recovered in

this case, and the state's witnesses who were with the defendant on the night of the murder were unable to describe the weapon he used.[12] The uncharged misconduct evidence was critical in establishing the identity of the shooter in this case. Therefore, contrary to the defendant's contention, the prior misconduct evidence was not merely cumulative but, rather, was highly probative. Additionally, the two prior shootings occurred less than three months prior to the charged homicides. This temporal proximity contributed to the probative value of the evidence. See id., 566 n.24.

Finally, it is significant that the trial court instructed the jury no fewer than five times about the limited purpose for which the uncharged misconduct evidence could be used, stating that it was being admitted "solely to the extent it bears [on] the [defendant's] having [had] the means to commit the crimes on trial before you." The court gave that instruction on the following occasions: (1) prior to the state's presenting any uncharged misconduct evidence, (2) following Long's testimony regarding the Mather Street shooting, (3) following the testimony of Walker regarding the Acton Street shooting, (4) following the direct examination of Jachimowicz, and (5) in its final charge to the jury. As this court has held, limiting instructions "serve to minimize any prejudicial effect that . . . evidence [of prior misconduct] otherwise may have had . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *James G.*, 268 Conn. 382, 397–98, 844 A.2d 810 (2004).

Considering the manner in which the testimony was limited and the numerous cautionary instructions given to the jury, it is clear that the trial court did not abuse

[12] This is unlike *Raynor*, in which the trial court relied on the fact that a witness previously had identified the recovered murder weapon as the weapon the defendant had purchased prior to the murder and as the gun he used to commit the charged crime. See *State* v. *Raynor*, supra, 337 Conn. 565–66.

its discretion in admitting the uncharged misconduct evidence because the probative value of the evidence outweighed its prejudicial effect.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 214

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CIT BANK, N.A. *v.* JOHANNA FRANCIS ET AL. (AC 43121)

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

Syllabus

The defendant J, an heir of the decedent mortgagors, appealed to this court following the trial court's judgment of strict foreclosure in favor of the plaintiff bank. J claimed that the trial court improperly granted the plaintiff's motion for a protective order that precluded her from obtaining the discovery materials she needed to develop and pursue her special defenses. J had filed special defenses that alleged, inter alia, that her father, F, had threatened and fraudulently induced the decedents, who were J's grandparents, to enter into the mortgage transaction. J filed discovery requests that sought information from the plaintiff about its communications with F and its knowledge of his actions. In response, the plaintiff sought a protective order, claiming that J's requests exceeded those normally made in mortgage foreclosure actions and that state and federal law prohibited disclosure of the requested information. In opposing the plaintiff's motion, J produced a letter from the executor of her grandmother's estate consenting to the discovery requests. The trial court granted the plaintiff's motion for the protective order as to documents other than the promissory note, the mortgage, assignments of the mortgage and the decedents' payment history. The court subsequently granted a motion the plaintiff filed to strike the special defenses relating to F, reasoning that the special defenses failed to allege that the plaintiff or its predecessor in interest knew of or participated in F's alleged misconduct and that F was acting on behalf of the plaintiff or as its agent. The court also granted motions the plaintiff filed seeking summary judgment as to liability only on the complaint and as to J's remaining special defenses. The court concluded, inter alia, that J could not prevail on her special defenses that alleged that the decedents lacked the mental capacity to enter into the loan and that there was an absence of consideration for the loan. *Held* that the trial court's granting of the plaintiff's motion for a protective order constituted an abuse of discretion that, under the particular circumstances of this case, was harmful to J, as it prevented her from discovering facts that would permit her to pursue, develop and support her special defenses: contrary to the plaintiff's assertion, state and federal law did not prohibit compliance with J's discovery requests, as those laws permitted disclosure based on consent, which J had obtained from the executor of her grandmother's estate, the plaintiff provided no authority for the court's refusal to permit any disclosure of documents beyond the note, the mortgage and assignments thereof and the decedents' payment history, and the plaintiff asserted no claim that J's discovery requests were not made in good faith

or were overbroad, unreasonable, oppressive or improper; moreover, the plaintiff's claim that J could have amended the stricken special defenses or obtained discovery from other sources was unavailing because J was not a party to the mortgage transaction, the special defenses necessarily encompassed information relevant to the plaintiff's participation in or knowledge of F's alleged conduct, and, once the court precluded full discovery, J could no longer develop an evidentiary basis from which to amend the stricken special defenses; furthermore, because J was denied the discovery needed to develop and pursue her special defenses, she was not, as the plaintiff claimed, required to file an affidavit pursuant to the applicable rule of practice (§ 17-47) in response to the plaintiff's motion for summary judgment as to the special defenses.

(*One judge concurring separately*)

Argued January 5, 2021—officially released August 9, 2022

Procedural History

Action to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion to cite in James M. Francis as a defendant; thereafter, the defendant James M. Francis et al. were defaulted for failure to appear; subsequently, the court, *Randolph*, *J.*, granted the plaintiff's motion for a protective order; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion to strike certain of the named defendant's special defenses; subsequently, the court, *Lee*, *J.*, granted the plaintiff's motion for summary judgment as to liability only on the named defendant's first and second special defenses; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for summary judgment as to the complaint; subsequently, the court, *Lee*, *J.*, granted the plaintiff's motion to substitute Cascade Funding RM1 Alternative Holdings, LLC, as the plaintiff; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

Timothy D. Miltenberger, for the appellant (named defendant).

Christopher J. Picard, for the appellee (substitute plaintiff).

Opinion

ELGO, J. In this mortgage foreclosure action, the defendant Johanna Francis[1] appeals from the judgment of the trial court in favor of the plaintiff, CIT Bank, N.A.[2] On appeal, the defendant claims that the court improperly granted the plaintiff's motion for a protective order regarding certain discovery requests, thereby preventing her from pursuing her special defenses. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff commenced this action on June 13, 2016, seeking to foreclose a residential mortgage on property located at 243 New Norwalk Road in New Canaan. According to the complaint, on April 8, 2008, Norbert Francis and Evelyn Francis (decedents) executed and delivered to Financial Freedom Senior Funding Corporation, a subsidiary of IndyMac Bank, F.S.B., a promissory note for a loan not to exceed a maximum principal amount of $818,550. To secure the note, the decedents executed a reverse annuity mortgage (mortgage) on the property. Thereafter, the mortgage was assigned from Financial Freedom Senior

[1] The Department of Revenue Services and the Judicial Branch also were named as defendants. The trial court thereafter granted the motion filed by the plaintiff, CIT Bank, N.A., to cite in James M. Francis as a defendant. On September 26, 2017, those three defendants were defaulted for failure to appear. We refer in this opinion to Johanna Francis as the defendant.

[2] We note that, after the court ruled on the motions at issue in this appeal, CIT Bank, N.A., assigned the mortgage at issue to Cascade Funding RM1 Alternative Holdings, LLC. The court thereafter granted the plaintiff's motion to substitute Cascade Funding RM1 Alternative Holdings, LLC, as the plaintiff. For clarity, we refer in this opinion to CIT Bank, N.A., as the plaintiff.

Funding Corporation to Mortgage Electronic Registration Systems, Inc., as nominee for Financial Freedom Acquisition, LLC. The mortgage then was assigned from Mortgage Electronic Registration Systems, Inc., to the plaintiff.

Norbert Francis died on January 30, 2009, and Evelyn Francis died on February 1, 2016. The complaint alleged that the note was in default and that the plaintiff, as the holder of the note, had elected to accelerate the balance due on the note, to declare the note to be due in full and to foreclose the mortgage securing the note. The complaint further alleged that the defendant, who was the decedents' granddaughter, and James M. Francis (Francis), the defendant's father, might claim an interest in the property by virtue of being the heirs at law to the decedent Evelyn Francis.

On September 20, 2017, the defendant filed an answer to the plaintiff's complaint. On December 12, 2017, the defendant filed a revised answer, in which she raised four special defenses. In those special defenses, she alleged that (1) the note and mortgage were unenforceable because the decedents "had mental illness that prevented them from understanding the true nature of the loan documents alleged in the complaint"; (2) "neither [of the decedents] received any consideration" for the note and mortgage; (3) Francis "made a false representation of fact to induce [the decedents] to sign the note and mortgage," and "Francis knew that his representations . . . were untrue and [that the decedents] relied on the false representation to their detriment"; and (4) "Francis wrongfully acted and threatened [the decedents] to sign the note and mortgage . . . leaving them with no reasonable alternative, and to which acts and, or, threats they acceded, resulting in a transaction that was unfair to [the decedents]."

The defendant also filed discovery requests, in which she asked, inter alia, that the plaintiff identify all communications between Francis and the plaintiff, and to produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them. In response, the plaintiff filed a motion for a protective order pursuant to Practice Book § 13-5, contending, inter alia, that disclosure of the requested information was precluded by state and federal law. On November 22, 2017, the defendant filed an objection to the plaintiff's motion for a protective order. At a hearing on the plaintiff's motion on January 29, 2018,[3] the plaintiff indicated that it was willing to provide "the note, the mortgage, the assignments, and the payment history" to the defendant. The plaintiff nevertheless informed the court that it objected to the defendant's requests for "any and all communications between [the] decedents, who were the ones who took out the note and the mortgage," "any communications between [the plaintiff] and [Francis]," and "any and all attorneys that were involved in the making and execution of the note and the mortgage." The plaintiff also argued that the defendant's discovery requests went "above and beyond asking for the normal documents that are required to give to the court in conjunction with a foreclosure action." The plaintiff made no claim that the defendant's discovery requests were made in bad faith or that they were overbroad, unreasonable, oppressive or improper. In response, the court stated: "What the court is taking into consideration is this: if the defenses that have been talked about include [incapacity], the court's not going to jump into the deep end of the pool and provide

[3] On November 27, 2017, the court summarily granted the plaintiff's motion for a protective order. On December 13, 2017, the defendant filed a motion to reargue. By order dated December 20, 2017, the court vacated its ruling on the plaintiff's motion for a protective order and conducted a hearing on January 29, 2018.

anything beyond the note, the mortgage, the assignments, and the payment history." The court thereafter granted the plaintiff's motion for a protective order as to documents other than the note, mortgage, assignments and payment history.

On January 26, 2018, three days before the trial court granted the plaintiff's motion for a protective order, the plaintiff filed a motion to strike pursuant to Practice Book § 10-39, claiming that the defendant's third and fourth special defenses were legally insufficient for failing to allege that the plaintiff or its predecessor in interest knew of or participated in Francis' alleged misconduct. The defendant did not file a response to the motion to strike. The court granted the plaintiff's motion to strike by order dated April 9, 2018. As to the third special defense, the court held that the defendant had failed to plead facts regarding the subject matter of the alleged misrepresentation or demonstrating that the plaintiff or Francis, acting on behalf of the plaintiff, made the subject misrepresentation. As to the fourth special defense, the court held that the defendant had failed to allege that Francis was acting on behalf of or as the agent of the plaintiff.[4]

On September 11, 2018, the plaintiff filed a motion for summary judgment as to liability on the defendant's

[4] In its order granting the motion to strike, the court stated: "In the third special defense, the [defendant alleges] that a third party made misrepresentations to the [decedents], but there is no allegation concerning the subject of the misrepresentation. There is no allegation that the plaintiff made the misrepresentation or that the third party who allegedly made the misrepresentation was in any way acting on behalf of or as the agent of the plaintiff or the plaintiff's predecessors in interest. These are essential elements of the special defense. Similarly, the fourth special defense alleges that the [decedents] were acting under the undue influence of the third party. But, again, the defense is lacking in any allegation that even infers that the third party was acting on behalf of or as the agent of the plaintiff or [its] predecessors, or even that they knew or had reason to know of the influence. The court also observes that the [defendant has] not filed a memorandum in opposition to the plaintiff's motion to strike, though [she] sought and received additional time to do so."

first and second special defenses. The defendant did not file a response to that motion and, on December 6, 2018, the court rendered summary judgment in favor of the plaintiff as to liability only. In so doing, the court concluded that the plaintiff had established that it was the holder of the note and mortgage, and that a default had occurred. The court further concluded that the defendant could not prevail on the first and second special defenses, which alleged that the decedents lacked the mental capacity to enter into the loan and that there was an absence of consideration for the loan.[5]

The plaintiff then filed a second motion for summary judgment as to liability on the sole count of the foreclosure complaint. Once again, the defendant did not file a response to the plaintiff's motion, which the court granted on January 28, 2019, stating: "The court has

[5] In its decision, the court stated that the defendant's first special defense "rests solely on speculation. [The defendant] acknowledges [that] she has no personal knowledge of the closing or, by extension, of [the decedents'] condition at the closing. On the other hand, the plaintiff submits the affidavit of Attorney Christopher J. Albanese, who handled the closing for the [decedents] and the bank. His affidavit attests that, although elderly, the [decedents] were lucid and pleased to be able to withdraw additional funds by refinancing the loan on their home. As a result, the first special defense is not supported by evidence and is insufficient to defeat the motion for summary judgment.

"[The] defendant's second special defense fares no better. [The] defendant claims that the loan is invalid because of lack of consideration and suggests that the money was stolen by [Francis]. . . . The evidence set forth in [Albanese's] affidavit is that the loan was funded, a prior mortgage was paid off, and the [decedents] received cash and retained a balance in the new home equity account. In [her response to the plaintiff's interrogatories], the defendant says that [Francis] has been charged with first and second degree larceny for stealing money from [the] home equity account [belonging to his mother, the decedent Evelyn Francis]. [The defendant] states that he used a power of attorney that had been executed by [the decedent Evelyn Francis]. As a result, any money taken by [Francis] would have come from [the decedent Evelyn Francis'] accounts after the loan had been funded by the lender. Accordingly, there was no lack of consideration demonstrated by the defendant. [The] defendant's complaint is with her father, not the bank." (Citation omitted.)

reviewed the affidavits on file and finds no genuine issue of material fact as to the essential allegations of the complaint. [The] court also observes that there were no counteraffidavits or no opposition filed." Thereafter, on June 11, 2019, the court rendered judgment of strict foreclosure in favor of the plaintiff. This appeal followed.

On appeal, the defendant claims that the court improperly granted the plaintiff's motion for a protective order regarding the defendant's discovery requests. According to the defendant, the plaintiff did not establish good cause for the granting of a protective order as required pursuant to Practice Book § 13-5.[6] She further contends that, in the absence of the discovery sought, she could not succeed on her third special defense, which alleged that Francis fraudulently had induced the decedents to enter into the mortgage transaction.[7] In response, the plaintiff argues that the defendant failed to preserve her claim because she did not challenge the propriety of the court's decision to strike that special defense or oppose the plaintiff's motions for summary judgment. The plaintiff further argues that, even if the trial court abused its discretion in granting the protective order, the defendant has failed to demonstrate that she was harmed by this decision. We agree with the defendant that the court improperly granted the motion for a protective order. We also conclude, under the circumstances of this case, that the defendant was harmed by the error because it prevented her from

[6] Practice Book § 13-5 provides in relevant part: "Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . (2) that the discovery may be had only on specified terms and conditions. . . ."

[7] At oral argument before this court, counsel for the defendant clarified that the "key special defenses" were the third and fourth special defenses alleging fraud and duress.

discovering facts that would permit her to pursue, develop and support her special defenses.

We begin by setting forth the applicable standard of review. "We have long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 16–17, 905 A.2d 55 (2006). "[T]he [trial] court's inherent authority to issue protective orders is embodied in Practice Book § 13-5 . . . . The use of protective orders and the extent of discovery is within the discretion of the trial judge. . . . We have long recognized that the granting or denial of a discovery request . . . is subject to reversal only if such an order constitutes an abuse of that discretion." (Citation omitted; internal quotation marks omitted.) *Coss* v. *Steward*, 126 Conn. App. 30, 46, 10 A.3d 539 (2011).

As stated previously in this opinion, in her special defenses, the defendant alleged that Francis knowingly made a false representation of fact to induce the decedents to sign the note and mortgage, and that they relied on the false representation to their detriment. The defendant further alleged that Francis wrongfully acted and threatened the decedents to sign the note and mortgage. In support of the special defenses, the defendant sought, inter alia, information relating to the plaintiff's knowledge of Francis' actions. Specifically, the defendant requested that the plaintiff identify all communications between Francis and the plaintiff and to produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents, or any attorney purporting to represent any of them.

In its motion for a protective order, the plaintiff argued that disclosure of this information was prohib-

ited by (1) General Statutes § 36a-42,[8] (2) the Fair Debt Collections Practices Act, 15 U.S.C. § 1692c (b),[9] and (3) the Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. § 6802.[10] These provisions, however, all contain an exception that permitted the bank to comply with the defendant's discovery requests based on consent. Section 36a-42 provides in relevant part that "[a] financial institution may not disclose to any person,

[8] General Statutes § 36a-42 provides: "A financial institution may not disclose to any person, except to the customer or the customer's duly authorized agent, any financial records relating to such customer unless the customer has authorized disclosure to such person or the financial records are disclosed in response to (1) a certificate signed by the Commissioner of Administrative Services or the Commissioner of Social Services pursuant to the provisions of section 17b-137, (2) a lawful subpoena, summons, warrant or court order as provided in section 36a-43, (3) interrogatories by a judgment creditor or a demand by a levying officer as provided in sections 52-351b and 52-356a, (4) a certificate issued by a medical provider or its attorney under subsection (b) of section 17b-124, provided nothing in this subsection shall require the provider or its attorney to furnish to the financial institution any application for medical assistance filed pursuant to an agreement with the IV-D agency under subsection (c) of section 17b-137, (5) a certificate signed by the Commissioner of Veterans Affairs pursuant to section 27-117, (6) the consent of an elderly person or the representative of such elderly person provided to a person, department, agency or commission pursuant to section 17b-454, provided the financial institution shall have no obligation to determine the capacity of such elderly person or the representative of such elderly person to provide such consent, (7) a request for information served upon a financial institution in accordance with subsection (e) of section 12-162, or (8) a request for information made by the Commissioner of Revenue Services pursuant to section 12-39cc."

[9] Section 1692c (b) of title 15 of the United States Code provides: "Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."

[10] Section 6802 (a) of title 15 of the United States Code provides: "Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title."

except to the customer or the customer's duly authorized agent, any financial records relating to such customer *unless the customer has authorized disclosure* . . . ." (Emphasis added.) Title 15 of the United States Code, § 1692c (b), provides in relevant part: "Except as provided in section 1692b of this title, *without the prior consent of the consumer* given directly to the debt collector . . . a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." (Emphasis added.) Title 15 of the United States Code, § 6802 (a), provides: "Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title." Title 15 of the United States Code, § 6802 (e) (2), permits such disclosure, however, "with the consent or at the direction of the consumer . . . ."

In her objection to the plaintiff's motion for a protective order, the defendant argued that Attorney Jeremiah S. Miller, the executor of Evelyn Francis' estate, had consented to her discovery requests. She also attached a letter from Miller dated November 16, 2017, memorializing that consent.[11] At the hearing on the plaintiff's motion, counsel for the defendant argued that, because the defendant, who is the sole beneficiary of the estate,[12]

[11] The letter, addressed to counsel for the plaintiff and counsel for the defendant, stated: "This is to inform you that I, as the executor of the Estate of Evelyn S. Francis, give permission to [the plaintiff] to comply with the [d]efendant's [f]irst [s]et of [i]nterrogatories and [r]equests for [p]roduction dated September 21, 2017, filed by [the defendant]."

[12] Evelyn Francis intentionally made no provision for Francis in her last will and testament.

and the executor, both had consented to the defendant's discovery request, the plaintiff's motion for a protective order was without merit. Moreover, the plaintiff has provided no authority, nor have we found any, for the court's refusal to provide anything beyond "the note, the mortgage, the assignments, and the payment history" in the context of an incapacity claim, especially here, where the defendant was not present during any stage of the transaction, including the closing. In light of the foregoing, as well as the fact that there is no claim that the defendant was pursuing discovery in bad faith, we conclude that the court abused its discretion in granting the plaintiff's motion for a protective order.[13]

Our conclusion that the trial court abused its discretion in granting the protective order, however, does not end our analysis. According to the plaintiff, even if the trial court erred in granting the motion for a protective order, the defendant abandoned her claim by failing to revise her special defenses or to appeal from the granting of the motion to strike. The plaintiff further argues that the defendant cannot show that the granting of the protective order precluded her from presenting a

[13] Although the plaintiff argues on appeal that the consent of the estate of Norbert Francis was also required in order to comply with the defendant's discovery request, the plaintiff did not make this argument before the trial court. During the hearing, after counsel for the defendant pointed out that Miller had consented to the discovery, the court asked counsel for the plaintiff, "[w]hat's wrong with that?" In response, counsel for the plaintiff stated that the reason he filed the motion for a protective order was because the defendant's discovery request went beyond requesting the note, mortgage, assignments and payment history. Because the plaintiff did not argue before the trial court that it needed the consent of the estate of Norbert Francis in order to comply with the discovery request, we decline to address this issue on appeal. See *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661 ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.)), cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016).

genuine issue of material fact in response to the plaintiff's two motions for summary judgment. Finally, the plaintiff argues that, even if the trial court abused its discretion in granting the protective order, the defendant has failed to demonstrate that she was harmed by this decision. We disagree.

Preliminary to our consideration of these issues, we recognize that "[a]n action for foreclosure is peculiarly an equitable action" and that "[a] party that invokes a court's equitable jurisdiction by filing an action for foreclosure necessarily invites the court to undertake . . . an inquiry [into his conduct]. . . . Equity will not afford its aid to one who by his conduct or neglect has put the other party in a situation in which it would be inequitable to place him. . . . A trial court conducting an equitable proceeding may therefore consider all relevant circumstances to ensure that complete justice is done." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 670–71, 212 A.3d 226 (2019). Relevant circumstances that may form a proper basis for defenses in a foreclosure action include "conduct occurring after the origination of the loan, after default, and *even after the initiation of the foreclosure action* . . . ." (Emphasis added.) Id., 672. We also observe that the defendant in the present case does not claim on appeal that the trial court erred in granting the motion to strike or in granting the motions for summary judgment. Instead, the defendant contends that the trial court's ruling on the protective order precluded her from obtaining the discovery materials that would permit her to determine whether she had any viable special defenses.

In order to prevail on her third special defense, the defendant was required to allege and prove "(1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the

other party; and (4) that the other party did so act to her detriment." (Internal quotation marks omitted.) *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 188, 850 A.2d 260 (2004). The defendant also had to establish that the plaintiff knowingly participated in or knew of the fraud. See id., 190 (spouse's fraud in inducing spouse to execute mortgage does not invalidate mortgage against mortgagee unless mortgagee participated in or knew of fraud). Similarly, in order to prevail on her fourth special defense, the defendant was required to allege and prove: "[1] a wrongful act or threat [2] that left the victim no reasonable alternative, and [3] to which the victim in fact acceded, and that [4] the resulting transaction was unfair to the victim." (Internal quotation marks omitted.) Id., 189. As with fraud, in order for the defendant to prevail on this special defense, she needed to establish that the plaintiff participated in or knew of the alleged duress. See id., 190.

When the court granted the plaintiff's motion for a protective order, it effectively prevented the defendant from obtaining information regarding the plaintiff's participation in or knowledge of Francis' alleged conduct. The plaintiff argues that the defendant could have obtained discovery from other sources, such as by deposing the decedent's doctors or Francis; this argument is not persuasive, however, because her special defenses necessarily encompassed information relevant to the *plaintiff's* participation in or knowledge of Francis' alleged conduct. Moreover, we reiterate that the plaintiff has sued a defendant with respect to a transaction to which she was not a party. As such, the defendant has a right to obtain discovery from the party most likely to have it. See Practice Book § 13-2 ("[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action *and if it can be provided by the disclosing party*

or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure" (emphasis added)). Under these circumstances, once full discovery was precluded, the defendant had no evidentiary basis on which to amend her special defenses to allege that the plaintiff knew of or participated in Francis' alleged misconduct.[14] Put differently, the striking of the defendant's special defenses without the evidentiary basis to amend is simply a foregone conclusion and, thus, a red herring in our consideration of her appellate claims. Because the defendant's claim is that the court abused its discretion in granting the plaintiff the protective order and precluding discovery, and not whether it erred in granting the motion to strike, we are not persuaded that the defendant was required to take an appeal on that determination.

The plaintiff further argues that, in order to preserve this claim of error, the defendant should have filed an objection to the plaintiff's motions for summary judgment with supporting affidavits. Specifically, the plaintiff argues that the defendant should have filed an affidavit, pursuant to Practice Book § 17-47,[15] setting forth the information that is solely under the control of the plaintiff. We disagree.

[14] In *Chase Manhattan Mortgage Corp.* v. *Machado*, supra, 83 Conn. App. 188–90, this court held that the defendant in a foreclosure action could not prevail on her special defenses of fraud and duress because there was no allegation that the plaintiff or its predecessor had knowingly participated in the alleged fraud or duress. The facts of this case are distinguishable from those of *Machado* because in this case, unlike *Machado*, the defendant sought, by way of discovery, information regarding the plaintiff's participation in or knowledge of Francis' alleged conduct. The court, however, granted the plaintiff's motion for a protective order, thus precluding the defendant from obtaining this discovery.

[15] Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

"A party opposing a summary judgment motion [pursuant to Practice Book § 17-47] on the ground that more time is needed to conduct discovery bears the burden of establishing a valid reason why the motion should be denied or its resolution postponed, including some indication as to what steps that party has taken to secure facts necessary to defeat the motion. Furthermore, under § 17-47, the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 675, 43 A.3d 215 (2012). "[A] party contending that it needs to conduct discovery to respond to a motion for summary judgment must do more than merely claim the information needed is within the possession of the opposing party." (Internal quotation marks omitted.) Id., 677.

In citing to the provisions of Practice Book § 17-47, the plaintiff contends that the defendant was required to pursue "other options available to her" such as deposing the decedents' physicians or Francis, and, notably, emphasizes that the defendant failed to dispute the affidavit of Christopher J. Albanese, the closing attorney for both the bank and the decedents, which was filed with the plaintiff's first motion for summary judgment. See footnote 5 of this opinion. By its terms, however, the relief available in § 17-47 assumes that discovery has not yet been attempted or is complete; it does not contemplate the present situation in which the defendant was precluded from full and complete discovery in the first instance. For that reason, the present case is unlike *Briarwood Connecticut, LLC*, in which the defendant already had successfully conducted extensive discovery and, as the court observed, the plaintiff had not hindered the defendant in its discovery efforts. See *Bank of America, N.A.* v. *Briarwood Connecticut*,

LLC, supra, 135 Conn. App. 677. In the present case, by contrast, the record indicates that the precluded discovery included communications between any attorney purporting to represent the plaintiff or its predecessors, the decedents and Francis. The protective order thus deprived the defendant of the ability to explore and potentially challenge the circumstances of the closing, as attested to by Albanese. Under the particular circumstances of this case, the defendant was not required to file an affidavit pursuant to § 17-47 in response to the plaintiff's motion for summary judgment as to her special defenses because the record already makes clear that the defendant sought, but was denied, the discovery needed to develop and pursue her special defenses.

Finally, we address whether the defendant has shown that she was harmed by the granting of the protective order. See *Coss* v. *Steward*, supra, 126 Conn. App. 47. "The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 249, 842 A.2d 1100 (2004). In considering the question of harm, we reiterate that the defendant's issue on appeal is not whether the court erred in rendering judgment based on the record before it. Instead, the defendant's claim of error is that the court's protective order prevented her from having the opportunity to pursue, develop and support the defenses she raised. Under the particular circumstances of this case, we conclude that the defendant has satisfied her burden of establishing that she was harmed by the granting of the protective order.

We initially note that our rules broadly allow for the discovery of information that is "reasonably calculated

to lead to the discovery of admissible evidence." Practice Book § 13-2.[16] "[T]he purpose of the rules of discovery is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks omitted.) *Krahel* v. *Czoch*, 186 Conn. App. 22, 36, 198 A.3d 103, cert. denied, 330 Conn. 958, 198 A.3d 584 (2018); see also *Standard Tallow Corp*. v. *Jowdy*, 190 Conn. 48, 58–59, 459 A.2d 503 (1983) (court's discretion in granting or denying discovery request limited by provisions of discovery rules, especially mandatory provision that discovery "*shall* be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action" (emphasis in original; internal quotation marks omitted)). Furthermore, the boundaries of discovery are clearly broader than the boundaries of admissible evidence. See *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 139, 491 A.2d 389 (1985).

Our rules of practice further provide the procedures governing the discovery process. As applied to the present case, Practice Book § 13-6 (a) provides in relevant part that "[w]ritten interrogatories may be served upon any party without leave of the judicial authority at any time after the return day. . . ." Similarly, Practice Book § 13-9 (d) provides in relevant part that "[r]equests for production may be served upon any party without leave of court at any time after the return day. . . ." By allowing discovery immediately after the return date, these rules implicitly acknowledge that a defendant

[16] Practice Book § 13-2 provides in relevant part that "[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . ."

might not know what special defenses are available in the absence of the discovery, and provide the defendant an opportunity to obtain any and all information that might be of assistance in the development and pursuit of special defenses. Cf. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 672 (relevant circumstances that may form proper basis for defenses in foreclosure action include "conduct occurring . . . e*ven after the initiation of the foreclosure action* . . . ." (emphasis added)). In accordance with these rules, on September 21, 2017, the defendant served interrogatories and requests for production on the plaintiff, seeking information relating to the plaintiff's knowledge of Francis' actions. Specifically, the defendant requested that the plaintiff identify all communications between Francis and the plaintiff and produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them.

It is important to note that the plaintiff does not argue on appeal that the information sought by the defendant in her discovery request was not "reasonably calculated to lead to the discovery of admissible evidence." Practice Book § 13-2. Furthermore, during oral argument before this court, counsel for the plaintiff conceded that the grounds stated in the motion for a protective order related only to the confidentiality of the requested information pursuant to federal and state law; the motion did not assert that the requested information was not likely to lead to the discovery of relevant and admissible evidence. Indeed, there can be no dispute that the discovery requests were reasonably seeking evidence in support of recognized and valid equitable defenses to the plaintiff's mortgage foreclosure action.

Similarly, the plaintiff does not argue on appeal that the special defenses alleged by the defendant were not pleaded in good faith. In fact, a review of the record

amply supports the defendant's good faith belief in her special defenses. Specifically, after the granting of the protective order, the defendant responded to the plaintiff's first set of interrogatories and requests for production. Her response explained how the decedents had no need for the additional money generated by the mortgage and set forth how the decedents managed their finances over the course of their lives with the intent of avoiding the type of mortgage transaction at issue.[17] The defendant's response also stated that Francis had been charged with first and second degree larceny for stealing an amount in excess of $500,000 from Evelyn Francis' home equity account and that both the defendant and an investigator had been unsuccessful in their attempts to contact the plaintiff to obtain information regarding the subject transaction.[18] At the hearing on the motion for the protective order, counsel

[17] The defendant's response stated in part: "[The decedents] were both elderly retirees at the time the loan documents at issue were executed. They were also wealthy individuals. I do real estate development and million dollar loan transactions, and I was not told that they were applying for anything. They had no need for additional money, either in a lump sum or as a stream of payments to supplement their income. During their entire adult lives, both [decedents] were frugal individuals that did not incur unnecessary expenses or incur unnecessary debts. They lived in such a manner as to protect them from needing any type of financial assistance whatsoever in their elderly years and to insure that the family would not be burdened with financial expenses upon their death[s]. As a result, over the course of their lifetimes, both [decedents] accumulated significant assets for the purpose—and with the intent—of avoiding the need to engage in the type of mortgage transaction [at] issue in this civil action. With my going so far as to even pay for funeral expenses upon my grandfather's death and make prearrangements for my grandmother's plot.

"In sum, [the decedents] would not have entered into the mortgage transaction at issue had they understood their true nature. I became fully aware of [the decedents'] mental incapacity when I learned that they had been duped into signing the loan documents."

[18] The defendant's response stated in part: "The state of Connecticut's Department of Social Services concluded that [Francis] may have stolen an amount in excess of $500,000 from [the decedent Evelyn Francis] and the amount stolen 'may have been from a home equity.' The Department of Social Services urged the chief state's attorney 'to commence a criminal investigation into this especially egregious case.' [Francis] has been charged

for the defendant advised the court that the state was prosecuting Francis for larceny. The plaintiff does not contend that any of these statements were not made in good faith.

When the trial court in the present case granted the plaintiff's motion for a protective order, it effectively prevented the defendant from pursuing, developing and supporting her special defenses. To be clear, in order for the defendant to pursue her special defenses of fraud and duress, she needed to establish that the plaintiff participated in or knew of the alleged fraud or duress. See, e.g., *Chase Manhattan Mortgage Corp.* v. *Machado*, supra, 83 Conn. App. 188–90. Although it is true that the defendant did not allege facts in her special defenses regarding the plaintiff's involvement in Francis' conduct, the record amply supports the defendant's good faith basis for requesting the discovery that would have enabled her to amend her special defenses to include those allegations. Moreover, we reiterate that the court's order granting the plaintiff's motion specifically precluded the defendant from obtaining the requested discovery of all communications between Francis and the plaintiff, and all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them. Under the limited circumstances of this case, and given the broad scope of our discovery rules, as well as the equitable nature of a foreclosure proceeding; see, e.g., *U.S. Bank National Assn.* v. *Blowers*,

with larceny in the [first] and [second] degree. His criminal trial is currently scheduled for November, 2019. I am aware that the Ct investigator tried to contact [the plaintiff] on various occasions, and I personally tried to contact them on various occasions prior to her death and upon her death and no information [was] forthcoming nor was I added as per POA which was provided to them on more than one occasion prior to her death and after her death. I also did not receive information as was requested by the estate executor to communicate with me right after her death."

supra, 332 Conn. 670–71; we conclude that the defendant has satisfied her burden of establishing that she was harmed by the granting of the protective order.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.[19]

In this opinion the other judges concurred.

BRIGHT, C. J., concurring. I concur with the result and the sound reasoning of the majority. I agree that the trial court abused its discretion in granting the motion filed by the plaintiff, CIT Bank, N.A., for a pro-

[19] We note that the plaintiff contends, in an alternative argument, that the defendant does not have standing to raise any claims concerning this loan as she was not a party to this transaction. In support of this alternative argument, the plaintiff cites *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 401, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), and *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 118, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017). These cases are readily distinguishable from the present case. In *Strong*, this court held, inter alia, that the defendant in a foreclosure action, who had raised a defense based on the plaintiff's alleged noncompliance with a pooling and servicing agreement, had failed to meet her burden of establishing that summary judgment as to liability should not have been rendered for the plaintiff. We stated in *Strong* that "[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." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, supra, 401. In *Cornelius*, this court held that the plaintiff's purported failure to comply with the mortgage's notice provision did not implicate the jurisdiction of the trial court or deprive this court of jurisdiction over the foreclosure action. See *Deutsche Bank National Trust Co.* v. *Cornelius*, supra, 116. In so holding, we noted that the defendant was not a party to the mortgage. See id., 116 n.10.

In the present case, the defendant was named as a party in this action by virtue of her being an heir of the decedents. "[I]f a mortgagee brings a foreclosure action against a decedent's property during the settlement of the decedent's estate, the mortgagee must name the heirs or devisees as defendants because they hold title to the equitable right of redemption . . . ." *Connelly* v. *Federal National Mortgage Assn.*, 251 F. Supp. 2d 1071, 1075 (D. Conn. 2003). As a defendant and proper party in this foreclosure action, the defendant had the right to seek discovery relevant to her special defenses of fraud and duress.

tective order and that, on the unique and specific facts of this case, the court's error was not harmless.

In particular, I find it significant that the defendant Johanna Francis was not a party to the underlying transaction that gave rise to the plaintiff's foreclosure action and, therefore, lacked knowledge of those events. Accordingly, I agree that the defendant, in light of the arrest of her father, James M. Francis, had a reasonable basis to suspect that her grandparents, the decedents, Norbert Francis and Evelyn Francis, had been defrauded and to question the plaintiff's involvement in that fraud. Under these circumstances the defendant's discovery requests were reasonable because the best source of information relevant to the plaintiff's possible involvement, if any, in James M. Francis' alleged scheme was the plaintiff itself. Furthermore, the plaintiff does not claim that the defendant's discovery requests were propounded in bad faith, constituted a "fishing expedition," or were interposed for the purpose of delay. Nor does the plaintiff claim that the defendant's special defenses that alleged fraud and duress, even though insufficiently pleaded, were made in bad faith. Given these facts, I agree with the majority that the defendant acted reasonably in seeking discovery before further alleging improper conduct on the part of the plaintiff. Consequently, I agree that the court's improper ruling depriving her of that discovery was not harmless. I write separately, however, to emphasize the uniqueness of these facts and to make clear that the denial of a discovery request typically will not justify a failure to plead a legally sufficient cause of action or special defense.

Connecticut is a fact pleading jurisdiction. See Practice Book § 10-1 ("[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies"). Our rules of practice do not require, however, that parties be certain as to the truth of the

facts that they allege. Instead, allegations must be made "with reasonable cause" and with a good faith belief in their truth. See Practice Book §§ 4-2 (b) and 10-5.[1] "Good faith pleading requires that counsel must not allege claims of fact which he has no reasonable grounds to assert and cannot prove. . . . If under all such circumstances counsel then has reasonable grounds to file the pleading or make the representation, he cannot later be faulted for his failure to satisfy his burden of proof." *State* v. *Anonymous (1974-5)*, 31 Conn. Supp. 179, 180–81, 326 A.2d 837 (1974).

Consistent with our rules of practice, rule 3.1 of the Rules of Professional Conduct provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." In applying rule 3.1, this court has stated: "[A] claim or defense is frivolous (a) if maintained primarily for the purpose of harassing or maliciously injuring a person, (b) if the lawyer is unable either to make a good faith argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith argument for an extension, modification or reversal of existing law." *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 614, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). Furthermore, as the

[1] Practice Book § 4-2 (b) provides in relevant part: "The signing of any pleading, motion, objection or request shall constitute a certificate that the signer has read such document, that to the best of the signer's knowledge, information and belief there is good ground to support it, [and] that it is not interposed for delay . . . ."

Practice Book § 10-5 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the judicial authority, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ."

commentary to rule 3.1 explains: "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Rules of Professional Conduct 3.1, commentary.

Parties and lawyers have the same good faith obligation when it comes to conducting discovery. Practice Book § 13-2, which defines the scope of discovery, provides in relevant part that a party may seek discovery of nonprivileged information "material to the subject matter involved in the pending action . . . relate[d] to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." Discovery of such information is permitted so long as "the information sought appears *reasonably* calculated to lead to admissible evidence." (Emphasis added.) Practice Book § 13-2. As set forth previously in this opinion, courts in Connecticut equate reasonable conduct with conduct undertaken in good faith. See, e.g., *State* v. *Anonymous (1974-5)*, supra, 31 Conn. Supp. 180–81; see also *Clinton* v. *Aspinwall*, 200 Conn. App. 205, 224, 238 A.3d 763 ("[a] determination will be considered to be in good faith unless it went so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith" (internal quotation marks omitted)), cert. granted, 335 Conn. 979, 241 A.3d 704 (2020), and cert. granted, 335 Conn. 980, 241 A.3d 703 (2020). Similarly, rule 3.4 (4) of the Rules of Professional Conduct provides that a lawyer shall not make a frivolous discovery request in pretrial proceedings. As previously noted, this court has interpreted "frivolous" under the Rules of Professional Conduct as being synonymous with a lack of good faith. See *Brunswick* v. *Statewide Grievance Committee*, supra, 103 Conn. App. 614. Thus, whether pleading or engaging in discovery, a party, or his or her attorney, has the

same duty to proceed in good faith. Accordingly, in most cases, a party either has good faith both to plead and pursue discovery as to a claim or defense or that party lacks good faith to do either.

Moreover, discovery is used to develop claims that have been properly pleaded, not to create them. As noted previously, pursuant to Practice Book § 13-2, a party is entitled in discovery to seek information that is material to the subject matter involved in the pending action and that is reasonably calculated to lead to the discovery of admissible evidence. If a party has not alleged a legally sufficient claim or defense, that claim or defense is not part of "the subject matter involved in the pending action . . . ." Practice Book § 13-2; see also *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 570, 657 A.2d 212 (1995) ("[t]he issues are framed by the pleadings and are controlled by substantive law" (internal quotation marks omitted)). As to whether discovery is reasonably likely to lead to the discovery of *admissible evidence*, "[i]t is axiomatic that [e]vidence is admissible only to prove material facts, that is to say, those facts directly in issue or those probative of matters in issue; evidence offered to prove other facts is immaterial." (Internal quotation marks omitted.) *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 316, 788 A.2d 1199 (2002); see also *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 211, 596 A.2d 396 (1991) ("[r]elevant evidence is admissible only to prove facts material to liability; that is, facts directly in issue or probative of matters in issue"). Consequently, a party ordinarily will not be harmed by the denial of discovery as to a matter it never put at issue in its pleading.

Thus, in the typical case in which the party whose pleading has been challenged was involved in the transaction or events underlying the case, that party should be expected to sufficiently plead their cause of action

or defense on which their discovery requests are based and should not be permitted to use the lack of discovery as a reason not to do so. Of course, I would expect that, in that typical case, the party to whom the discovery is directed would object to the discovery as overly broad, unduly burdensome, and not likely to lead to the discovery of admissible evidence if it was not tethered to a properly pleaded claim or defense.

As noted previously, however, this is not that typical case. The defendant was not involved in the underlying transaction, and the plaintiff never claimed that her discovery requests were unreasonable and not made in good faith. Consequently, for the reasons set forth in the majority opinion, I agree that the judgment of the trial court must be reversed because the court's erroneous discovery order was not harmless.

Accordingly, I concur.

MICHAEL G. *v.* COMMISSIONER OF CORRECTION* (AC 43327)

Alvord, Cradle and Eveleigh, Js.

Syllabus

Pursuant to statute (§ 52-470 (d) (1)), when a habeas petitioner files a subsequent petition for a writ of habeas corpus more than two years after the date on which judgment on a prior habeas petition challenging the same conviction is deemed final, there is a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause.

The petitioner, who had been convicted of the crimes of sexual assault in the first degree and risk of injury to a child, filed a third petition for a writ of habeas corpus. Because the third petition was filed beyond the two year time limit for subsequent petitions set forth in § 52-470 (d) (1), the habeas court, upon the request of the respondent Commissioner

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

of Correction, issued an order to show cause why the petition should be permitted to proceed and scheduled an evidentiary hearing on the issue. Prior to the show cause hearing, the petitioner moved to disqualify the habeas judge on the ground that he had presided over the petitioner's first habeas trial and that his comments related to the credibility of the petitioner's testimony in that case would create the appearance of impropriety if he were to preside over the present case. The habeas court denied the petitioner's motion for disqualification. At the show cause hearing, the petitioner testified that he had filed a timely second habeas petition, but it was withdrawn prior to trial on the advice of his counsel and that his counsel had advised him to wait at least sixty days before filing another petition to avoid the suspicion of the court. The habeas court dismissed the third habeas petition as untimely, concluding that the petitioner failed to demonstrate good cause for the nearly ten month delay in filing the petition and that the withdrawal of the second petition was strategically filed to manipulate or delay proceeding to trial. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions raised were adequate to deserve encouragement to proceed further.
2. The habeas court did not abuse its discretion in determining that the petitioner failed to demonstrate good cause for the delay in filing his third habeas petition: contrary to the petitioner's claim that he established good cause because the delay was due to his second habeas counsel's incorrect advice, the petitioner failed to establish that something outside of his or his counsel's control caused or contributed to the delay in filing the third petition, and, even assuming that it was reasonable for him to withdraw the second petition prior to his pending trial and to wait at least sixty days before filing another petition, the petitioner did not file his third petition until nearly ten months after the statutory deadline had elapsed, and he provided no explanation as to why he waited an additional eight months beyond his counsel's suggested sixty day period before filing it; moreover, in making its determination, the habeas court reasonably considered the fact that the petitioner made no claim that the delay was due to missing witnesses or newly discovered evidence and reasonably concluded that the petitioner's actions were an attempt to manipulate or delay proceeding to trial.
3. The habeas court did not abuse its discretion in denying the petitioner's motion for disqualification of the habeas judge: contrary to the petitioner's contention that certain comments made by the judge during the petitioner's first habeas trial created the appearance of impropriety, the judge indicated that he had no recollection of the prior proceeding,

which had occurred seven years earlier, and the subject comments were made in the purview of his judicial role and reflected credibility determinations made with respect to the specific testimony given and the demeanor exhibited at the first habeas trial, and, therefore, it was clear that the judge's previous credibility determinations would not cause a reasonable person to question his impartiality in presiding over the present case nor were his comments so extreme as to display a clear inability to render fair judgment.

Argued March 10, 2021—officially released August 9, 2022

Procedural History

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

Jennifer B. Smith, assistant public defender, for the appellant (petitioner).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, *Leah Hawley*, senior assistant state's attorney, and *Amy L. Bepko-Mazzocchi*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Michael G., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus pursuant to General Statutes § 52-470 (d) and (e).[1] On appeal, the

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

petitioner claims that the court abused its discretion in denying his petition for certification to appeal because (1) the habeas court erred in determining that the petitioner failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay and (2) the habeas judge improperly failed to disqualify himself. We disagree and, therefore, dismiss the appeal.

The following facts and procedural history are relevant to our resolution of this appeal. "On December 20, 2005, [a] jury returned a guilty verdict on four counts of sexual assault in the first degree and four counts of risk of injury to a child. On March 10, 2006, the [petitioner] was sentenced to a total effective term of eighty years imprisonment, execution suspended after forty years, followed by six years of special parole and twenty years probation." *State* v. *Michael G.*, 107 Conn. App. 562, 566, 945 A.2d 1062, cert. denied, 287 Conn. 924, 951 A.2d 574 (2008). This court affirmed the judgment of conviction on direct appeal. Id., 563. Our Supreme Court denied certification to appeal this court's decision.

Thereafter, on January 21, 2010, the petitioner filed his first petition for a writ of habeas corpus, which he amended on March 16, 2012 (first petition), alleging that his trial counsel had rendered deficient performance. Following a trial on the merits, the habeas court denied

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

that first petition. *Michael G.* v. *Commissioner of Correction*, 153 Conn. App. 556, 558, 102 A.3d 132 (2014), cert. denied, 315 Conn. 916, 107 A.3d 412 (2015). The habeas court denied his petition for certification to appeal, and this court dismissed his appeal on October 21, 2014. Id., 563. Our Supreme Court denied the petitioner certification to appeal on January 21, 2015.

The petitioner filed a second petition for a writ of habeas corpus on September 23, 2014 (second petition). A habeas trial with respect to that second petition was scheduled to begin on May 9, 2017. The petitioner, however, withdrew that petition on February 7, 2017.

The petitioner filed a third petition for writ of habeas corpus, the subject of this appeal, on December 1, 2017 (third petition). The respondent, the Commissioner of Correction, thereafter filed a request with the habeas court, pursuant to § 52-470 (d) and (e), for an order to show cause as to "why [the petitioner] should be permitted to proceed despite his delay in filing the instant habeas corpus petition." Subsequently, the habeas court, *Newson*, *J.*, ordered an evidentiary hearing (show cause hearing).

On February 20, 2019, prior to the show cause hearing, the petitioner moved that the habeas judge disqualify himself, arguing that, because Judge Newson had presided over the habeas trial on the petitioner's first petition, he should disqualify himself from presiding over this case. On March 15, 2019, at the start of the show cause hearing, the court addressed the motion for disqualification and concluded that disqualification was not necessary. The court then proceeded to conduct the show cause hearing on March 15, 2019. The only evidence presented at the hearing was the testimony of the petitioner. The court also heard legal arguments from both sides.

Thereafter, on June 21, 2019, the court issued a memorandum of decision dismissing the petitioner's third petition. In its decision, the court concluded that the petitioner's third petition was untimely by approximately ten months[2] and, further, that the petitioner did not demonstrate good cause for the delay in filing the petition. Thereafter, the petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

Following oral argument before this court held on March 10, 2021, at the petitioner's request, this appeal was stayed pending our Supreme Court's consideration of *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022).

Following our Supreme Court's decision in *Kelsey*, the parties were ordered to file supplemental briefs addressing *Kelsey*'s impact on this appeal. Additional procedural history will be set forth as necessary.

We begin by setting forth the legal principles that govern our review of a habeas court's denial of a petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [denial] of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994),

[2] Specifically, the court determined that the statutory deadline applicable to the filing of subsequent habeas petitions was January 21, 2017. On appeal, the petitioner argues that this was a clearly erroneous factual finding because he had two years and twenty days from the day our Supreme Court denied the petitioner's petition for certification to appeal to file another petition, rendering the operative deadline February 10, 2017. As the respondent maintains, however, we need not consider this assertion because, regardless of which date is used, the petitioner's third petition was late by several months, a fact the petitioner concedes. See footnote 3 of this opinion. Furthermore, in his supplemental brief to this court, the petitioner notes that "[t]he statutory deadline expired on January 21, 2017," therefore seeming to abandon this claim.

and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Olorunfunmi* v. *Commissioner of Correction*, 211 Conn. App. 291, 303, 272 A.3d 716, cert. denied, 343 Conn. 929, A.3d (2022).

I

The petitioner's first claim is that he established good cause for his delay in filing his third petition because the delay was due to incorrect advice from his counsel in his second habeas case.[3] We disagree.

The petitioner was the only witness who testified at the show cause hearing, and no other evidence was

[3] The petitioner does not dispute that his third petition was untimely.

offered by the parties. With respect to his second petition, the petitioner testified that it was filed before our Supreme Court denied his petition for certification to appeal this court's decision in his first habeas case. He testified that he was represented by counsel in the second habeas case, his counsel advised him to withdraw the second petition, and, "as far as [he knew], it was" withdrawn. In addition, when asked during direct examination, he agreed that his counsel further had advised him that he should wait "at least sixty days" after withdrawing the second petition before filing another "in order to avoid suspicion of the court."

Following the petitioner's testimony, each side presented argument. The respondent's counsel maintained that "[t]he [petitioner's] attorney was not here to testify as to what he did and didn't tell [the petitioner]. The only thing we have is the self-serving testimony that, you know, he, he was given this advice. I mean, clearly, the petition is late. It was filed after the statutory time period and there has been . . . no testimony as to newly discovered evidence, and nothing that shows good cause for the time delay. So, the petitioner's failed to meet his burden of proof." The petitioner's counsel discussed the issue of what exact date established when a petition was timely or not, asserting that the petitioner had until February 10, 2017, three days after he withdrew his second petition, to file another subsequent petition. In closing, the petitioner's counsel noted: "I think that the issue is . . . that he was given the incorrect advice during the time frame in which he could have filed another one timely."

Thereafter, on June 21, 2019, the habeas court dismissed the petitioner's third petition, determining that he lacked good cause for the delay in the filing of the petition. In its memorandum of decision, the habeas court first determined that "the petitioner had two years from when the Supreme Court issued notification [that]

it had denied certification to file a subsequent habeas action attacking the same conviction, which would have given him until January 21, 2017, but the present action was not filed until December 1, 2017." The habeas court then concluded that the petitioner did not meet his evidentiary burden of demonstrating good cause for the delay because "[t]here is no claim that the petitioner was 'forced' or 'misled' into withdrawing this prior petition. There is also no claim that the petitioner was lacking necessary information or witnesses when he filed the withdrawal, or that he has discovered otherwise unknown evidence between then and now. Instead, the court is left with the only reasonable conclusion that the withdrawal of the prior action was strategically filed simply to manipulate or delay proceeding to trial."

We begin by setting forth the applicable standard of review. "[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did."[4] (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 440.

[4] Initially, the petitioner argued that the habeas court's determination regarding good cause was subject to plenary review because "the question of whether the petitioner has established 'good cause' under . . . § 52-470 presents an issue of statutory interpretation . . . ." As discussed previously in this opinion, this appeal was stayed pending our Supreme Court's decision in *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 424. In *Kelsey*, our Supreme Court rejected the argument that a decision to dismiss a habeas petition for failure to establish good cause required statutory interpretation and clarified that the proper standard of review is abuse of discretion. Id., 432, 440. In his supplemental brief, the petitioner acknowledges that the applicable standard of review is abuse of discretion.

Section 52-470 (d) provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after . . . [t]wo years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . ." Section 52-470 (e) provides in relevant part that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition."

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42. The following nonexhaustive list of factors aid in determining whether a petitioner has satisfied the definition of good cause: "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition."[5] (Internal quotation marks omitted.) Id., 442.

[5] In his initial appellate briefing, the petitioner argued for "an expansive definition" of what constitutes good cause. In his supplemental briefing, however, the petitioner does not challenge the definition of good cause or the relevant factors for consideration set forth in *Kelsey*, which Supreme Court decision is binding on this court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent").

"[A]lthough . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge."[6] (Footnote omitted.) Id., 444–45.

In *Kelsey*, the petitioner filed a second petition for a writ of habeas corpus approximately five years after our Supreme Court denied his petition for certification to appeal from this court's judgment affirming the habeas court's denial of his first petition for a writ of habeas corpus. Id., 429. The habeas court determined that the petitioner did not demonstrate good cause for the delay in filing his second petition and, therefore, dismissed the petition. Id., 431. Before our Supreme Court, the petitioner argued that, "in addition to his prior habeas counsel's failure to inform him of any statutory filing deadlines, his status as a self-represented party when he filed this petition caused the delay in filing insofar as his conditions of confinement had caused him to be unaware of the deadline set by the 2012 amendments to § 52-470." Id., 441. The court

[6] In addition to these factors, but not relevant to our review of the petitioner's claim, our Supreme Court established that "the habeas court may also include in its good cause analysis whether a petition is wholly frivolous on its face. . . . [T]he good cause determination can be, in part, guided by the merits of the petition." *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444 n.9.

rejected this argument, noting that the "petitioner had access to a resource center that included the General Statutes" and that "the petitioner stated [as explanation for the delay] that he was housed in and out of administrative segregation due to a disciplinary problem." Id., 446.

In the present case, the petitioner argues that he established good cause because "his second habeas counsel failed to explain the statutory time limits in . . . § 52-470 and incorrectly advised him to withdraw his prior petition and refile it outside of the two year statutory deadline."[7] Specifically, he argues that his "second habeas counsel's deficient advice caused the delay in filing the instant petition. At the time the petitioner withdrew his prior petition, counsel failed to inform him of the statutory deadline that could preclude him from pursuing [an additional] habeas corpus [petition]." The petitioner further states that his habeas counsel was "required to understand the time constraints governing habeas corpus . . . ." The respon-

[7] In his principal brief to this court, the petitioner also argues that the delay was due to his then pending sentence review application, as he was waiting to see if his sentence would be modified before filing a third habeas petition. The respondent argues that "this claim is unreviewable because the habeas court did not issue a ruling on it, and the petitioner never sought articulation of the record on either the claim itself or the respondent's written objection thereto."

On March 18, 2019, following the show cause hearing, the petitioner filed a "supplemental brief in support of good cause" in which he argued that the habeas court could "infer that the petitioner waited to file a new petition for a writ of habeas corpus . . . because of his pending sentence review application." The petitioner attached the sentence review decision, which was issued on January 23, 2018, to the brief. The respondent objected to the brief and the arguments therein and requested that the brief be stricken. The court did not rule on the objection and did not address the sentence review argument in its memorandum of decision. Given that the petitioner did not raise the argument during the show cause hearing and the court did not address it in its memorandum of decision, we agree with the respondent that the issue is not reviewable.

dent replies that the petitioner's arguments "cannot be reconciled with the *Kelsey* court's statement that good cause must be something outside the control of both the petitioner and habeas counsel" because "*both* the petitioner and [his habeas counsel] bear personal responsibility for the consequences of the withdrawal of the prior petition." (Emphasis in original.) We agree with the respondent.

As the respondent notes, the record does not establish that the petitioner or his counsel was unaware of § 52-470 and the time limits included therein.[8] Even if we were to assume without determining, however, that neither the petitioner nor his habeas counsel was aware of the time limits,[9] the petitioner still cannot demonstrate that the habeas court abused its discretion in determining that the erroneous advice the petitioner received did not establish good cause for the delay in filing the third petition. The first two *Kelsey* factors are particularly instructive: On the basis of the evidence presented at the show cause hearing, there are no external factors at play and the petitioner and his habeas counsel together exclusively bear responsibility for the delay in filing the petition.[10] See *Kelsey* v. *Commis-*

[8] The respondent also asserts that we should apply the principle that "everyone is presumed to know the law"; (internal quotation marks omitted) *State* v. *Legrand*, 129 Conn. App. 239, 271, 20 A.3d 52, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011). Because lack of knowledge alone does not establish good cause, we need not consider whether the presumption applies in this case. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444.

[9] The evidence at the show cause hearing established only that the petitioner was advised to withdraw his second petition and file a third petition after the expiration of at least sixty days. There was no evidence as to the petitioner's knowledge, or lack thereof, of the time limitations contained in § 52-470 and, similarly, no evidence regarding his habeas counsel's knowledge of § 52-470.

[10] The petitioner argues that his habeas counsel provided ineffective assistance and that such defective assistance, being the result of the delay, established good cause for the delay in filing. The petitioner has failed, however, to provide any binding or persuasive law to support this position.

sioner of Correction, supra, 343 Conn. 445 ("whether and to what extent the petitioner or his counsel bears any responsibility for that lack of knowledge" is relevant to good cause inquiry); see also *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591–92, 684 A.2d 1191 (1996) (neglect by party or party's attorney does not meet traditional definition of good cause), cert. denied, 240 Conn. 913, 691, A.2d 1079 (1997). It has not been established that "something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." *Kelsey* v. *Commissioner of Correction*, supra, 442.

In addition, the length of the delay further supports the habeas court's determination that the petitioner failed to demonstrate good cause for the delay. Even assuming, without determining, that it was reasonable for the petitioner to withdraw the second petition prior to his pending trial and to wait "at least [sixty] days" before filing another petition, he did not file his third petition until almost ten months had elapsed, and, further, he provides no explanation as to why he waited an additional eight months after his habeas counsel's suggested sixty day waiting period.[11]

Finally, the habeas court reasonably considered the fact that the petitioner made no claim that the delay was due to missing witnesses or newly discovered evidence and reasonably concluded that the petitioner's actions were an attempt to "manipulate or delay pro-

[11] The petitioner initially argued that "[i]t is irrelevant when the petitioner filed the instant habeas petition because, even as the habeas court acknowledged, the petitioner 'would have been beyond the two year window . . . .' " In *Kelsey*, however, our Supreme Court affirmed that the length of time between the filing deadline and the filing of the petition is relevant to the good cause inquiry. *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 438.

ceeding to trial."[12] Thus, we conclude that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing his third petition for a writ of habeas corpus.

II

The petitioner's second claim is that the court "improperly failed to recuse itself from deciding the respondent's good cause motion." We disagree.

The following additional procedural history is relevant to our resolution of this claim. Subsequent to the trial on the petitioner's first petition for a writ of habeas corpus, during which the petitioner testified as a witness, Judge Newson issued an oral decision denying the petition. In that ruling, Judge Newson made the following comments: "[F]rankly, to put it bluntly, the petitioner's testimony lacked even the slightest semblance of credibility as to anything that came out of his mouth. . . . [H]e lacked even the slightest semblance of credibility. I watched his demeanor and his action, and I'm not just talking about his words. I don't think [the petitioner] even believed himself . . . and that's the court's assessment of him and his demeanor while he was testifying here.

"So that it's clear for the record, I am not judging the words; I am judging the person I saw on the stand and whether or not I found him the least bit credible as to those allegations . . . ." In addition, Judge Newson commented that the petitioner's parents, who also testified at the habeas trial, similarly lacked credibility.

In the present case, prior to the show cause hearing, the petitioner filed a motion pursuant to Practice Book

[12] The petitioner does not claim that this conclusion was unfounded but, rather, asserts that "why the petitioner sought to withdraw his prior petition is irrelevant."

§§ 1-22[13] and 1-23[14] and rule 2.11 of the Code of Judicial Conduct to disqualify Judge Newson "from hearing any aspect of this case." The petitioner argued that, because Judge Newson had "remarked on multiple occasions" that the petitioner lacked credibility and because "[t]he petitioner's credibility, in the present case, will be critical to the outcome . . . [i]n order to maintain the fairness of these proceedings and ensure that the petitioner receives due process, the court must not place itself in the precarious position of opining on the credibility of the petitioner [whom] it once found 'lacked any semblance of credibility.' " In the motion, the petitioner conceded that "there is no Practice Book rule or statute that explicitly prohibits the court from presiding over the petitioner's case" and that there is "no evidence that the court is actually biased against him." (Emphasis omitted.) Instead, his position was that "presiding over the present case would, at the very least, present an appearance of impropriety that this court could easily avoid by assigning the matter to another judge for all future proceedings . . . ."

At the start of the show cause hearing, Judge Newson addressed the motion for disqualification. The petitioner argued that Judge Newson's previous credibility

[13] Practice Book § 1-22 (a) provides: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct or because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal. A judicial authority may not preside at the hearing of any motion attacking the validity or sufficiency of any warrant the judicial authority issued nor may the judicial authority sit in appellate review of a judgment or order originally rendered by such authority."

[14] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

determinations created the "appearance of impropriety," warranting disqualification. The respondent's attorney stated, "[w]e take no position."

Judge Newson then made the following oral ruling: "All right. I can, I can say this, I, I did read the, I did read the transcript. I can tell you in reading the transcript, I don't necessarily have any direct memory of the case or the proceedings. I will honestly say, notwithstanding the court's rather strong language, I think that language, as it was expressed in the opinion, was related to whatever the stories or the stories or testimony, for lack of a better word, that was related to the court in that matter.

"I don't know that I think I found, generally, that as a person [the petitioner] was not credible, but—and I think there's even mention of comments about, I think his parents testified—that watching their demeanor and other things that were in front of me at that time, I found that they lacked credibility. I also would note that, notwithstanding the strong language under those circumstances, that's a court's job in matters like this, which is to find whether or not persons are or not credible. And, I would imagine that if the fact that a court used strong language related to a matter as opposed to generally, were grounds for disqualification, there would be many.

"So I will, again, deny the request. Again, this is a substantially different matter, some seven years in the future. And, again, I can tell you—and I know, I know counsel's doing her job. At, at this point, I don't honestly have a direct memory of what even the facts and circumstances of that matter were. Although, I can tell you, it's not the—well, I'll just leave it at that."

On appeal, the petitioner asserts that "[a] reasonable person would have believed that the habeas court had a preconceived view that the petitioner was not credible

at the time he presided over the petitioner's show cause hearing, based on his repeated findings in the petitioner's prior habeas action that the petitioner 'lacked even the slightest semblance of credibility as to anything that came out of his mouth.' "[15] In reply, the respondent asserts that "the habeas court properly exercised its discretion in denying the motion for recusal because its comments on the petitioner's credibility were limited to the evidence presented during the first habeas trial, of which the habeas court had no direct recollection and which occurred seven years before the [show] cause hearing. Moreover, the comments would not have impacted the outcome of the instant proceeding, which did not depend on the court's assessment of the petitioner's credibility." We agree with the respondent.

"Appellate review of the trial court's denial of a defendant's motion for judicial disqualification is subject to the abuse of discretion standard. . . . That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.) *State* v. *Lane*, 206 Conn. App. 1, 8, 258 A.3d 1283, cert. denied, 338 Conn. 913, 259 A.3d 654 (2021); see also *Joyner* v. *Commissioner of Correction*, 55 Conn. App. 602, 609, 740 A.2d 424 (1999).

[15] We note that many of the arguments set forth in the petitioner's appellate brief assert the existence of actual bias. Because the petitioner specifically disclaimed any argument that Judge Newson was actually biased during the hearing before the habeas court, however, any argument that Judge Newson was actually biased against the petitioner is waived. See *State* v. *Andres C.*, 208 Conn. App. 825, 853–54, 266 A.3d 888 (2021) ("[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.)), cert. granted, 342 Conn. 901, 270 A.3d 97 (2022).

We begin our analysis with Practice Book § 1-22 (a), which provides in relevant part that "[a] judicial authority shall . . . be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[16]

"In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

"[O]pinions that judges may form as a result of what they learn in earlier proceedings in the same case rarely constitute the type of bias, or appearance of bias, that requires recusal. . . . To do so, an opinion must be so extreme as to display clear inability to render fair judgment. . . . In the absence of unusual circumstances, therefore, equating knowledge or opinions

[16] The rule provides a nonexhaustive list of examples of situations warranting disqualification. See Code of Judicial Conduct, Rule 2.11 (a).

acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal finds no support in law, ethics or sound policy." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Rizzo*, 303 Conn. 71, 121, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012); see *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 529, 911 A.2d 712 (2006) (plain error for judge, who had represented petitioner during criminal proceedings, to not recuse himself given that habeas petition over which he presided had initially alleged that "his own prior representation of the petitioner was so deficient that it deprived the petitioner of counsel in violation of the sixth amendment to the federal constitution" as reasonable person would question judge's impartiality).

As noted, the petitioner argues that Judge Newson's previous comments regarding the petitioner's testimony during his first habeas trial created the appearance of impropriety. After considering the record, we cannot conclude that Judge Newson abused his discretion in denying the petitioner's motion for disqualification. As Judge Newson noted in his oral ruling, the allegedly offending comments properly were made in the purview of his judicial role as it is squarely within a habeas judge's authority to make credibility determinations concerning witness testimony. See, e.g., *Chase* v. *Commissioner of Correction*, 210 Conn. App. 492, 500, 270 A.3d 199 ("[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony" (internal quotation marks omitted)), cert. denied, 343 Conn. 903, 272 A.3d 199 (2022). Judge Newson's comments reflect credibility determinations made with respect to the specific testimony given and the demeanor exhibited at the habeas trial, further demonstrating that the judge acted in accordance with his role rather than making

an unbounded determination that the petitioner is incapable of giving credible testimony. Furthermore, Judge Newson stated that he had no recollection of the prior proceeding, which occurred seven years earlier. See *State* v. *Webb*, 238 Conn. 389, 461, 680 A.2d 147 (1996) ("[t]he greater the length of time that has passed since the prior appearance, the less likely it is that the judge possesses any bias against the party"). Given these circumstances, it is clear that Judge Newson's previous credibility determinations would not cause a reasonable person to question the impartiality of the arbiter of the current proceeding nor were his comments "so extreme as to display a clear inability to render fair judgment." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 303 Conn. 121. As the respondent aptly suggested: "An objective observer, upon reviewing the transcript from the habeas court's decision in 2012, would not reasonably doubt the court's ability to assess the petitioner's credibility anew in an unrelated proceeding held seven years later."

Accordingly, we conclude that the petitioner has failed to demonstrate that his claims involve issues that are debatable among jurists of reason, a court could resolve the issues in a different manner, or the questions are adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

BRASS MILL CENTER, LLC *v.* SUBWAY REAL ESTATE CORP. ET AL.
(AC 44436)

Suarez, Clark and Sheldon, Js.

Syllabus

The plaintiff shopping mall sought indemnification from the defendant A Co., a security company it contracted with to provide security services to the mall property, including crime prevention. The plaintiff had incurred economic losses as a result of a separate wrongful death action brought against it by the administrator of the estate of a pedestrian who had been struck and killed while crossing the roadway surrounding the mall while on her way to work in the mall. The wrongful death action alleged that the plaintiff's negligence caused the collision by, inter alia, its design of the mall's parking lots and roads and its failure to implement various traffic calming measures. The plaintiff demanded defense and indemnification from A Co. in connection with the wrongful death action; A Co. denied the plaintiff's demand, explaining that A Co. was not responsible for the design of the roadway or the absence of traffic calming measures. The plaintiff filed a motion for summary judgment in the indemnification action, asserting that, inter alia, A Co. had a contractual duty to defend and indemnify the plaintiff in connection with the wrongful death action, and A Co. filed a cross motion for summary judgment. The trial court denied A Co.'s motion, granted the plaintiff's motion as to liability and awarded damages to the plaintiff. On A Co.'s appeal to this court, *held* that the trial court erred in granting the plaintiff's motion for summary judgment and denying A Co.'s motion for summary judgment, as A Co. was entitled to judgment in its favor as a matter of law: A Co.'s obligation to defend the plaintiff was not triggered by the wrongful death action, as the wrongful death action did not contain allegations of negligence or other conduct that even arguably fell within the scope of A Co.'s contractual responsibilities to provide security services, and the court erroneously conflated the allegations in the wrongful death action regarding traffic control with A Co.'s contractual obligations for crime prevention as the security contractor for the property; moreover, as A Co. did not have a duty to defend the plaintiff pursuant to the indemnification provision of the security contract, A Co. did not have a duty to indemnify the plaintiff.

Argued March 2—officially released August 9, 2022

Procedural History

Action for, inter alia, indemnification for economic losses allegedly incurred by the plaintiff, and for other

relief, brought to the Superior Court in the judicial district of Waterbury, where the action was withdrawn as against the named defendant et al.; thereafter, the court, *Roraback*, *J.*, denied in part the motion for summary judgment filed by the defendant AlliedBarton Security Services, LLC, and granted the plaintiff's motion for summary judgment as to liability; subsequently, after a hearing in damages, the court, *Roraback*, *J.*, rendered judgment for the plaintiff, from which the defendant AlliedBarton Security Services, LLC, appealed to this court. *Reversed*; *judgment directed.*

Ashley A. Noel, with whom was *Cassandra Pilczak*, for the appellant (defendant AlliedBarton Security Services, LLC).

Michael Smith, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant AlliedBarton Security Services, LLC,[1] appeals from the judgment rendered by the trial court in favor of the plaintiff, Brass Mill Center, LLC, granting summary judgment as to liability and awarding damages. The defendant argues that the trial court improperly concluded that it had a contractual duty (1) to defend the plaintiff in an underlying wrongful death action brought against the plaintiff and (2) to indemnify the plaintiff in that same wrongful death action, including for attorney's fees and costs that the plaintiff incurred in pursuing claims against third parties. We agree and, accordingly, reverse the judgment of the trial court.

[1] Subway Real Estate Corp. (Subway) and Foot Locker Retail, Inc. (Foot Locker), were also named as defendants in the present action. The plaintiff's claims for defense and indemnity against Subway and Foot Locker were eventually settled leaving AlliedBarton Security Services, LLC, as the sole defendant in this case. Accordingly, we refer to AlliedBarton Security Services, LLC, as the defendant in this opinion.

The following facts and procedural history are relevant to this appeal. The plaintiff, the owner of the Brass Mill Center & Commons shopping mall in Waterbury (mall), and the defendant, a security company, are parties to a security agreement, which sets forth the security services that the defendant is obligated to provide the plaintiff. The security agreement states that "[The defendant's] personnel assigned to the Property[2] shall be responsible for promoting a pleasant shopping atmosphere and crime prevention efforts through patrol of the Property; seeking out and providing appropriate customer service to patrons; reasonable inspection of the Property for safety hazards and enforcement of the Property's rules and regulations; appropriate response to incidents and emergencies; preliminary investigation and appropriate disposition of incidents; access control/physical security as appropriate during operating and non-operating hours; official reporting of activities, incidents, and inspection logs; and any special assignments and/or events related to the security/safety function of the Property as agreed upon by the parties." (Footnote added.)

The security agreement also contains an indemnification provision that provides in relevant part that "[the defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff] . . . from and against any claims, liabilities, losses, damages, actions, causes of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way . . . ."[3]

[2] The security agreement defines " 'Property' " as the "Brass Mill Center & Commons located at 495 Union Street, Waterbury, CT 06706."

[3] Section 8 (e) of the security agreement provides in its entirety: "[The defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff], GGP Limited Partnership and General Growth Properties, Inc. ('Indemnitees') and the agents, officers and employees of all of the Indemnitees from and against any claims, liabilities, losses, damages, actions, causes

At approximately 8:20 a.m. on December 21, 2012, Yaneli Nava Perez, who was a pedestrian crossing the travel lane of the mall on her way to work in the mall's food court, was struck by a vehicle driven by a seventeen year old unlicensed driver. The weather conditions at the time of the accident were poor, with heavy to torrential rains and high wind gusts. The windows of the vehicle were obscured by "fog," preventing the young

of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way, (B) [the defendant's] failure to purchase and maintain all insurance required by this Agreement and (C) negligence or willful misconduct of [the defendant] or its agents or employees in any operation of a Security Vehicle under this Agreement. It is intended that all claims and demands, legal proceedings and lawsuits in which any party to this Agreement or additional insured under this Agreement is named or described as a defendant which alleges or describes any claim in which [the defendant] or a security officer has done or has failed to do any act or thing required pursuant to this Agreement or failed to provide the Services at the Property shall be a claim tendered to, accepted by or defended by [the defendant]. [The plaintiff] shall within thirty (30) days after notice of any incident, potential claim or suit, or service of legal process, provide [the defendant], at AlliedBarton Security Services LLC, Eight Tower Bridge, 161 Washington Street, Suite 600, Conshohocken, PA 19428 to the attention of Michael A. Meehan, Vice President/Deputy General Counsel with written notice that an action has been brought and shall require [the defendant], at its own expense, to employ such attorneys as [the defendant] may see fit to employ, and as reasonably approved by [the plaintiff's] Director of Risk Management, to defend such claim or action on behalf of the Indemnitees. If a tender of defense and/or indemnity is refused by [the defendant] or its insurer, or if a defense is provided under any reservation of rights and [the plaintiff] does not consent to such refusal or reservation of rights, [the defendant] shall pay liquidated damages in the sum of $2,000.00 to [the plaintiff] for the amount of the added internal expense incurred by the Indemnitees in dealing with the claim or action for which tender was refused or rights reserved. This liquidated damages provision shall be in addition to the Indemnitees' actual costs of defense, investigation, litigation, litigation management expenses for in-house counsel, costs of trial and/or settlement of the claim which are incurred by the Indemnitees which shall be billed to [the defendant] as incurred until the tender is accepted without reservation. The provisions of this paragraph shall survive the termination or expiration of this Agreement and shall not be construed to provide for any indemnification which would, as a result thereof, make the provisions of this paragraph void or to reduce or eliminate any other indemnification or right which the indemnified parties have be law."

driver from seeing Perez at the time of the collision. After the Waterbury police and emergency responders arrived at the scene, Perez was transported by ambulance to St. Mary's Hospital for emergency treatment, where she later succumbed to her injuries.

In 2014, Gabriel Avendano, the administrator of the estate of Yaneli Nava Perez, filed a four count complaint (Avendano complaint) against the plaintiff, General Growth Services, Inc., General Growth Management, Inc., and Anthony Guerriero (Avendano action).[4] As we discuss in greater detail later in this opinion, the Avendano complaint alleged eight separate allegations of negligence against the plaintiff, including, inter alia, that the plaintiff failed to install or use any traffic calming measures on the roadway within the mall premises that ran parallel to Union Street and designed the premises in such a way so as to allow motorists to easily travel at unsafe rates of speed through areas routinely filled with pedestrians. The Avendano complaint did not name the defendant as a defendant.

On October 5, 2015, pursuant to the security agreement, the plaintiff demanded defense and indemnification from the defendant with respect to the Avendano action. By letter dated October 23, 2015, the defendant denied the plaintiff's tender, explaining, inter alia, that the Avendano complaint did not allege that the plaintiff "failed to do something that was required of [the defendant] under the [security] [a]greement. [The defendant] was clearly not responsible for the design of the roadway or the absence of traffic calming measures."

On August 25, 2016, the plaintiff filed the present action against the defendant, Subway Real Estate Corp.

[4] The complaint alleged that the plaintiff, General Growth Services, Inc., and General Growth Management, Inc., were owners and operators of the mall and its parking lots and internal roadways and that Guerriero was the manager of the mall on the day of the accident.

(Subway), and Foot Locker Retail, Inc. (Foot Locker). The complaint asserts two causes of action against the defendant: count VI alleges that the defendant had a contractual duty to defend and indemnify the plaintiff in connection with the Avendano complaint, and count VII alleges a common-law indemnification claim.

On October 28, 2019, the parties filed cross motions for summary judgment. In a memorandum of decision dated June 11, 2020, the court, *Roraback*, *J.*, granted the plaintiff's motion as to liability on the contractual indemnification claim but denied its motion with respect to the common-law indemnification claim. In so doing, the court concluded, as a matter of law, that the Avendano complaint could "fairly [be] read to allege negligent acts or omissions for which [the defendant] was responsible under its contractual duties to inspect, monitor and secure the property . . . ." Accordingly, it held that the defendant had a duty to defend the plaintiff. The court also held that the defendant had a duty to indemnify the plaintiff.[5] The court also denied the defendant's motion for summary judgment in its entirety.

On July 1, 2020, the defendant filed a motion to reargue/reconsider the court's June 11, 2020 decision arguing, inter alia, that, because the court had denied the plaintiff's motion for summary judgment with respect to the common-law indemnification claim on the basis that the plaintiff was unable to satisfy two of

[5] In the defendant's motion for summary judgment, the defendant also argued that it was entitled to summary judgment because the plaintiff failed to provide the defendant with the requisite thirty day written notice set forth in the indemnification provision of the security agreement. The court rejected that argument, stating, inter alia, that the defendant failed "to plead lack of proper notice as a special defense," which "precludes it from prevailing on this ground in the context of either winning its motion for summary judgment or defeating [the plaintiff's] motion for summary judgment." The defendant does not challenge this portion of the court's judgment on appeal.

the four elements required to prevail on its claim, the court should have granted the defendant's motion for summary judgment with respect to that claim. On July 17, 2020, the court issued a decision granting the defendant's motion for summary judgment as to the plaintiff's common-law indemnification claim.[6]

On September 9, 2020, the court held a hearing in damages. In a memorandum of decision dated December 3, 2020, the trial court awarded the plaintiff damages totaling $426,807.97,[7] plus offer of compromise interest on that amount at a rate of 8 percent per annum from May 24, 2019, until the date that judgment entered, and postjudgment interest at a rate of 5 percent per annum from the date that judgment entered until the date the judgment is satisfied. This appeal followed.

We begin by setting forth our standard of review. "Summary judgment rulings present questions of law; accordingly, [o]ur review of the . . . decision to grant [a] . . . motion for summary judgment is plenary." (Internal quotation marks omitted.) *Farrell* v. *Twenty-First Century Ins. Co.*, 301 Conn. 657, 661, 21 A.3d 816 (2011); see also Practice Book § 17-49. In addition, the interpretation of definitive contract language presents a question of law, over which our review also is plenary. See, e.g., *CCT Communications, Inc.* v. *Zone Telecom*,

[6] The plaintiff has not appealed from that decision.

[7] The court found that the plaintiff paid the sum of $500,000 to settle the Avendano action, and received contributions from three third parties in the aggregate amount of $255,000 toward the settlement. Accordingly, the court found that the plaintiff's damages were the unpaid portion of the Avenado settlement—$245,000. The court also found that the legal fees expended by the plaintiff were reasonable, including the legal fees expended by the plaintiff in obtaining contributions from Subway, Foot Locker, and the plaintiff's prior counsel, reasoning that the contributions the plaintiff received inured to the benefit of the defendant. In total, the court awarded legal fees and expenses in the amount of $179,807.97. Last, the court held that the plaintiff was entitled to $2000 in liquidated damages pursuant to the security agreement.

Inc., 327 Conn. 114, 133, 172 A.3d 1228 (2017); see also *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 154, 61 A.3d 485 (2013).

We must also determine the appropriate standard of review and analysis to employ when deciding whether one sophisticated business party to a contract has a contractual duty to defend a claim brought against another sophisticated business party to that contract. The duty to defend most commonly arises in the context of a contract of insurance; see, e.g., *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687, 846 A.2d 849 (2004); and our courts have made clear that "whether an insurer has a duty to defend its insured is purely a question of law . . . ." (Internal quotation marks omitted.) *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 866, 261 A.3d 825 (2021). Our appellate courts have not previously addressed whether our standard of review and analysis regarding a duty to defend in the context of insurance contracts should apply to contracts between sophisticated business entities that contain similar provisions. See, e.g., *Henderson* v. *Bismark Construction Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-17-6062488-S (July 10, 2019) (68 Conn. L. Rptr. 852, 853) ("[a]lthough research did not reveal any appellate authority, and the parties have not provided any appellate authority, a few Superior Court decisions have discussed whether the law on an insurer owing a duty to defend applies to the analysis of whether one of two commercial parties owes a duty to defend to the other based on a contract for indemnity"). In reviewing our case law, we discern no reason to apply a different analysis in such cases.[8] Accordingly,

[8] We note that numerous Superior Court decisions also have held that that our jurisprudence regarding a duty to defend in the context of insurance contracts applies equally to contracts between sophisticated business parties that contain similar defense and indemnification provisions. See, e.g., *Henderson* v. *Bismark Construction Co.*, supra, 68 Conn. L. Rptr. 853–54 (collecting cases); *Gemma Power Systems, LLC* v. *Smedley Co.*, Superior Court, judicial district of Hartford, Docket No. CV-15-6059165 (July 26, 2017) (same).

we hold that "[t]he question of whether [one sophisticated business party] has a [contractual] duty to defend [another sophisticated business party] is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the [parties' agreement]." (Internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 154.

With this standard of review in mind, we next turn to the legal principles that inform our analysis. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 498, 746 A.2d 1277 (2000).

Moreover, as noted, we conclude that a duty to defend in the context of insurance contracts applies equally to contracts between sophisticated business parties that contain similar defense and indemnification provisions. To that end, it is well settled that an insurer's duty to defend "is determined by reference to the allegations

contained in the [underlying] complaint." (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, supra, 268 Conn. 687. The duty to defend "does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 712, 826 A.2d 107 (2003). "If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). However, an insurer "has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy." (Emphasis in original.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 156. "[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) Id.

"In contrast to the duty to defend, the duty to indemnify is narrower: while the duty to defend depends only on the allegations made against the insured, the duty to indemnify depends upon the facts established at trial and the theory under which judgment is actually entered in the case." (Internal quotation marks omitted.) *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 48–49, 801 A.2d 752 (2002). "[W]here there is no duty to defend, there is no duty to indemnify, given the fact that the duty to defend is broader than the duty to indemnify." *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 382, 773 A.2d 906 (2001).

With these principles in mind, we turn our attention to the language of the indemnification provision in the

parties' security agreement. By its terms, "[The defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff], GGP Limited Partnership and General Growth Properties, Inc. ('Indemnitees') and the agents, officers and employees of all of the Indemnitees from and against any claims, liabilities, losses, damages, actions, causes of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way . . . ." It further provides that "[i]t is intended that all claims and demands, legal proceedings and lawsuits in which any party to this Agreement or additional insured under this Agreement is named or described as a defendant which alleges or describes any claim in which [the defendant] or a security officer has done or has failed to do any act or thing required pursuant to this Agreement or failed to provide the Services at the Property shall be a claim tendered to, accepted by or defended by [the defendant]." See footnote 3 of this opinion.

As the language of the indemnification provision makes clear, the defendant agreed to defend the plaintiff against claims brought against the plaintiff alleging conduct falling within the scope of the defendant's obligations under the security agreement. With respect to the scope of the defendant's obligations under the contract, section 3 of the security agreement sets forth the "On-Site Contracted Services." In particular, subsection B of section 3, titled "Security Functions," provides: "[The defendant's] personnel assigned to the Property shall be responsible for promoting a pleasant shopping atmosphere and crime prevention efforts through patrol of the Property; seeking out and providing appropriate customer service to patrons; reasonable inspection of the Property for safety hazards and enforcement of the

Property's rule and regulations; appropriate response to incidents and emergencies; preliminary investigation and appropriate disposition of incidents; access control/physical security as appropriate during operating and non-operating hours; official reporting of activities, incident, and inspection logs; and any special assignments and/or events related to the security/safety function of the Property as agreed upon by the parties."

Additionally, section 3 of the security agreement addresses "Duties/Responsibilities." Specifically, subsection H of section 3 of the security agreement states that the defendant "shall provide a comprehensive security policy and procedures manual for the Property ('Manual'). The Manual shall consist of [the defendant's] mall security guidelines and site-specific 'security orders'. Site-specific 'security orders' shall include, but not be limited to, mall organizational structure, radio call signs and procedures, code of conduct, tenant rules, commonly encountered state laws, banning guideline, shift procedures to include opening and closing procedures, and site specific inspections. The Property Manager[9] shall have the right to approve any site-specific 'security orders' related to the operation of the Property. [The defendant's] Security Staff shall be familiar with, understand and adhere to the requirements of The Manual at all times. The Manual shall be developed within thirty (30) days following the Effective Date and shall be updated during the Term at the request of [the defendant], the Property Manager, or the GGP Corporate Security Director." (Footnote added.)

At this point, we must determine whether the Avendano complaint triggered the defendant's duty to defend the plaintiff under the terms of the security agreement.

[9] "Property Manager" is defined as "[the plaintiff's] property manager."

The defendant argues that the allegations in the Avendano complaint did not fall within its contractual obligations under the security agreement because the complaint did not contain any allegations of negligence, or other conduct, that even arguably falls within the scope of the defendant's contractual responsibilities under the security agreement. The plaintiff disagrees. In its view, the security agreement "is notably broad and certainly encompasses the mall parking lot/roadway safety claims asserted in the [Avendano complaint]." On the basis of our review of the security agreement and the allegations in the Avendano complaint, we conclude that the defendant's obligation to defend the plaintiff was not triggered by the Avendano complaint.

The Avendano complaint alleged that the plaintiff negligently caused the subject collision because it "failed to install or use any traffic calming measure on the roadway within the mall premises that ran parallel to Union Street"; "failed to install or use sufficient traffic calming measures on the roadway within the mall premises that ran parallel to Union Street"; "knew that numerous accidents occurred on the roadway within the mall that ran parallel to Union Street but failed to make any measures to slow traffic down"; "failed to properly inspect the traffic, accidents, parking areas and internal roadways"; "designed the premises in such a way so as [to] allow motorists to easily travel at unsafe rates of speed through areas routinely filled with pedestrians"; "knew or should have known that motorists sped through the mall property, yet took no steps to slow them down"; "ignored the need for traffic calming measures at the Brass Mill Center for economic reasons"; and/or "knew that other mall properties within the General Growth Properties company installed and used traffic calming measures to protect pedestrians, yet failed to implement any such procedures at the Brass Mill Center."

It is clear from these allegations that the theory of liability against the plaintiff was premised on the layout and design of the mall's internal roadways and parking lots and the plaintiff's alleged failure to monitor and implement traffic calming measures on the property to prevent motor vehicles from operating at excessive rates of speed. We have found nothing in the security agreement or the procedures manual that suggests that the defendant had any obligation to monitor or control traffic, to design or redesign the layout of the parking lots or roads, or otherwise to implement traffic calming measures.[10]

Upon our review of the Avendano complaint and the security agreement, we agree with the defendant that the court erroneously conflated the allegations of the Avendano complaint regarding traffic control and design with the defendant's responsibility for crime prevention as the security contractor for the property. The

[10] To the extent there is any ambiguity with respect to the defendant's obligations under the security agreement, undisputed evidence in the record resolves that ambiguity in favor of the defendant. The plaintiff's own representative, Guerriero, the general manager of the mall, testified at a deposition that traffic calming measures, including implementing signage on the mall's roadways to slow vehicular traffic down, fell within the plaintiff's purview and was not the defendant's contractual obligation. Similarly, Steven Crumrine, the corporate security director for General Growth Properties, Inc., who oversees the defendant's compliance with the security agreement, testified at a deposition that the defendant was not responsible for installation, implementation, and/or design of the roadway within the mall property and testified that there was no language within the security agreement that required the defendant to employ, install, and/or use traffic calming measures or slow down traffic on the roadway. When asked whether there was an expectation for a security officer of the defendant to attempt to stop a speeding motorist if the officer observed one, Crumrine testified, "No." He indicated that "[t]hey're not trained nor do they have the legal authority to do that. Their own policies and procedures manual would prohibit them from pulling over a vehicle, and we wouldn't expect them to do that either because it presents an elevated risk. It's not what they're trained to do." Tawana Perry, the defendant's national account portfolio manager for General Growth Properties, Inc., similarly confirmed in her deposition testimony that the defendant was not responsible for traffic calming measures.

defendant's obligations under the security agreement to respond to "incidents and emergencies"; to notify law enforcement; to make "reasonable inspection of the Property for safety hazards"; to prepare incident reports and inspection logs after those occurrences; and to "track statistical trending for the Property" do not include or impose upon the defendant any obligation to control the traffic on the property, install traffic calming measures, or design or redesign the mall's parking lots or thoroughfares.

Although the plaintiff points to the allegation in the Avendano complaint that the plaintiff "failed to properly inspect the traffic, accidents, parking areas and internal roadways" as the basis for its contention that the Avendano complaint triggered the defendant's duty to defend, we are not persuaded that this allegation falls within the defendant's obligation under the security agreement to make "reasonable inspection of the Property for safety hazards." Rather, that allegation, read within the context of the entire Avendano complaint, clearly pertains to the plaintiff's alleged failure to properly design the mall's parking lots and roads and implement traffic calming measures—obligations not coming within the defendant's contractual obligations. Indeed, it is difficult to conjure a contrary interpretation in light of the nature of the claims made in the Avendano complaint. We decline to "predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 91, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019). As such, we cannot conclude that the Avendano "complaint *reasonably* alleges an injury that is covered by the [indemnification provision]." (Emphasis in original; internal quotation marks omitted.) *Kling* v. *Hartford*

Casualty Ins. Co., 211 Conn. App. 708, 714, 273 A.3d 717, cert. denied, 343 Conn. 926, 275 A.3d 627 (2022).

Because we conclude that, as a matter of law, the defendant did not have a duty to defend the plaintiff pursuant to the indemnification provision of the security agreement, it inexorably follows that the defendant did not have a duty to indemnify the plaintiff either. See, e.g., *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 256 Conn. 382 ("where there is no duty to defend, there is no duty to indemnify, given the fact that the duty to defend is broader than the duty to indemnify"). We therefore conclude that the trial court improperly granted summary judgment in favor of the plaintiff. In light of the absence of any genuine issue of material fact as well as our conclusion that the defendant did not owe the plaintiff a duty to defend or indemnify, the defendant is entitled to judgment in its favor as a matter of law.

The judgment is reversed and the case is remanded with direction to deny the plaintiff's motion for summary judgment and to grant the defendant's motion for summary judgment and to render judgment thereon for the defendant.

In this opinion the other judges concurred.

CHARLES D. GIANETTI *v.* ALAN NEIGHER
(AC 44320)

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

Syllabus

The plaintiff physician sought to recover damages from the defendant attorney for his alleged legal malpractice in connection with his representation of the plaintiff in a prior breach of contract action against a hospital. During the pendency of the breach of contract action, the trial court denied the plaintiff's motion for leave to amend his complaint to add a count asserting a violation of the Connecticut Unfair Trade Practices

Act (CUTPA) (§ 42-110a et seq.). After the court found in favor of the plaintiff and awarded him damages on his breach of contract claims, the defendant commenced a separate action against the hospital, alleging a violation of CUTPA. The trial court in that action rendered judgment for the hospital, concluding that the CUTPA claim was barred by the applicable statute of limitations (§ 42-110g (f)). The plaintiff thereafter brought this legal malpractice action, claiming that the defendant had committed professional negligence by failing to timely bring the CUTPA claim and a claim of tortious interference with business expectancies against the hospital. Pursuant to the applicable rule of practice (§ 13-4), the plaintiff disclosed an attorney, S, as an expert witness who would testify at trial. The plaintiff did not disclose S's opinions at that time. After the trial court extended the trial date and discovery deadlines several times, the defendant filed motions to preclude S from testifying at trial and for summary judgment. The defendant claimed that the plaintiff's expert witness disclosure was not in conformance with the requirements of Practice Book § 13-4 and that summary judgment was required because, in the absence of expert testimony, the plaintiff could not prevail on his legal malpractice claims. The court again continued the trial date and extended the plaintiff's deadline for the disclosure of expert witnesses. Two weeks after the court-ordered deadline for the disclosure of expert witnesses, the plaintiff again disclosed that S would be the expert he planned to call to testify at trial. The plaintiff disclosed that S would testify that the defendant had breached the standard of care he owed to the plaintiff in the prior action and that the breach caused the plaintiff to sustain damages. The defendant thereafter deposed S, who testified in his deposition, inter alia, that, although he had received sixteen boxes of materials from the defendant's representation of the plaintiff in the prior action, he was not authorized to read that material, he would not read it until he received authorization to do so and that the plaintiff's counsel had instructed him not to review the documents or spend much time preparing for the deposition. S further testified that the plaintiff's counsel had told him that he could opine as to the elements of legal malpractice in light of certain facts that S could assume the plaintiff hoped to prove at trial. S also testified that he had not read the fact finder's decision in the prior action or spoken to the expert witnesses who testified in that action. The defendant again filed motions to preclude S from testifying at trial as an expert witness and for summary judgment. The trial court granted both motions and rendered judgment for the defendant, concluding, inter alia, that the plaintiff's disclosure did not comply with the requirements of § 13-4 in that it failed to set forth an expert opinion concerning causation and damages as well as the factual bases for S's opinions. On the plaintiff's appeal to this court, *held*:

1. This court could not conclude that the trial court abused its discretion by precluding S from testifying at trial and determining that the sanction

of preclusion was proportional to the plaintiff's noncompliance with the disclosure requirements of Practice Book § 13-4: the plaintiff failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, he did not supplement his disclosure of S to add such opinions, he failed to provide the substance of the grounds for each of the disclosed opinions, and he abused the discovery process by engaging in gamesmanship that prevented S from learning the pertinent facts of the prior action, thereby thwarting the defendant's ability to ascertain what S likely would opine at trial; moreover, S admitted that he had done limited legal research and lacked knowledge about the prior action, and the affidavit he submitted in opposition to the defendant's summary judgment motion showed that S reviewed only limited and selective materials from the prior action and that his opinions were untethered to facts in the record, as he admitted that they were based on hypothetical facts and facts that he expected to be brought out at trial; furthermore, the court reasonably could have concluded that the plaintiff's noncompliance and discovery abuse could not be addressed by a less severe sanction or combination of sanctions, as the trial date had been continued eight times, the plaintiff had ample opportunity to disclose a prepared, informed expert or to ensure that S was apprised of the pertinent facts, and a less severe sanction or combination of sanctions would have the practical effect of rewarding the plaintiff's pattern of game-playing, as S did not review the file during the two months between the two days of his deposition and another continuance to allow him more time to review the file would require the defendant to conduct additional discovery.

2. The plaintiff could not prevail on his claim that the trial court improperly granted the defendant's motion for summary judgment; summary judgment was required because, in the absence of expert testimony, the plaintiff could not prevail on his legal malpractice claims, as he could not establish the applicable standard of care that the defendant owed to the plaintiff and whether the defendant breached that standard of care by not initiating CUTPA and tortious interference with business expectancies claims against the hospital in the prior action, and, thus, contrary to the plaintiff's contention, there was no genuine issue of material fact as to causation and damages.

Argued March 3—officially released August 9, 2022

Procedural History

Action to recover damages for the defendant's alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich II*, judge trial referee, granted the defendant's motions to

preclude certain evidence and for summary judgment and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, with whom, on the brief, was *Anthony J. Beale*, for the appellant (plaintiff).

Robert C. E. Laney, with whom, on the brief, was *Ryan T. Daly*, for the appellee (defendant).

Opinion

PRESCOTT, J. This appeal arises out of a legal malpractice action brought by the plaintiff, Charles D. Gianetti, against the defendant, Alan Neigher, an attorney who represented the plaintiff in a prior civil action (prior action) against Norwalk Hospital (hospital). The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant. On appeal, the plaintiff claims that the court improperly granted the defendant's motion to preclude the testimony of the plaintiff's expert witness, Attorney Bruce H. Stanger, because (1) the sanction of precluding the testimony was not proportional to the plaintiff's noncompliance with the expert disclosure requirements set forth in Practice Book § 13-4,[1] which the plaintiff contends

[1] Practice Book § 13-4, titled "Experts," provides in relevant part: "(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial . . . .

"(b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition. In addition, the disclosure shall include the following information:

"(1) . . . [T]he field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; [and] the substance of the grounds for each such expert opinion . . . .

"(3) . . . [T]he party disclosing an expert witness shall, upon the request of an opposing party, produce to all other parties all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case within fourteen days prior to that expert's deposition . . . .

"(c) (1) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness disclosed pursuant to subsection (b) of this section . . . .

could have been adequately remedied by a less severe sanction, and (2) in so sanctioning the plaintiff, the court improperly determined that the expert's opinion was not supported by a sufficient factual basis.[2] The plaintiff additionally claims that the court improperly rendered summary judgment because (1) the court failed to consider the testimony of his expert witness, and (2) even if the court properly precluded the testimony of his expert witness, a genuine issue of material fact nonetheless existed as to the legal malpractice elements of causation and damages.[3] We affirm the judgment of the court.

The following facts and procedural history, both in the present legal malpractice action and arising out of

"(h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions. . . ."

[2] The plaintiff also argues that the court improperly determined that Stanger was not qualified to offer an expert opinion as to the elements of legal malpractice or the likelihood of success of a claim under the Connecticut Unfair Trade Practices Act; General Statutes § 42-110a et seq.; or a tortious interference with business expectancies claim had the plaintiff brought either claim against the hospital in the prior action. As we note later in this opinion; see footnote 15 of this opinion; it is unclear whether the court, in its memorandum of decision, conflated the requirement that an expert witness be qualified to render an expert opinion with the requirement that there be a factual basis for the opinion; see Conn. Code Evid. §§ 7-2 and 7-4; *Weaver* v. *McKnight*, 313 Conn. 393, 406, 97 A.3d 920 (2014); or, instead, whether the court independently determined that Stanger was not qualified to render an expert opinion. Nonetheless, because we conclude that the court properly precluded Stanger's testimony on other grounds, we need not consider whether the court improperly concluded that Stanger was unqualified to offer expert testimony.

[3] "In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) *causation*; and (4) *damages*." (Emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012).

the defendant's representation of the plaintiff in the prior action, are relevant to our resolution of this appeal. "The plaintiff [was] a physician who specialize[d] in the field of plastic and reconstructive surgery. In 1974, the plaintiff was granted provisional clinical privileges as a member of the . . . medical staff [of the hospital]. In 1976, the plaintiff was granted full clinical privileges as an assistant attending staff physician [for the hospital]. The plaintiff's privileges were renewed on an annual basis through 1983. . . .

"In 1983, the plaintiff applied for the renewal of privileges for 1984. On the basis of the recommendations of the hospital's department of surgery, section of plastic and reconstructive surgery and credentials committee, the medical staff of the hospital declined to renew the plaintiff's privileges for 1984. The hospital's board of trustees subsequently ratified the decision of the medical staff. . . .

"In response to the [hospital's decision not to renew his] privileges [for 1984], the plaintiff [initiated] the [prior] action against the hospital[4] in December, 1983 . . . ." (Footnote added; footnote omitted.) *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 547–48, 833 A.2d 891 (2003). The defendant represented the plaintiff in the prior action. In his complaint, the plaintiff alleged breach of contract and antitrust violations. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 52, 557 A.2d 1249 (1989). The matter thereafter was assigned to an attorney trial referee. See *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 548.

On March 11, 1987; see *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 52; "[the] attorney trial referee . . .

[4] The plaintiff additionally named as defendants in the prior action the president of the hospital, certain hospital administrators, and certain hospital physicians. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 52 and n.1, 557 A.2d 1249 (1989).

concluded in [a] report that . . . the hospital, through its employees and agents, had breached [its] contract [with the plaintiff] by failing to follow the procedural requirements of its bylaws in declining to renew the plaintiff's privileges." *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 548. On July 18, 1993, the trial court accepted the attorney trial referee's report; see *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 760, 43 A.3d 567 (2012); and "rendered [an interlocutory] judgment in favor of the plaintiff on [his breach of contract claim as to] the issue of liability."[5] (Internal quotation marks omitted.) Id.; see also *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 549. The court subsequently conducted a hearing to determine the appropriate remedy and, on September 9, 1999, awarded the plaintiff nominal damages. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 761.

The plaintiff appealed from the court's award of nominal damages and, after this court; see *Gianetti* v. *Norwalk Hospital*, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003); and our Supreme Court; see *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 544; decided the appeal, the matter was remanded to the trial court. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 763. On remand, the court

[5] Between March 11, 1987, the date of the release of the attorney trial referee's report, and July 18, 1993, the date on which the court accepted the attorney trial referee's report, the parties filed a joint motion for reservation of legal issues, pursuant to General Statutes § 52-235, arising out of certain issues raised in the attorney trial referee's report. *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 53 and n.2. In the motion, the parties sought advice from this court as to certain questions of law. Id., 53 n.2. Our Supreme Court "transferred [the matter] to itself on April 14, 1988"; id.; and, on April 25, 1989, released a decision in which it resolved the legal questions presented by the parties. See id., 66–67. The matter subsequently was returned to the trial court. See *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-84-0214340-S (September 9, 1999), rev'd on other grounds, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003).

held a hearing in damages and, in a memorandum of decision dated April 15, 2009, awarded the plaintiff $258,610 plus costs on the breach of contract count.[6] See id.

In August, 1996, during the pendency of the prior action and before the court had awarded him damages for the hospital's breach of contract, the plaintiff sought leave to amend his complaint to add an additional count asserting a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. See *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-84-0214340-S (September 9, 1999), rev'd on other grounds, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003). The court, *Rush*, *J.*, denied the plaintiff's motion for leave to amend the complaint. See id. Subsequently, the defendant commenced, on the plaintiff's behalf, a separate action against the hospital, alleging a violation of CUTPA. On April 9, 2002, the court, *Sheedy*, *J.*, granted the hospital's motion for summary judgment as to the plaintiff's CUTPA claim; see *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-98-0354312-S (April 9, 2002) (31 Conn. L. Rptr. 676, 678); and concluded that the claim was time barred by the applicable three year statute of limitations. See General Statutes § 42-110g (f).

On May 14, 2015, the plaintiff initiated the present legal malpractice action (present action) against the defendant in connection with the defendant's representation of the plaintiff in the prior action. In his revised, operative complaint, dated February 27, 2017, the plaintiff alleged two counts of legal malpractice,[7] one count

[6] In its decision released on May 15, 2012, our Supreme Court affirmed this damages award. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 819.

[7] In his answer, the defendant raised one special defense—that the plaintiff's claims of legal malpractice were time barred by the applicable three year statute of limitations. See General Statutes § 52-577. On January 8,

of violating CUTPA, one count of breach of fiduciary duty, and one count of breach of contract. With respect to the legal malpractice counts, the plaintiff contended that, despite his having prevailed on the breach of contract count against the hospital in the prior action and having recovered $258,610 plus costs on that count; see *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 763; the defendant nonetheless committed professional negligence by failing to timely bring against the hospital claims of violation of CUTPA and tortious interference with business expectancies in the prior action.

The court, *Heller*, *J.*, entered a scheduling order on October 15, 2015, which required the plaintiff to disclose any expert witnesses he anticipated calling to testify at trial by April 1, 2016, and scheduled the trial to commence on April 25, 2017. On July 12, 2016, the court granted the defendant's motion to amend the court's scheduling order and, accordingly, modified the plaintiff's deadline to disclose any expert witnesses he anticipated calling to testify at trial to August 8, 2016.

On November 1, 2016, the defendant filed a motion for nonsuit, arguing that the plaintiff had failed to respond sufficiently to interrogatories—including an interrogatory in which the defendant requested that the plaintiff identify the expert witnesses he anticipated calling to testify at trial—and requests for production that the defendant had served on the plaintiff on July 6, 2015.

2018, and after the case had been scheduled for trial, the defendant moved for summary judgment, arguing that the plaintiff's claims of legal malpractice were time barred. The court denied the defendant's motion for summary judgment on June 12, 2018, on the procedural basis that the applicable scheduling order required that motions for summary judgment be filed no later than September 30, 2016, and the defendant had not filed with the court a motion for permission to file his late motion for summary judgment, despite the fact that the case already had been assigned for trial. See Practice Book § 17-44 ("[i]f no scheduling order exists but the case has been assigned for trial, a party must move for permission of the judicial authority to file a motion for summary judgment").

The court, *Jacobs*, *J.*, denied the defendant's motion without prejudice and ordered "[t]he plaintiff . . . to comply with [the defendant's] interrogatories . . . and requests [for] production . . . by" December 27, 2016. On January 25, 2017, the defendant moved for a continuance of the trial date, which the court, *Mintz*, *J.*, granted on February 1, 2017. The trial date was continued to November 28, 2017.

The plaintiff responded to the defendant's interrogatories on March 8, 2017. In his response, the plaintiff for the first time named Stanger as an expert witness he planned to call to testify at trial. The plaintiff, however, merely stated the following in his response: "I expect . . . Stanger . . . will testify as an expert witness at the trial in this matter"; the "[s]ubject matter [of Stanger's testimony] [would] be [the] defendant's [alleged] professional negligence and legal malpractice"; that "[s]uch facts and opinions [would] be supplemented as required after review of [the plaintiff's] revised complaint and [after] discovery"; and "[s]uch grounds for each opinion [would] be supplemented as required after review of [the plaintiff's] revised complaint and [after] discovery." The plaintiff promised the defendant that he would supplement his response by disclosing Stanger's opinions at a later date. The plaintiff, however, did not supplement this response.

On April 10, 2017, the defendant moved to strike all counts of the plaintiff's complaint, including the legal malpractice counts. On October 23, 2017, the court, *Jacobs*, *J.*, granted the defendant's motion to strike the plaintiff's CUTPA, breach of fiduciary duty, and breach of contract counts but denied the defendant's motion as to the legal malpractice counts. On October 26, 2017, the defendant moved for a continuance of the trial date from November 28, 2017, to July 16, 2018. On October 31, 2017, the court granted the motion and extended the trial date to July 17, 2018.

On January 3, 2018, the defendant filed a motion for judgment as to the CUTPA, breach of fiduciary duty, and breach of contract counts, contending that the plaintiff had failed to file a new pleading within fifteen days of the court's decision granting the defendant's motion to strike those counts. See Practice Book § 10-44. The court granted the defendant's motion on January 22, 2018.

On July 2, 2018, the defendant filed a motion to preclude the plaintiff from introducing expert testimony at trial as to the remaining malpractice counts. The defendant contended that the plaintiff had failed to disclose the expert witnesses that he planned to call to testify at trial by August 8, 2016, as required by the amended scheduling order. The defendant further argued that, although the plaintiff had identified Stanger in his March 8, 2017 response to the defendant's interrogatories, the plaintiff nonetheless had failed to satisfy the requirements of Practice Book § 13-4.[8] On or about July 12, 2018, less than one week before trial was scheduled to begin, the plaintiff moved for a continuance of the trial date and filed a case flow request seeking the same. The court, *Genuario*, *J.*, granted the plaintiff's case flow request, stating that the new trial schedule would be determined soon thereafter at a status conference. Subsequently, the trial was continued to February 26, 2019, and, in a joint motion to modify the scheduling order, the parties requested that a new deadline of September 7, 2018, be imposed for the plaintiff to disclose

[8] The defendant specifically argued that the plaintiff had failed to satisfy the requirements set forth in Practice Book § 13-4 (a) and (b) (1). As we have explained; see footnote 1 of this opinion; § 13-4 (a) requires a party to disclose "each person who may be called by that party to testify as an expert witness at trial." Section 13-4 (b) (1) requires the party to file an expert witness disclosure, in which the party must identify the expert witnesses he may call and specify the "field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; [and] the substance of the grounds for each such expert opinion."

any expert witnesses that he planned to call to testify at trial. The court, *Jacobs*, *J.*, granted the parties' motion on August 6, 2018, thereby setting a deadline of September 7, 2018, for the plaintiff to disclose expert witnesses. In a motion to modify the scheduling order dated December 7, 2018, the parties jointly requested that the trial be continued to June 4, 2019, and a new deadline of January 25, 2019, be imposed for the plaintiff to disclose expert witnesses.[9] The court, *Genuario*, *J.*, granted the motion on January 7, 2019. On May 29, 2019, the plaintiff moved for a continuance of the trial date, and, on May 30, 2019, the court granted the plaintiff's motion and rescheduled the commencement of trial to August 21, 2019.

On August 8, 2019, the defendant filed a second motion to preclude the plaintiff from introducing expert testimony at trial. The defendant argued that the plaintiff had failed to disclose the expert witnesses he planned to call to testify at trial, despite his obligation to do so under the court's order. The defendant contended that the sanction of preclusion of expert testimony was proportional to the plaintiff's failure to file an expert witness disclosure, as required by Practice Book § 13-4, particularly in light of the facts that (1) the plaintiff had failed to file an expert witness disclosure by January 25, 2019, as mandated by the court, (2) the plaintiff had failed to supplement his interrogatory response and disclose Stanger's opinions and their factual bases, and (3) the trial was scheduled to commence in two weeks.

The defendant also filed a motion for summary judgment on August 8, 2019. In his motion and accompanying memorandum of law, the defendant argued that,

[9] As the parties explained in a joint motion to modify the scheduling order that the court, *Genuario*, *J.*, granted on May 30, 2019, counsel for the plaintiff in the present action, Attorney Michael Kogut, was suspended from the practice of law on July 31, 2018. The plaintiff subsequently hired Attorney Kenneth A. Votre to represent him in the present action, and Votre appeared on the plaintiff's behalf on October 25, 2018.

because the plaintiff failed to timely file an expert witness disclosure, the plaintiff should not be permitted to present expert testimony at trial. The defendant specifically asserted that, in the absence of expert testimony, the plaintiff would be unable to meet his burden of proof with respect to the standard of care that the defendant owed to the plaintiff, causation, or damages, each of which the plaintiff was required to prove to prevail on his legal malpractice claims.

On August 12, 2019, the plaintiff moved for a continuance of the trial date "in order to finish discovery . . . and respond to" the defendant's August 8, 2019 motions. The court granted the plaintiff's motion and ordered that the trial be scheduled either in January or February, 2020. The trial date subsequently was scheduled for February 4, 2020. The court also extended the plaintiff's deadline to disclose expert witnesses to October 4, 2019.

On October 18, 2019—two weeks after the plaintiff's October 4, 2019 deadline to disclose expert witnesses—the plaintiff filed a disclosure of expert witnesses in which he disclosed Stanger as the expert witness he planned to call to testify at trial. The plaintiff summarily stated in the disclosure that he expected Stanger to opine "as to the [standard] of care" that the defendant owed to the plaintiff and that the defendant "failed to meet the applicable standard of care" he owed to the plaintiff when he represented the plaintiff in the prior action. The plaintiff also stated therein that he expected Stanger to testify about "Connecticut law applicable to the [prior action]," including CUTPA. Finally, the plaintiff stated that Stanger would testify that the defendant breached the standard of care he owed to the plaintiff by failing to timely bring a CUTPA claim against the hospital, which "caused damages to the plaintiff." The plaintiff provided in the disclosure that Stanger's opinions would "be based [on] his knowledge of the

case from review of the [prior action] and his experience as an attorney admitted in Connecticut." On the same day that the plaintiff filed the expert disclosure, the defendant provided notice to the plaintiff that the defendant would depose Stanger on November 6, 2019. The deposition, however, did not take place on that day.

On November 25, 2019, the plaintiff filed a motion for a protective order in which he claimed that the defendant had withheld certain documents from him and requested that the deposition be postponed until after the defendant had produced the documents and Stanger had an opportunity to review them. The court, *Hon. Edward T. Krumeich II*, judge trial referee, later determined in its memorandum of decision that the defendant *had in fact* produced electronically the documents at issue long before the plaintiff filed the expert disclosure. Additionally, Stanger testified during his deposition that he had received the documents prior to the first day of the deposition, but counsel for the plaintiff had instructed him not to review the documents. In an order dated December 2, 2019, the court ordered in relevant part: "By no later than [December 6, 2019], counsel shall select a mutually agreeable date and time between [December 6 and 31, 2019] to schedule and conduct [Stanger's] deposition. If [Stanger] fails to appear for [the] deposition on the date selected, the defendant may move for the entry of sanctions, including a judgment of nonsuit, by filing a motion that references this order and the plaintiff's failure to comply."

The defendant conducted the first day of the deposition of Stanger on December 20, 2019. Stanger testified at the deposition that he had spent "many, many hours" preparing to testify. He specifically stated that, to prepare to testify at the deposition, he had reviewed some

of the decisions of our Supreme Court, this court,[10] and the Superior Court in the prior action, certain demand letters in the prior action, and the complaint in the present action. Stanger, however, admitted that he had not reviewed the transcripts of the depositions taken during the pendency of the prior action, the trial transcripts from the prior action—apart from "[seeing] one page" from a deposition transcript, the date and the content of which he could not identify—or the deposition exhibits, trial exhibits, discovery materials, and expert reports from the prior action. Stanger testified that, apart from counsel for the plaintiff, he did not speak to any individuals about the prior action, including the expert witnesses called to testify at trial in that action. Stanger further testified that he did not review the hospital bylaws or the minutes of the hospital meetings during which the medical staff decided not to renew the plaintiff's hospital privileges. Stanger also stated that he had not read the fact finder's decision in the prior action, but that he "long[ed] to see" it.

Stanger additionally testified that, a few weeks before the first day of the deposition, he had received a file that consisted of "sixteen boxes" of materials from the defendant's representation of the plaintiff in the prior action (file), which included, inter alia, deposition and trial transcripts from the prior action. When Stanger was asked whether he "only looked at what [counsel for the plaintiff] asked [him] to look at," Stanger replied, "[n]o. . . . [Counsel for the plaintiff] didn't direct me to [look at] very much. Whatever I looked at was probably, as I recall it, things that I already had in my [personal] file." Additionally, the following colloquy occurred:

[10] Stanger testified, however, that he merely "skimmed" one decision of this court in the prior action.

"[Stanger]: . . . I look forward to hearing the evidence or reading the evidence after . . . *I'm told to read the* . . . [*file*].

"[The Defendant's Counsel]: Have you been limited in any way in the work that you've done so far?

"[Stanger]: Yes.

"[The Defendant's Counsel]: How so?

"[Stanger]: When [counsel for the plaintiff and I] saw the scope of those [sixteen] boxes . . . we realized that it was going to take a lot of time to review [the materials therein]. . . . *So*, *I have not been authorized.* I said to [counsel for the plaintiff], one of us has got to look at this, either your office or me or mine, or a third party, or somebody in order to understand this better as you go forward with the depositions, and I look forward to us dividing up that work.

"[The Defendant's Counsel]: So, let me see if I understand that. *You have not been authorized to look through the sixteen boxes of* . . . [*materials from the defendant's representation of the plaintiff in the prior action*], correct?

"[Stanger]: *I have not been authorized to read them. I can flip through them*, as I did a couple of times, just to see how they work . . . .

"[The Defendant's Counsel]: Okay. Has there been any resolution to the issue of who is going to review these sixteen boxes of [materials]?

"[Stanger]: *All I can say is*, *I have not been authorized to review one or all.* . . .

"[The Defendant's Counsel]: [Counsel for the plaintiff] hasn't directed you to [specific items] in [the file] as to where to look?

"[Stanger]: Right." (Emphasis added.)

Stanger iterated multiple times during the first day of the deposition that he had not reviewed any of the materials within the file, neither before the plaintiff had filed the expert disclosure nor before the first day of the deposition. Stanger additionally reiterated that he would review materials in the file only once he was "authorized to" do so.

Stanger further testified that counsel for the plaintiff had instructed him that he could "assume" certain facts that the plaintiff hoped to prove at trial and, in light of those facts, opine as to the elements of legal malpractice. For example, when counsel for the defendant asked Stanger "[h]ow heinous" the hospital's conduct was in the prior action, Stanger replied, "[t]hat's something that I look forward to understanding better. I've been told to assume that it was heinous." Stanger also testified that counsel for the plaintiff had informed him that, for the purposes of identifying the immoral, unethical, oppressive, or unscrupulous conduct that the hospital had committed in contravention of CUTPA; see *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 484, 871 A.2d 981 (2005); he could "assume" that the hospital had decided not to renew the plaintiff's privileges due to demands from other doctors who were "interested in eliminating [the plaintiff from the hospital staff] for inappropriate reasons." Stanger, however, could not identify with certainty the names of the other doctors[11] or the "inappropriate reasons" for their wanting the plaintiff's privileges not to be renewed. Instead, Stanger stated: "I just was told that there [were] inappropriate reasons . . . ." When counsel for the defendant asked Stanger to identify evidence of this allegedly unlawful conduct, the following colloquy occurred:

[11] When he was asked to identify the doctors, Stanger responded, "I assume—*again*, *assume*—[the doctors are] the other defendants . . . [named] in the complaint . . . filed" by the plaintiff in the prior action. (Emphasis added.)

"[The Defendant's Counsel]: What evidence is there that [this allegedly immoral, unethical, oppressive, or unscrupulous conduct occurred]?

"[Stanger]: I'm sure it's in those sixteen boxes . . . .

"[The Defendant's Counsel]: It's in those sixteen boxes that you've never looked at?

"[Stanger]: Correct."

Stanger explained that, in his view, he need not "have personal knowledge" of the facts pertinent to the prior action; he simply needed to know of the facts that "[would] be proven at trial," and he either had been told by counsel for the plaintiff the pertinent facts he should "assume" or had learned the pertinent facts by reviewing the plaintiff's allegations in the complaint filed in the present action. When counsel for the defendant asked Stanger whether, as an expert witness, he believed it would be permissible to base his opinions at trial solely on the facts represented to be true by counsel for the plaintiff, Stanger replied, "[n]o. But the good news is . . . by the time we get to the trial, then . . . evidence [will have] come in . . . ."

With respect to whether the plaintiff would have prevailed had he brought a tortious interference with business expectancies claim against the hospital in the prior action, counsel for the defendant asked Stanger, "you don't have any way to divine for us how a tortious interference claim would have turned out [in the prior action] because you don't know the [pertinent] facts [to the prior action], correct?" Stanger replied, "[c]orrect." With respect to whether the plaintiff would have prevailed had he brought a CUTPA claim against the hospital in the prior action, counsel for the defendant asked Stanger, "with respect to an unadvanced CUTPA claim, you don't have any opinions at this moment that such a claim would have been successful?" Stanger replied,

"I'm waiting to see other evidence." Stanger later agreed when asked if he believed that "the evidence [would] establish that it was more likely than not that" the defendant could have brought successfully a CUTPA claim in the prior action because the defendant eventually commenced on the plaintiff's behalf a separate action, alleging a violation of CUTPA, against the hospital. With respect to the basis of Stanger's opinion that the plaintiff likely would have prevailed had he brought a CUTPA claim against the hospital in the prior action, the following colloquy occurred:

"[The Defendant's Counsel]: What unlawful acts did [the hospital] commit vis-à-vis [the plaintiff]?

"[Stanger]: I can't enumerate them. I haven't looked at all the evidence.

"[The Defendant's Counsel]: Give me one. I'm not asking you to enumerate them. Give me one unlawful act on the part of [the hospital].

"[Stanger]: I'm—I've been told that there are rules to be followed with regard—state of Connecticut laws that are required to be followed with regard to a doctor being dismissed or being treated as . . . the facts will show [the plaintiff] was treat[ed] . . . .

"[The Defendant's Counsel]: What Connecticut laws?

"[Stanger]: *I wasn't told them. I was told that I can assume them.*

"[The Defendant's Counsel]: You can assume that they exist? Or assume—

"[Stanger]: That the facts will—I don't know which particular law it was. . . . I can't help you. . . .

"[The Defendant's Counsel]: You don't know?

"[Stanger]: —I'm sure [you'll find out], when [you complete] your depositions." (Emphasis added.)

Stanger additionally stated that he was "told by [counsel for the plaintiff] that there are certain specific regulations regarding doctors that the state of Connecticut has in terms of [employment] dismissal or negative action. I don't know the details. But [counsel for the plaintiff] said they would be . . . relevant to a CUTPA claim . . . [a]nd [counsel for the plaintiff] said he would get me that information." When counsel for the defendant asked Stanger, "as you sit here today, you don't know what those regulations are or what they say," Stanger once again replied, "[c]orrect." Finally, with respect to Stanger's opinions concerning damages, the following colloquy took place:

"[The Defendant's Counsel]: Do you intend to give an opinion on damages at the trial of this case . . . [o]r is your engagement [as an expert witness limited to] proving a deviation from the standard of care?

"[Stanger]: I understand [that the] scope [of my engagement as an expert witness] would include [opining as to] the damages, and *it would be subject to my hearing from other* [*expert witnesses*] *who I may rely upon.*

"[The Defendant's Counsel]: What other [expert witnesses]?

"[Stanger]: That's for . . . counsel [for the plaintiff] to decide and to present to me. . . .

"[The Defendant's Counsel]: Have you advised [counsel for the plaintiff] that it would be helpful to engage [any other expert witnesses]?

"[Stanger]: I've said to him that *we may need somebody on damages.* That *I need to understand the damages better* . . . .

"[The Defendant's Counsel]: As you sit here today, do you still believe . . . that [counsel for the plaintiff]

and [the plaintiff] may need [another expert witness to provide an opinion as to] damages and that you need to understand the damage analysis better in this case?

"[Stanger]: It's a—there's a may in that. There's not a will. I think it's possible, depending upon . . . the evidence . . . . And when I have a chance to review all or some of [the file], depending upon what I'm authorized to do, before that decision can be made. . . . [T]here's multiple ways that that can go depending upon what's in those boxes and what the testimony is of the two parties. *I believe there's damage here. The amount of the damage is the thing that's uncertain to me.*" (Emphasis added.)

Stanger also testified that he believed it was "likely that . . . additional damages" would be available to the plaintiff, aside from the damages the plaintiff had obtained as a result of his successful breach of contract claim against the hospital, but that he "would have to [review] each of the decisions [in the prior action]" to be sure. When counsel for the defendant asked Stanger if a "fair synopsis" of his deposition testimony related to damages was that Stanger "believe[d] that" damages would have been available to the plaintiff, "but [he] [could not] quantify them," Stanger answered affirmatively.

On January 8, 2020, following the first day of Stanger's deposition, the defendant filed a supplemental memorandum of law in support of his motion for summary judgment and motion to preclude Stanger's expert testimony. The defendant argued in his supplemental memorandum of law that, because Stanger had not reviewed the file, he lacked sufficient knowledge concerning the defendant's representation of the plaintiff in the prior action such that he could not opine as to whether the defendant had committed legal malpractice in the prior action. The defendant additionally argued that Stanger

had no independent opinion as to damages. The defendant asserted that, because the plaintiff had disclosed Stanger as an expert before Stanger had formed any meaningful, relevant opinions about the defendant's representation of the plaintiff in the prior action, the plaintiff had made the disclosure in bad faith.

On January 13, 2020, the defendant filed a supplemental motion to preclude the plaintiff from introducing expert testimony at trial and a supplemental motion for summary judgment. The defendant argued in his supplemental motions that, because Stanger had testified during his deposition that he could not opine as to whether the plaintiff would have prevailed had he pursued a CUTPA claim or a tortious interference with business expectancies claim against the hospital in the prior action, the plaintiff could not meet his burden of proof as to his claims of legal malpractice in the present action. The plaintiff filed objections to the defendant's supplemental motions, as well as an affidavit from Stanger dated January 20, 2020.

In his affidavit, Stanger stated that, in his opinion, the defendant was required to comply with an applicable standard of care in his representation of the plaintiff in the prior action. He opined that, by failing to raise a CUTPA or tortious interference with business expectancies claim on behalf of the plaintiff in the prior action, the defendant had failed to comply with that standard of care. Stanger stated in his affidavit that the plaintiff had "suffered [financial] injury, loss and damage, for which [the defendant] is liable," arising out of the defendant's failure to raise a CUTPA or tortious interference with business expectancies claim. Stanger averred several times in his affidavit that he based his opinions on "[t]he facts [he] expected [would] be asserted at trial . . . ." He also averred that he had reviewed "the appellate decisions," "the complaints,"

and "portions of the present proceedings." In his affidavit, however, Stanger did not opine that the plaintiff would have prevailed had he brought a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action. Likewise, Stanger did not to any reasonable degree of specificity aver to an amount of damages that the plaintiff would have recovered above and beyond the $258,610 plus costs he recovered on the breach of contract count; see *Ulbrich* v. *Groth*, 310 Conn. 375, 411, 78 A.3d 76 (2013) ("CUTPA was intended to provide a remedy that is *separate and distinct* from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances" (emphasis added)); had he prevailed against the hospital on a claim of CUTPA violations or tortious interference with business expectancies.

On January 21, 2020, two weeks before the trial was scheduled to begin on February 4, 2020, the court heard argument on the defendant's motion to preclude expert testimony and motion for summary judgment.[12] Counsel for the plaintiff contended that, because Stanger's deposition was incomplete at that time, the court could not consider Stanger's testimony in considering the defendant's motions. The court subsequently ordered that Stanger's deposition be completed on Wednesday, January 29, 2020, after confirming that counsel for both parties were available on that date. The court continued argument on the defendant's motions to Friday, January 31, 2020, four days before trial was scheduled to commence.

On Tuesday, January 28, 2020—the day before the scheduled second day of Stanger's deposition and three

[12] On January 17, 2020, the plaintiff filed a motion for a continuance of the hearing on the defendant's motions, as well as a case flow request requesting the same. The court denied the plaintiff's continuance motion and case flow request on January 21, 2020.

days before trial was scheduled to commence—counsel for the plaintiff notified counsel for the defendant that Stanger was unavailable to be deposed the following day. The plaintiff also filed a motion for relief, in which he requested that the court allow Stanger's deposition to take place at a later date because Stanger was on vacation. The defendant subsequently filed an objection to the plaintiff's motion. The plaintiff additionally moved for a continuance of the trial date. On January 30, 2020, the defendant filed a supplemental memorandum of law in support of his motion to preclude expert testimony and motion for summary judgment, in which he argued that the plaintiff had violated the court's January 21, 2020 order requiring Stanger to appear for the continued deposition on January 29, 2020, and that preclusion of Stanger's testimony was a proportional sanction in accordance with Practice Book § 13-4.

On Friday, January 31, 2020, on which date argument on the defendant's motion to preclude expert testimony and motion for summary judgment was continued, counsel for the plaintiff once again argued that the court could not consider the incomplete deposition testimony of Stanger. The court, *Genuario*, *J.*, granted the plaintiff's motion for a continuance and continued the trial date to October 6, 2020.

The second day of Stanger's deposition eventually took place on February 12, 2020. Counsel for the plaintiff asked Stanger whether his opinions were based on "reasonable legal probabilities" that he had deduced from his experience as an attorney, and Stanger answered affirmatively. Stanger, however, also testified that, although two months had passed between the first and second days of his deposition, he still had not read the file, aside from "skim[ming] a few" items and "review[ing] pieces" of select materials. He additionally testified that he had not reviewed the communications between the parties, read the hospital bylaws—aside

from the portions of the bylaws that either the plaintiff had included in the complaint in the prior action and were included in the decisions from that action that he had reviewed—or reviewed any of the defendant's bills from the defendant's representation of the plaintiff in that action.

Stanger explained that counsel for the plaintiff had sent him a letter several weeks prior to the second day of his deposition listing certain materials within the file that Stanger should review before the second day of his deposition and the start of trial. Stanger, however, explained that he had not reviewed these materials, or others in his possession, because counsel for the plaintiff had not authorized him to do so. Specifically, Stanger testified:

"[Stanger]: . . . I have got all these piles of paper . . . of the various parts of the file . . . . I just flipped through them to see what's there.

"[The Defendant's Counsel]: Did you read them?

"[Stanger]: I did not. I just breezed through them. I skimmed a few. . . .

"[The Defendant's Counsel]: Have you reviewed [the] boxes and boxes of [materials from the file]?

"[Stanger]: I have reviewed pieces of [them] . . . .

"[The Defendant's Counsel]: . . . [A]m I to understand that [the] letter [from counsel for the plaintiff] [was] your authorization to look at . . . specific boxes and . . . specific items in those boxes?

"[Stanger]: That's not how I understood it.

"[The Defendant's Counsel]: Okay, then how did you understand it?

"[Stanger]: I understood it as, this is a foreshadow of what is to come, and that *I will be told when I am authorized to dig in deeply.*

"[The Defendant's Counsel]: So, as we sit here today, *you still have not been authorized to dig in deeply, correct*?

"[Stanger]: *Correct.* . . .

"[The Defendant's Counsel]: . . . [W]hen you got this list [in the letter] from [counsel for the plaintiff] a couple [of] weeks ago . . . [d]id you look at all of these things on this list?

"[Stanger]: Well, I certainly looked at the list and I clicked through the different folders [in the electronic version of the file] . . . . [J]ust glancing at it, I thought what I was facing . . . was a couple thousand pages . . . . [With respect to any of the electronic folders within the file] that had subfolders . . . I . . . shut down the printing [of those materials].

"[The Defendant's Counsel]: Why?

"[Stanger]: *Because I was told not to spend a lot of time on this.*

"[The Defendant's Counsel]: *Who told you that?*

"[Stanger]: [*Counsel for the plaintiff's*] *office.*

"[The Defendant's Counsel]: What kind of limitation did [counsel for the plaintiff] give you?

"[Stanger]: The limitation that I understood that I was under was [that] the opinion that [I have been] giving [was] sufficient for the purposes of the deposition. That [counsel for the plaintiff] will be able to present the evidence at the time that it's needed that provides the factual basis for the claims made in the complaint. And just like any expert, I am to rely upon the actual facts that are proven in court. . . .

"[The Defendant's Counsel]: . . . [D]id you review most of [the items delineated in the letter from counsel for the plaintiff]?

"[Stanger]: . . . It depends on how you're defining review. Did I take a look at the size of the paper and think about whether I am going to read these thoroughly—yes. Did I skim through looking at a page here and there and looking at different things—yes. Did I keep records of that—no.

"[The Defendant's Counsel]: Okay, but in your skimming through, I mean, you said to me that you were told not to spend a lot of time on this, right?

"[Stanger]: Right.

"[The Defendant's Counsel]: And [counsel for the plaintiff] told you that?

"[Stanger]: Correct.

"[The Defendant's Counsel]: Did [counsel for the plaintiff] tell you that before or after he sent you [the] letter . . . ?

"[Stanger]: After." (Emphasis added.)

When counsel for the defendant asked Stanger whether, at any point, Stanger substantively had reviewed the items listed in the letter, Stanger answered, "[i]f by substantive review, you mean looking through [the items] in a thorough way, taking notes, considering how I [would] use them in opinions so that I could recite . . . [the] page and chapter and whatever," then he had not substantively reviewed the items, but that he "did spend some time on a couple of areas . . . ." Stanger also testified that counsel for the plaintiff never gave him the "green light" to conduct more than a cursory review of the files listed in the letter.

Nonetheless, Stanger opined that the hospital had violated CUTPA by failing to provide the plaintiff with a hearing before declining to renew his hospital privileges because, according to Stanger, "the law generally provides for that kind of hearing if a doctor is being found to have lost [his] privileges," and, thus, the defendant should have asserted on behalf of the plaintiff a CUTPA claim against the hospital in the complaint in the prior action. Stanger then stated that a statute required that a hearing be held before the Department of Public Health before a hospital decided to decline to renew a doctor's privileges. When counsel for the defendant asked Stanger to identify the statute, Stanger stated that he had "looked it up . . . in the [previous] week" but that he did not have a copy of it in his personal file. Ultimately, he could not identify the statute, outside of stating, "I think 20D and E comes to mind, but that's not the title. . . . [S]omething dash 20D and E," until counsel for the plaintiff "refresh[ed] [Stanger's] recollection" by providing him the statutory sections.[13] Nonetheless, Stanger could not articulate how, by statute, the hearing must be conducted. Stanger also testified that he was unaware of any decisions of our Supreme Court, this court, or the Superior Court in which a hospital's failure to provide a hearing to a doctor before his privileges were not renewed was determined to be a violation of CUTPA.

Stanger further opined that the plaintiff likely would have prevailed had he brought a CUTPA claim against

[13] Specifically, the following colloquy occurred between counsel for the plaintiff and Stanger:

"[The Plaintiff's Counsel]: . . . I know when you were being [questioned by counsel for the defendant], an issue came up about a state statute. Is that correct?

"[Stanger]: Two state statutes.

"[The Plaintiff's Counsel]: Okay, and I know you didn't remember the state statutes. If I told you it was [General Statutes §§] 20-13[d] and 20-13[e], would that refresh your recollection? . . .

"[Stanger]: . . . Yes, it does."

the hospital in the prior action, and, in connection with his opinion, Stanger theorized that "unfair motives" underpinned the hospital's decision not to renew the plaintiff's privileges and that the hospital had acted in bad faith in deciding not to renew the plaintiff's privileges. When, however, counsel for the defendant asked Stanger to explain "everything [he knew] about [the hospital's] unfair motives and [to identify] the evidence in [his personal] file of those motives," Stanger stated that he did not "believe [it was his] responsibility to do" so and that he believed that, at trial, counsel for the plaintiff would present evidence of the hospital's improper motives. Additionally, when counsel for the defendant asked Stanger whether he had "any evidence . . . that show[ed] bad faith conduct [committed by the hospital] vis-à-vis [the plaintiff], other than the fact that [the hospital] did not hold a hearing," Stanger replied, "I believe that I probably do have that evidence in the . . . boxes [of materials] . . . that the [p]laintiff will make part of his case [at trial] . . . . It was represented to me that . . . [the plaintiff would] present . . . this evidence, and I was asked to assume that fact." Stanger then stated that he "[did not] recall having been shown" any actual evidence. Stanger additionally testified that, if the plaintiff had prevailed on a CUTPA claim, he likely would have recovered $258,000 trebled—approximately three times the amount he had recovered in the prior action. In support of this opinion, Stanger testified that he estimated that the total amount would be trebled because the total trebled amount "seemed like a reasonable number for a judge to do in this case." He further opined that the plaintiff additionally would have recovered attorney's fees, which he estimated totaled $800,000—despite not reviewing the defendant's bills for his representation of the plaintiff in the prior action.[14] Ultimately, Stanger testified that

[14] After confirming with Stanger that he had not reviewed any of the defendant's bills in the prior action, counsel for the defendant asked Stanger whether "somebody [else had] told" Stanger that the defendant's attorney's

he had based his opinions on his review of the decisions of our Supreme Court, this court, and the Superior Court in the prior action and the allegations made in the plaintiff's complaint in the prior action, which Stanger "accept[ed] . . . as . . . true . . . ."

On February 25, 2020, after the conclusion of Stanger's deposition, the defendant filed an additional memorandum of law in support of his motion to preclude expert testimony and motion for summary judgment in which he argued that, despite Stanger's having had two additional months to prepare for the second day of the deposition, Stanger remained ignorant as to the facts of the prior action. On August 25, 2020, the court, *Hon. Edward T. Krumeich II*, judge trial referee, held a remote hearing on the defendant's motion to preclude expert testimony and motion for summary judgment.

In a memorandum of decision dated September 1, 2020, the court granted the defendant's motion to preclude Stanger's testimony and motion for summary judgment. The court first determined that Stanger lacked the requisite factual predicate to opine as to the legal malpractice element of causation—specifically, that the plaintiff likely would have prevailed on CUTPA and tortious interference with business expectancies claims had he brought them against the hospital in the prior action. The court also determined that Stanger lacked the factual predicate to opine as to the legal

fees totaled $800,000. Stanger testified, "I think [the $800,000 value is] in the complaint that was filed in [the present] action."

We note that, in his principal appellate brief to this court, the plaintiff likewise asserted that, "[o]ver the course of the [pendency of the prior action], [the plaintiff] paid [the defendant] over eight hundred thousand dollars ($800,000) in legal fees, costs, and expenses . . . ." (Footnote omitted.) To support this assertion, the plaintiff merely cited to the operative complaint in the present action—namely, the allegation in his complaint that, "over the course of [the pendency of the prior action], [the plaintiff] was billed and paid the defendant nearly eight hundred thousand ($800,000) dollars in legal fees, costs, and expenses."

malpractice element of damages and to estimate the damages that the plaintiff would have been able to recover, above and beyond the $258,610 plus costs he recovered on the breach of contract count, had he brought and prevailed on CUTPA and tortious interference with business expectancies claims in the prior action.[15] The court then concluded that preclusion of expert testimony was a proper and proportional sanction to impose on the plaintiff. Because the plaintiff was unable to meet his burden of presenting expert testimony as to the elements of legal malpractice in light of the court's sanction precluding the plaintiff from presenting expert testimony; see, e.g., *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012) ("[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]" (internal quotation marks omitted)); see also *Bozelko* v. *Papastavros*, 323 Conn. 275, 285, 147 A.3d 1023 (2016) ("expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases"); the court concluded that summary judgment was proper.

In determining that Stanger lacked the factual predicate to provide an expert opinion as to causation and

[15] The court also stated that Stanger "lack[ed] . . . knowledge concerning the law to be applied to the facts relating to the CUTPA claim and . . . general[ly] lack[ed] . . . experience litigating CUTPA claims." It is unclear whether, by this statement, the court concluded that Stanger was unqualified to render expert opinions or instead conflated the requirements that an expert witness be qualified "by knowledge, skill, experience, training, education or otherwise"; Conn. Code Evid. § 7-2; and that "there . . . be a factual basis for the [expert witness'] opinion[s]." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 406, 97 A.3d 920 (2014). Because we conclude that the court properly determined that Stanger's testimony should be precluded on other grounds, we need not consider whether the court properly determined that Stanger was unqualified to render expert opinions, to the extent that it made such a finding. See footnote 2 of this opinion.

damages, the court reviewed the expert disclosure dated October 18, 2019, Stanger's affidavit, and the transcripts from each day of Stanger's deposition. Looking first at the expert disclosure, the court noted that the plaintiff set forth therein Stanger's opinion that, by failing to bring the CUTPA and tortious interference with business expectancies claims against the hospital on behalf of the plaintiff in the prior action, the defendant had violated the applicable standard of care; the plaintiff, however, failed to set forth therein any expert opinion concerning the legal malpractice elements of causation and damages. The court noted that the plaintiff did not supplement his expert disclosure to add any such opinions. The court also concluded that the plaintiff had failed to provide in the expert disclosure the factual bases for Stanger's opinions—"if any"—concerning liability, causation, and damages.

The court similarly determined that Stanger's affidavit failed to set forth an expert opinion as to causation and damages. The court stated, "[t]here is no opinion [set forth in Stanger's affidavit] . . . as to the basis for and viability of . . . [a] CUTPA claim and [a tortious] interference [of business expectancies] claim," had they been brought in the prior action. As to damages, the court continued, Stanger merely had provided a conclusory statement that the plaintiff had suffered financial harm and damage. Regarding the factual basis for Stanger's opinions, the court noted that Stanger had averred that he had based his opinions on "some of the facts [he] expected [would] be brought out at trial," as opposed to facts that he himself had gleaned from the record. (Internal quotation marks omitted.) Further, the court noted that Stanger had reviewed only "limited and selective" materials—"the appellate decisions, the complaints and portions of the present proceedings"—before providing his opinions. (Internal quotation marks omitted.)

Turning to the first day of Stanger's deposition, the court noted that Stanger had admitted that he lacked knowledge about the prior action and had relied on the representations of counsel for the plaintiff as to what the plaintiff "hoped to prove at trial" instead of reviewing the record. The court highlighted Stanger's testimony that counsel for the plaintiff did not authorize Stanger to review the file and, consequently, Stanger had not done so. Finally, the court concluded that Stanger had provided no opinion as to whether the plaintiff would have prevailed had he brought a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action, or as to damages. By contrast, Stanger had testified that he would have to rely on the opinion of another expert to provide an opinion as to damages.

With respect to the second day of Stanger's deposition, the court noted that counsel for the plaintiff once again had failed to authorize Stanger to review the file and, instead, had "caution[ed] [Stanger] not to spend . . . too much time reviewing the [file] to prepare for the deposition . . . ." Consequently, the court explained, "Stanger curtailed his review and remained largely ignorant of" the facts pertinent to the prior action and instead based his opinions "on hypothetical facts that [the] plaintiff [purportedly] hoped to [prove] at trial." As the court noted, "Stanger testified that his opinions [were] based on his belief [that] the facts alleged in the [plaintiff's] complaint in the [prior action] would have supported" a CUTPA claim and that the claim would have been successful so long as "there was evidence to support" it. Likewise, the court noted, Stanger admitted that he had completed "limited research" with respect to the applicable law. The court thus concluded that, to the extent Stanger had opined as to the essential elements of a legal malpractice claim, Stanger lacked the necessary factual basis to provide

expert testimony and his opinions were "untethered to facts" in the record.

The court next noted that it was "mindful" that the decision to preclude the plaintiff from presenting expert testimony pursuant to Practice Book § 13-4 would be a "severe sanction that [would] doom [the] plaintiff's case . . . ." The court, however, explained that, pursuant to § 13-4 (h), the sanction of preclusion, "including any consequence thereof on the [plaintiff's] ability to prosecute . . . [his] case, [was] proportional to [the plaintiff's] noncompliance" with the disclosure requirements of § 13-4, and the plaintiff's noncompliance could not "adequately be addressed by a less severe sanction or combination of sanctions." Practice Book § 13-4 (h).

With respect to proportionality, the court concluded that the sanction of preclusion was proportional to the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4. In so concluding, the court noted that the plaintiff's disclosure had failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, and the plaintiff did not at any point supplement the disclosure to add such opinions. See Practice Book § 13-4 (b) (requiring a party to "disclos[e] . . . [the] expert witnesses . . . [whom the party] may . . . [call] . . . to testify . . . at trial" and requiring disclosure to include "the expert opinions to which the witness is expected to testify"). The court determined that the plaintiff had "ample opportunity" throughout the duration of the pending action to "disclose an expert [witness who was] prepared to" provide an informed expert opinion as to "the central issues" of the case, including causation and damages, based on his independent review of the record of the prior action. Instead, and before Stanger had received the file from the prior action, the plaintiff disclosed Stanger as the sole expert witness he planned to call to testify at trial. After he filed the

disclosure and provided Stanger the file in November, 2019, the plaintiff then "delay[ed] and limit[ed] . . . Stanger's review of the [file]" through both days of Stanger's deposition. As a result, throughout the pendency of the action, Stanger possessed only a cursory understanding of the facts of the prior action and based his opinions on his assumptions and the allegations that counsel for the plaintiff assured him would be proven at trial. The court thus determined that the plaintiff had failed to disclose to the defendant the factual substance on which Stanger based his opinions, in contravention of the disclosure requirements set forth in § 13-4. See Practice Book § 13-4 (b) (requiring a party to "disclos[e] . . . [the] expert witnesses . . . [whom the party] may . . . [call] . . . to testify . . . at trial" and requiring disclosure to include "the substance of the grounds for each expert opinion").

The court determined that Stanger's lack of preparation, and the plaintiff's contributions thereto, prevented the defendant from ascertaining what Stanger likely would opine at trial. The court noted that "[the] plaintiff's plan appeared to be to delay educating [Stanger] until trial and to delay [Stanger from] review[ing] and analy[zing] [the] material evidence until trial . . . ." The court emphasized that such a strategy could have resulted in further delay of the trial date or caused the defendant to be ambushed by a "newly informed expert" witness at trial. The court recognized that, between May 14, 2015, the date on which the present action was commenced, and September 1, 2020, the date of the court's memorandum of decision on the defendant's motions, the trial date was scheduled and rescheduled eight separate times.[16] The court thus concluded that continuing the trial date "for the ninth time"

[16] Between May 14, 2015, and September 1, 2020, the court scheduled trial for the following dates: April 25, 2017; November 28, 2017; July 16, 2018; February 26, 2019; June 4, 2019; August 21, 2019; February 4, 2020; and October 6, 2020.

to allow Stanger more time to review the file would "not [be] an adequate sanction,"[17] as such a continuance would require that the defendant conduct additional discovery in light of any additional expert opinions or analysis and would be akin to "[r]ewarding [the plaintiff's] strategy of unduly limiting expert preparation" and encouraging an expert witness to "parrot the pleadings without independent[ly] review[ing] and anal[yzing] . . . the . . . [pertinent] evidence" from the underlying action. For the same reasons, the court also noted that it was "far too late" for the plaintiff to disclose another expert. The court, thus, determined that the plaintiff's noncompliance could not adequately be addressed by a less severe sanction or combination of sanctions. See Practice Book § 13-4 (h) (2).

Consequently, the court granted the defendant's motion to preclude the plaintiff from presenting expert testimony at trial. Because the plaintiff would be unable to prove his legal malpractice claims "[w]ithout [the] admissible testimony [of] a competent expert" witness as to the elements of legal malpractice, the court granted the defendant's motion for summary judgment as to the plaintiff's claims. Following the court's decision, the plaintiff filed a motion to reargue the motion to preclude expert testimony and motion for summary judgment, which the court denied on September 22, 2020. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court improperly granted the defendant's motion to preclude Stanger's testimony at trial. In connection with this claim, the

[17] Although the court recognized that "[s]ome of the delay [of the trial date was] attributable to the substitution of [the plaintiff's] counsel . . . the delay of trial from August 21, 2019, to February 4, 2020," was caused by the plaintiff's failure to timely disclose an expert.

plaintiff argues that the sanction of preclusion was not proportional to the plaintiff's alleged noncompliance with the disclosure requirements set forth in Practice Book § 13-4 and that the noncompliance adequately could have been addressed by a less severe sanction. The plaintiff additionally contends that, in imposing a sanction for failing to comply with the disclosure requirements, the court improperly concluded that Stanger's opinions were not based on sufficient facts.

Before we address the merits of the plaintiff's claim, we first set forth the appropriate standard of appellate review, an issue about which the parties disagree. The plaintiff argues that, in accordance with this court's decision in *Fortin* v. *Hartford Underwriters Ins. Co.*, 139 Conn. App. 826, 59 A.3d 247, cert. granted, 308 Conn. 905, 61 A.3d 1098 (2013) (appeal withdrawn November 26, 2014), we should exercise plenary review over the trial court's decision to preclude Stanger's testimony because the court considered the defendant's motion to preclude Stanger's testimony in the same proceeding in which it considered the defendant's motion for summary judgment. The defendant contends that *Fortin* is distinguishable from the present case and that we should review the court's decision granting the defendant's motion to preclude Stanger's testimony for an abuse of discretion because, generally speaking, "[w]e afford our trial courts wide discretion in determining whether to admit expert testimony . . . ." *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014).

In resolving this dispute, we first look to this court's decisions in *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012), and *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 826. In *DiPietro*, the plaintiff's minor daughter injured her ankle while playing soccer at an indoor soccer facility operated by the defendants. *DiPietro* v.

Farmington Sports Arena, supra, 585–86. The plaintiff initiated separate actions against the defendants, alleging that the defendants negligently had installed and maintained the carpet that covered the facility's floor, creating an unreasonably dangerous surface on which to play soccer. Id., 586–87. The defendants filed motions for summary judgment as to the plaintiff's actions, claiming that there was no genuine issue of material fact as to, inter alia, the applicable duty that the defendants owed—which this court clarified on appeal was "the duty to provide and to maintain [their] premises in a reasonably safe condition"; id., 619; and whether the defendants had breached that duty. Id., 587, 619. In opposition, the plaintiff submitted the deposition testimony and affidavit of an expert witness, who opined that the carpeted surface was unreasonably dangerous. Id., 605–606.

In its consideration of the defendants' motions for summary judgment, the trial court determined that the expert witness' testimony was inadmissible because the expert lacked the requisite personal knowledge about the case to render an expert opinion of substantial value. See id., 609. Having determined that the testimony of the expert witness was inadmissible, the court granted the defendants' motions for summary judgment because, among other reasons, "expert testimony was required to establish the . . . applicable . . . [duty of the defendants as it pertained to the safety of the] indoor soccer facility and the breach thereof . . . ." Id., 609–10.

On appeal, this court "consider[ed] [its] scope of review of the question of the admissibility of [the expert witness'] testimony in [the] summary judgment proceeding . . . ." Id., 610. This court stated, "[o]rdinarily, a trial court's ruling on the admissibility of an expert's testimony at trial is subject to the deferential scope of review of abuse of discretion. . . . *That scope of*

review does not apply, however, [*if*] *the trial court has excluded such testimony in connection with a summary judgment proceeding*." (Citation omitted; emphasis added.) Id. This court explained, "[i]t is well settled that our scope of review of a trial court's determination on a motion for summary judgment is plenary. . . . [In a case], as here, [in which] the trial court ruled the expert's testimony inadmissible in the course of summary judgment proceedings, it would be inconsistent with that plenary scope of review to subject a particular subset of the trial court's determinations in those proceedings, *namely*, *the admissibility of an expert's opinion*, to the highly deferential abuse of discretion scope of appellate review." (Citation omitted; emphasis added.) Id., 610–11. This court further noted, "because the movant in a summary judgment proceeding has the burden to show that there is no genuine issue of fact and the facts are to be viewed in the light most favorable to the nonmoving party, a trial court in such a proceeding would be obligated to exercise its discretion in favor of the nonmoving party's offer of evidence. Similarly, in applying our plenary scope of review to the question of the admissibility of [the expert witness'] testimony, the same considerations compel us to resolve any doubts about that question in favor of admissibility." Id., 611.[18]

In *Fortin*, the plaintiffs initiated a civil action against the defendants, North River Insurance Company (North

[18] Following the release of this court's decision in *DiPietro*, our Supreme Court "granted the defendants' petition for certification to appeal . . . [as to the following question: *whether this court*] *properly rule*[*d*] *that plenary review applied to the trial court's decision concerning the admissibility of expert testimony in a summary judgment motion* . . . ." (Emphasis added; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 111 n.2, 49 A.3d 951 (2012). Our Supreme Court, however, ultimately "[did] not reach [this] certified [issue] because . . . [it] conclude[d] that, despite the trial court's stated concerns as to the admissibility of the expert's opinion, the court did consider [the expert's opinion] in ruling on the defendants' motions for summary judgment but found it to be substantively insufficient." Id.

River) and Hartford Underwriters Insurance Company (Hartford). *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 829 and n.1. The plaintiffs alleged that they had purchased liability insurance policies from each of the insurance companies. Id., 830. Pursuant to its policy, Hartford agreed to defend the plaintiffs in specific legal actions and to pay certain damages resulting therefrom, and, pursuant to its policy, North River provided umbrella coverage above and beyond the policy issued by Hartford. Id. The plaintiffs alleged that they had been named as third-party defendants in a separate action, which they contended "gave rise to coverage under the policies"; id.; but that Hartford declined to provide representation to the plaintiffs or to indemnify them for the financial obligations they incurred as a result of the action, and North River declined to participate in settlement negotiations in the separate action on their behalf or to contribute moneys toward the plaintiffs' settlement obligation. Id., 830–31. After the parties to the separate action settled, the plaintiffs subsequently sued the insurance companies for, inter alia, breach of contract. Id., 831.

The plaintiffs disclosed an expert witness, whom they asserted would opine as to, inter alia, the objective reasonableness of the settlement amount paid by the plaintiffs—an essential element of their case against North River. Id., 832–33, 837. In response, North River filed two motions: a motion to preclude the plaintiff's expert witness from testifying, in which it argued, inter alia, that the opinion of the plaintiff's expert witness was based on insufficient facts, and a motion for summary judgment, in which it argued that the plaintiffs were unable to prove an essential element of their case—that the settlement amount was unreasonable. Id., 832. "The [trial] court considered [North River's] motion to preclude in the context of a hearing on the motion for summary judgment . . . [and ultimately]

granted both . . . motions." Id., 832–33. The court determined that the expert witness' testimony was inadmissible because "the plaintiffs were unable to demonstrate that [the expert witness'] opinion was based on sufficient facts and, thus, that his testimony would assist the trier of fact in understanding the evidence or in determining the objective reasonableness of the settlement paid by the plaintiffs." Id., 833. The court consequently concluded that, because the plaintiffs had failed to present expert evidence demonstrating that the settlement amount was objectively reasonable, summary judgment in favor of North River was warranted. See id.

On appeal, this court first set forth the applicable standard of review. See id. This court noted that the plaintiffs "urge[d]" it to apply the plenary standard of review; id., 834 n.4; enunciated in *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 610–11, and North River urged it "not to apply the plenary standard of review . . . ." *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 834–35 n.4. This court observed that, in *DiPietro*, it had concluded "that its [determination as to the proper standard of review in this context] was consistent with Connecticut's summary judgment jurisprudence." Id., 835 n.4. Thus, this court determined, "*DiPietro*'s relevant [analysis] govern[ed] the legal standard by which a court should evaluate a motion to preclude in conjunction with a motion for summary judgment." Id., 836 n.4.

Because the trial court had ruled the expert's testimony inadmissible within the context of the summary judgment proceedings, this court determined that the proper standard of appellate review was plenary. See id., 833–34. Accordingly, viewing the record "in the light most favorable to the plaintiffs"; id., 840; this court concluded that the expert did not have an "adequate

factual basis [on] which to . . . [base an] opinion concerning the reasonableness of the settlement," and, thus, the trial court "properly [had] precluded" the expert witness' opinion. Id.

Significantly, and as the plaintiff conceded during oral argument before this court, the trial courts in *DiPietro* and *Fortin* had not precluded the plaintiffs' expert witnesses from testifying as a discovery sanction for the plaintiff's failure to comply with the disclosure rules set forth in Practice Book § 13-4. By contrast, in both *DiPietro* and *Fortin*, the courts precluded the testimony of the plaintiffs' expert witnesses *solely* because the opinions of the plaintiffs' expert witnesses were not based on sufficient facts. See id., 833; *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 609.

In the present case, although the court determined that Stanger's opinions were not based on sufficient facts, our thorough review of the court's memorandum of decision reveals that the court principally precluded the plaintiff's expert witness from testifying as a sanction for the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4. As we have explained, the court stated in its memorandum of decision that it was "mindful" that its decision to preclude the plaintiff from presenting expert testimony would be a "severe sanction . . . ." The court further emphasized that the plaintiff had failed to comply with the disclosure requirements set forth in § 13-4 and, consequently, considered whether, pursuant to § 13-4 (h), it should impose on the plaintiff the sanction of preclusion of the expert testimony. The court specifically considered whether the sanction was "proportional to [the plaintiff's] noncompliance" with the disclosure requirements of § 13-4 and whether the plaintiff's noncompliance with the disclosure requirements otherwise could be addressed adequately by a less severe sanction or

combination of sanctions. The court determined that Stanger's lack of knowledge as to the pertinent facts of the prior action evidenced the discovery abuse in which the plaintiff had engaged—specifically, eventually disclosing Stanger as an expert witness but keeping Stanger uninformed as to the pertinent facts of the case to prevent the defendant from conducting meaningful discovery.

Ultimately, the court concluded that, in light of the discovery abuses in which the plaintiff engaged, including but not limited to his attempt to keep his own expert uneducated about the facts underlying the matter, the sanction of preclusion was proportionate to the plaintiff's failure to timely comply with the requirements of Practice Book § 13-4, and the plaintiff's noncompliance otherwise could not be addressed adequately by a less severe sanction or combination of sanctions. Thus, the court exercised its discretion in determining that the sanction of preclusion was justified pursuant to § 13-4 (h). Accordingly, we conclude that the case before us is distinguishable from *DiPietro* and *Fortin* because, in the present case, the court treated in large part its decision to preclude the plaintiff's expert witness from testifying as a sanction for the plaintiff's failure to comply with the disclosure requirements of § 13-4. To review this decision on a plenary basis simply because it was made at or about the time the court adjudicated the defendant's motion for summary judgment would deprive the court of its discretion, or severely curtail the court's discretion, to govern effectively the discovery process, supervise the conduct of the litigants, and manage its dockets. We therefore decline to extend *DiPietro* and *Fortin* to the circumstances of this case.[19]

[19] We note that, in his appellate briefs to this court, the plaintiff additionally argues that the trial court applied the wrong legal standard when it reviewed the evidence in deciding the defendant's motion to preclude Stanger's expert testimony. Specifically, the plaintiff asserts that, because the court decided the defendant's motion to preclude in connection with the defendant's motion for summary judgment, the court was required to construe "the facts

It is well accepted that "we . . . [review] the action of the trial court in imposing sanctions for failure to comply with its orders regarding discovery under a broad abuse of discretion standard." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 15, 776 A.2d 1115 (2001); see also *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, 153 Conn. App. 753, 757, 107 A.3d 422 (2014) (trial court's "decision to impose sanctions," including sanction of "preclusion of expert testimony . . . rests solely in the discretion of the court"). "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In reviewing a claim that the court has abused this discretion, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did given the facts presented. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 15–16. "Under an abuse of discretion standard,

. . . in the light most favorable to [the plaintiff as] the nonmoving party . . . [and] exercise its discretion in favor of the nonmoving party's offer of evidence." (Internal quotation marks omitted.) *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 834. Because we have concluded that, unlike in *Fortin* and *DiPietro*, the court in the present case treated its preclusion of Stanger's testimony in large part as a sanction for the plaintiff's failure to comply with the expert disclosure requirements of Practice Book § 13-4, we conclude that the court in the present case was not obligated to employ the standard governing a trial court's decision on a motion for summary judgment when it decided the defendant's motion to preclude Stanger's expert testimony.

a court's decision must be legally sound and [the court] must [have] honest[ly] attempt[ed] . . . to do what is right and equitable under the circumstances of the law, without the dictates of whim or caprice." (Internal quotation marks omitted.) *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, supra, 757.

We now turn to the merits of the plaintiff's claim. The plaintiff contends that the sanction of preclusion was not proportionate to his noncompliance with the expert disclosure requirements set forth in Practice Book § 13-4 and that his "alleged" noncompliance adequately could have been addressed by a less severe sanction. The plaintiff argues that, at the time the court imposed the sanction in its decision dated September 1, 2020, he had disclosed Stanger as an expert witness in the expert disclosure he had filed on October 18, 2019. The plaintiff further asserts that the defendant "was not prejudiced" by any noncompliance on the plaintiff's part because the defendant "had a meaningful opportunity to depose [Stanger as to] the basis [of Stanger's] opinions." Finally, the plaintiff argues that, as a less severe sanction, the court could have precluded "only the testimony and opinions that it believed were not . . . based [on sufficient] . . . facts." We are not persuaded.

As we have explained, Practice Book § 13-4 (h) provides a trial court with the authority to "impose sanctions on a party for [the party's] failure to comply with the" disclosure requirements set forth in § 13-4, such as the requirement that a party must disclose the expert witnesses it may call to testify at trial; see Practice Book § 13-4 (a); or the requirement that a party must file an expert disclosure identifying, inter alia, the expert witness, the subject matter on which the expert is expected to testify, and the substance of the grounds for each expert opinion. See Practice Book § 13-4 (b)

(1). "An order precluding the testimony of an expert witness, [however] may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions." Practice Book § 13-4 (h). As our Supreme Court has reiterated, "the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18. In considering whether the sanction was proportional to the plaintiff's failure to comply with the disclosure requirements set forth in § 13-4 and his discovery abuse, we are guided by "the factors [our Supreme Court] . . . ha[s] employed when reviewing the reasonableness of a trial court's imposition of sanctions: (1) the cause of the [party's] failure to [comply with the disclosure rules and the party's discovery abuse], that is, whether it [was] due to inability rather than the [wilfulness], bad faith or fault of the [party] . . . (2) the degree of prejudice suffered by the opposing party . . . and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 375, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

We also note that, pursuant to § 7-2 of the Connecticut Code of Evidence, "[a] witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of

fact in understanding the evidence or in determining a fact in issue." "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 405–406. "An expert may testify in the form of an opinion and give reasons therefor, *provided sufficient facts are shown as the foundation for the expert's opinion*." (Emphasis added.) Conn. Code Evid. § 7-4 (a). Thus, "[t]o render an expert opinion the witness must be qualified to do so *and there must be a factual basis for the opinion*." (Emphasis added; internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 406. Accordingly, this court has stated, "[t]he essential facts on which an expert opinion is based are an important consideration in determining the admissibility of the expert's opinion." *Glaser* v. *Pullman & Comley, LLC*, 88 Conn. App. 615, 624, 871 A.2d 392 (2005).

In a case in which "the factual basis of an [expert witness'] opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 244, 963 A.2d 943 (2009). For example, this court has determined that the opinions of a purported expert witness, whose testimony was based on "speculation" and who "lack[ed] [sufficient] personal knowledge . . . of the facts" on which he based his opinions; *Porter* v. *Thrane*, 98 Conn. App. 336, 341, 908 A.2d 1137 (2006); were "without substantial value." Id., 340.

Turning to the present case, the court determined that the plaintiff failed to comply with the disclosure

requirements set forth in Practice Book § 13-4 and, instead, engaged in a course of conduct that rose to a discovery abuse. The court noted that the plaintiff had filed an expert disclosure on October 18, 2019, two weeks after the October 4, 2019 deadline set by the court's scheduling order, and years after the previous deadlines of August 8, 2016, and September 7, 2018. In addition to the plaintiff's historical failure to comply with the court's scheduling orders in filing the disclosure, the court stated that, within the disclosure, the plaintiff had failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, as required by Practice Book § 13-4 (b), and at no point did the plaintiff supplement the disclosure to add such opinions, despite having "ample opportunity" to do so during the pendency of the action. Likewise, the plaintiff had failed to provide the substance of the grounds for each of the disclosed opinions, as required by § 13-4 (b). Instead, the plaintiff merely provided that Stanger's opinions would be "based [on] his knowledge of the case from review of the [prior action] and his experience as an attorney admitted in Connecticut."

More significantly, however, the court determined that the plaintiff had committed what amounted to a discovery abuse by engaging in a particular course of "gamesmanship" that prevented the defendant from completing meaningful discovery. In particular, although the plaintiff eventually "disclosed" Stanger as an expert witness—albeit outside of each of the deadlines to do so—counsel for the plaintiff prevented Stanger from learning the pertinent facts of the prior action during the entirety of his involvement as an expert witness in the present action. The court noted that, at the time the plaintiff had disclosed him as an expert witness, Stanger had not been provided the file from the prior action and, thus, could not have based the expert opinion disclosed in the disclosure on his

independent review of the file. Additionally, in his affidavit dated January 20, 2020, Stanger averred that he had reviewed only a few select materials before developing his opinions—specifically, the "appellate decisions," the "complaints," and "portions of the present [action]"—and that his opinions largely were based on "the facts [he] expected [would be brought out] at trial," as opposed to facts that he himself had gleaned from independently reviewing the record.

The court confirmed, by reviewing the transcripts of Stanger's deposition, that Stanger possessed a limited understanding of the prior action because counsel for the plaintiff had curtailed Stanger's review of the record in the prior action. As the court stated, counsel for the plaintiff had "authorized" Stanger to review only a limited portion of the available materials before he testified and instructed Stanger "not to spend . . . too much time" on the matter. Consequently, Stanger admitted during his deposition that he did not review a myriad of materials associated with the prior action, including the following: the transcripts from the depositions taken in connection with the prior action, the trial transcripts from the prior action—apart from "[seeing] one page" from a deposition transcript, the date and the content of which he could not identify when he was deposed—the deposition exhibits, trial exhibits, discovery materials, and expert reports from the prior action, the hospital bylaws—apart from the portions reprinted in the plaintiff's complaint and the decisions he reviewed—the minutes of the hospital meetings during which the medical staff decided not to renew the plaintiff's hospital privileges, the defendant's bills from the defendant's representation of the plaintiff in the prior action, and the communications between the parties in the present action. Stanger also testified that he had not spoken with any individuals about the prior action, including the expert witnesses called to testify at trial

in the prior action, aside from counsel for the plaintiff. As the court additionally noted, Stanger repeatedly acknowledged during both days of the deposition that, although he had received the file from the defendant's representation of the plaintiff in the prior action, which he testified consisted of sixteen boxes of materials, he did not "substantively review" any of the materials in the file and would not do so until he was "authorized to do" so by counsel for the plaintiff.

As the court further emphasized, Stanger testified that he had based his opinions on the facts that counsel for the plaintiff hoped to prove at trial and that counsel for the plaintiff instructed Stanger he could "assume" existed, as opposed to the facts he gleaned from his own independent review of the record. For example, when counsel for the defendant asked Stanger "[h]ow heinous" the hospital's conduct was in the prior action, Stanger replied, "I've been told to *assume* that it was heinous"; (emphasis added); and when counsel for the defendant asked Stanger to identify the immoral, unethical, oppressive, or unscrupulous conduct that the hospital allegedly had committed in contravention of CUTPA, Stanger stated that he "just was told that" the conduct existed and that he was "sure [that evidence thereof was] in [the] [sixteen] boxes" of materials in the file he did not review. Likewise, during the first day of the deposition and in connection with his opinion that it was "more likely than not" that the plaintiff could have prevailed on a CUTPA claim had one been pursued in the prior action, Stanger stated that counsel for the plaintiff told him "that [he] [could] assume" that certain laws—which he could not identify without his memory being "refreshed" by counsel citing to him the statutory sections—existed that the hospital had violated such that a CUTPA claim would have been successful if it had been brought against the hospital. As the court noted, "Stanger testified that his opinions [were] based

on his belief that [the] facts alleged in the [plaintiff's] complaint in the [prior action] would have supported" a CUTPA claim and that such a claim would have been successful, so long as "there was evidence to support" it.[20]

Additionally, the court explained that, although the plaintiff eventually disclosed Stanger as his expert witness, the plaintiff "delay[ed] and limit[ed] . . . Stanger's review of the [file]" and other salient materials such that, on the two days on which he was deposed, Stanger

[20] In light of Stanger's deposition testimony, the court determined that Stanger's expert opinion lacked substantial value because it was "untethered to facts" in the record. The plaintiff contends that the court improperly determined that the plaintiff's opinions were not based on sufficient facts. The plaintiff specifically argues that Stanger testified during his deposition that the materials he reviewed and on which he based his expert opinion—specifically, the judicial decisions from the prior action and the allegations contained in the plaintiff's complaint in the prior action—provided him the necessary factual basis from which to develop an informed expert opinion.

As we have explained, overwhelming evidence exists in the record to support the court's determination that Stanger possessed limited knowledge of the pertinent facts of the prior action and that Stanger relied on the representations made by counsel for the plaintiff, instead of independently gleaning the pertinent facts from the record, in coming to his expert opinion. Based on this overwhelming evidence, we conclude that the court reasonably could have concluded, as it did, that Stanger's opinions were not based on sufficient facts. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15. Thus, we cannot say that the court abused its discretion by determining that "the uncertainties in the essential facts"; (internal quotation marks omitted) *Wyszomierski* v. *Siracusa*, supra, 290 Conn. 244; on which Stanger based his opinions, rendered his opinions to be without substantial value.

We note that, even if we were to exercise plenary review over this argument, we nonetheless would reach the same conclusion as did the trial court. Significantly, we agree with the court that the evidence is clear that Stanger failed to review the necessary materials to educate himself about the facts of the prior action. Instead, Stanger accepted as true the allegations made in the plaintiff's complaint. Accordingly, Stanger lacked a substantial factual basis on which to evaluate the merits of and opine as to the plaintiff's allegations of legal malpractice. See Conn. Code Evid. § 7-4 (a) (permitting "[a]n expert [to] testify in the form of an opinion . . . *provided sufficient facts are shown as the foundation for the expert's opinion*" (emphasis added)).

possessed only a cursory understanding of the relevant facts of the prior action and was required to base his opinion on his assumptions that counsel for the plaintiff assured him would be proven at trial. Thus, from the time Stanger was disclosed as an expert witness, through his deposition, Stanger remained unapprised of the pertinent facts of the prior action, at the behest of counsel for the plaintiff, such that his expert opinion lacked the necessary factual basis. See, e.g., *Weaver* v. *McKnight*, supra, 313 Conn. 406 ("[t]o render an expert opinion the witness must be qualified to do so *and there must be a factual basis for the opinion*" (emphasis added; internal quotation marks omitted)). The court stated that "[the] plaintiff's plan appeared to be to delay educating [Stanger as to the pertinent facts of the prior action] until trial and to delay [Stanger from] review[ing] and analy[zing] [the] material evidence until trial . . . ." Accordingly, the court determined, the plaintiff had engaged in a course of "gamesmanship" that "thwarted" the defendant's ability to ascertain what Stanger likely would opine at trial and, consequently, impeded the defendant from completing "meaningful discovery" with respect to the expert testimony the plaintiff likely would elicit at trial.

Once it had identified the plaintiff's noncompliance and discovery abuse, the court considered whether the sanction of preclusion, which it recognized was a "severe" sanction, was proportional to the plaintiff's noncompliance and discovery abuse. The court highlighted the fact that the trial date had been continued for the eighth time—including to account for the plaintiff's failure to timely disclose an expert witness, which caused the delay of the trial date from August 21, 2019, to February 4, 2020.[21] The court stated that the plaintiff

[21] The plaintiff argues in his principal appellate brief that the sanction of preclusion was not proportional to his noncompliance because, when the court released its decision on September 1, 2020, "there was no trial date looming due to the" coronavirus pandemic. We acknowledge that, despite the fact that the trial had been scheduled to commence on October 6, 2020,

had "ample opportunity" during the lengthy pendency of the present action to disclose a prepared, informed expert or to ensure that Stanger was apprised of the facts pertinent to the prior action such that Stanger's opinion, as represented in the disclosure, was informed by sufficient facts and such that Stanger could provide an informed expert opinion at the time he was deposed. Instead, the court noted, the plaintiff engaged in a pattern of game-playing by disclosing an expert witness while simultaneously preventing that expert from reviewing the file—to which the expert had access—so that the defendant would remain uninformed as to the factual and legal basis of the expert's opinion until trial. This strategy, the court stated, could have resulted in further delay of the trial date to allow the defendant the opportunity to conduct meaningful discovery or in the defendant's being ambushed by a "newly informed expert" witness at trial. The court likened failing to impose a sanction on the plaintiff to "[r]ewarding [the plaintiff's apparent] strategy of unduly limiting expert preparation . . . ." To reward such a strategy, the court noted, would be to "encourage" parties to disclose uninformed expert witnesses "willing to parrot the pleadings without independent[ly] review[ing] and anal[yzing] . . . the . . . [pertinent] evidence" from the prior action so that the party could comply technically with the disclosure requirements while simultaneously

jury trials were suspended at the time the court imposed the discovery sanction on the plaintiff in its memorandum of decision due to the coronavirus pandemic. Specifically, the Judicial Branch suspended civil jury trials in March, 2020, through the end of the 2020 calendar year and into the 2021 calendar year.

The fact, however, that jury trials were suspended at the time the court imposed the discovery sanction does not alter the reality that the court had rescheduled the trial date eight times *before* the Judicial Branch suspended civil jury trials in March, 2020. We note that the court specifically emphasized that the trial date was delayed—*before* jury trials were suspended—from August 21, 2019, to February 4, 2020, because of the plaintiff's failure to timely disclose an expert witness.

preventing the opposing party from engaging in meaningful discovery as to the expert witness' true opinion.

The court also concluded that a less severe sanction or combination of sanctions could not address adequately the plaintiff's noncompliance. The court noted that allowing Stanger more time to review the file, after the trial date had been scheduled and rescheduled eight times and in light of the fact that Stanger did not review the file during the two months between the first and second days of his deposition, would "not [be] an adequate sanction" because such a continuance likely would require the defendant to conduct additional discovery once Stanger became apprised of the salient facts of the case. The court further noted that continuing the trial date to provide Stanger additional time to review the file would have the practical effect of "[r]ewarding" the plaintiff's gamesmanship. The court also considered whether providing the plaintiff the opportunity to disclose another expert would serve as an adequate sanction and rejected the option, stating that it was "far too late" to do so and, again, would have the practical effect of "[r]ewarding" the plaintiff's pattern of game-playing.[22]

On the basis of the record before it, the court reasonably could have concluded, as it did; see *Millbrook*

[22] With respect to the plaintiff's argument that the court could have precluded only the testimony and opinions it believed were not based on sufficient facts, the court made clear that, in its view, Stanger's opinions as to several elements of legal malpractice—including causation—were not based on sufficient facts. Thus, even if the court precluded *only* Stanger's opinions as to the legal malpractice elements, summary judgment still would be proper because the plaintiff would be unable to prove the essential elements of his case. See, e.g., *Grimm* v. *Fox*, supra, 303 Conn. 329 ("[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]" (internal quotation marks omitted)); see also *Bozelko* v. *Papastavros*, supra, 323 Conn. 285 ("expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases").

Owners Assn., *Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15; that the sanction of preclusion of expert testimony was proportional to the plaintiff's noncompliance with the disclosure rules set forth in Practice Book § 13-4 and his pattern of gamesmanship, which rose to a discovery abuse. The court likewise reasonably could have concluded, as it did, that the plaintiff's noncompliance and discovery abuse could not adequately be addressed by a less severe sanction or combination of sanctions. Thus, we cannot conclude that the court abused its discretion in so determining.

II

The plaintiff additionally claims that the court improperly granted the defendant's motion for summary judgment. In connection with this claim, the plaintiff first argues that, when it rendered summary judgment in favor of the defendant, the court improperly failed to consider Stanger's deposition testimony. As we have explained; see part I of this opinion; the court properly precluded Stanger's testimony as a sanction for the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4 and the plaintiff's discovery abuses. Accordingly, we reject this argument.

The plaintiff also contends that, even if the court properly precluded Stanger's testimony, genuine issues of material fact nonetheless exist as to the legal malpractice elements of causation and damages. We note that, in so arguing, the plaintiff nonetheless cites several of the opinions that Stanger articulated during his deposition and relies on these opinions as evidence of the alleged genuine issues of material fact.

"In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal

quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 329. As the plaintiff acknowledges in his principal appellate brief, "[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]. . . . The requirement of expert testimony in malpractice cases serves to assist lay people, such as members of the jury . . . to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard."[23] (Internal quotation marks omitted.) Id., 329–30.

"[E]xpert testimony also is a general requirement for establishing the element of causation in legal malpractice cases." *Bozelko* v. *Papastavros*, supra, 323 Conn. 285.[24] With respect to the causation element, "the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the

[23] We note that "[t]here is an exception to [the] rule [requiring the plaintiff to present expert testimony to establish the elements of legal malpractice] . . . [if] there is such an obvious and gross want of care and skill that neglect is clear even to a lay person. . . . Nevertheless, [t]he exception to the need for expert testimony is limited to situations in which the defendant attorney essentially has done *nothing whatsoever to represent his or her client's interests*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 330.

To the extent that the plaintiff argues generally in his principal appellate brief that the exception to the rule requiring that he present expert testimony applies in this case, at no point in his principal appellate brief does the plaintiff contend that the defendant "essentially ha[d] done nothing whatsoever to represent his . . . client's interests" in the prior action; (internal quotation marks omitted) id.; such that this exception would be applicable. Accordingly, we reject the plaintiff's argument to the extent that he made it.

[24] Our Supreme Court has recognized that "exceptions [to the requirement that a plaintiff present expert testimony to establish the causation element exist] in obvious cases"; *Bozelko* v. *Papastavros*, supra, 323 Conn. 285; such as in a case in which a New Jersey court determined that a plaintiff in a legal malpractice action need not present expert testimony to establish that an attorney "may not charge for work that has not been performed . . . [or] to establish the causal connection between [an attorney's] charge for [legal representation] services [he had] not [yet] performed [for the plaintiff]

[prior] action had the [attorney] not been negligent. This traditional method of presenting the merits of the [prior] action is often called the case-within-a-case. . . . [T]he plaintiff must prove that, in the absence of the alleged breach of duty by [his or] her attorney, the plaintiff would have prevailed [in] the [prior] cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the [prior] action." (Citations omitted; internal quotation marks omitted.) Id., 284. Put differently, the plaintiff generally must present expert testimony to "establish that the defendant's conduct legally caused the injury of which [he] complain[s]." (Internal quotation marks omitted.) *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 750, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

In the present case, the plaintiff alleged that the defendant committed professional negligence by failing to bring on his behalf claims of CUTPA violations and tortious interference with business expectancies against the hospital in the prior action. Thus, to prevail in the present action, the plaintiff was required to "[present] the merits of the [prior] action," or the "case-within-a-case," as to either of those causes of action. (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284. Put differently, the plaintiff was required to prove that, had the defendant brought on his behalf claims of CUTPA violations and

and [the plaintiff's receipt of] lesser proceeds" from a settlement check. *Sommers* v. *McKinney*, 287 N.J. Super. 1, 14, 670 A.2d 99 (App. Div. 1996); see *Bozelko* v. *Papastavros*, supra, 285 n.12 (citing *Sommers*). The plaintiff argues in his principal appellate brief that the issue of causation in the present case "is within the realm of a jury's ordinary knowledge." (Internal quotation marks omitted.) We disagree. Whether the plaintiff in the present case would have prevailed had he pursued a CUTPA claim in the prior action does not appear to fall within the "obvious" category of cases described by our Supreme Court. *Bozelko* v. *Papastavros*, supra, 285.

tortious interference with business expectancies against the hospital in the prior action, he would have prevailed on either cause of action. See id.

"[W]e [first] set forth the legal standard that governs CUTPA claims. . . . [General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . [I]n determining whether a practice violates CUTPA [our Supreme Court has] adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . ." (Footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 409–10. Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to CUTPA; (internal quotation marks

omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to establish the elements of CUTPA, including "an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 409.

Although "a breach of contract may form the basis for a CUTPA claim"; id., 410; "not every contractual breach rises to the level of a CUTPA violation." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 228, 990 A.2d 326 (2010). "CUTPA was intended to provide a remedy that is *separate and distinct* from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances." (Emphasis added.) *Ulbrich* v. *Groth*, supra, 310 Conn. 411. Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to CUTPA; (internal quotation marks omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to show that he was entitled to additional relief in the prior action, above and beyond the damages award he received in connection with his prevailing on the breach of contract claim. See *Ulbrich* v. *Groth*, supra, 411. Further, because, "[i]n order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights"; (internal quotation marks omitted) id., 446; the plaintiff likewise was required to show that the defendant exhibited a reckless indifference to, or an intentional and wanton violation of, the plaintiff's rights to establish that the plaintiff would have received punitive or exemplary damages in the prior action. See id.

We next set forth the legal standard that governs a claim of tortious interference with business expectancies. "[I]n order to recover for a claim of tortious interference with business expectancies, the claimant must

plead and prove that: (1) a business relationship existed between the plaintiff and another party; (2) the defendant intentionally interfered with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffered actual loss. . . . [I]t is an essential element of the tort of unlawful interference with business relations that the plaintiff suffered actual loss." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Hi-Ho Tower*, *Inc.* v. *Com-Tronics*, *Inc.*, 255 Conn. 20, 32–33, 761 A.2d 1268 (2000). Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to tortious interference with business expectancies; (internal quotation marks omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to establish each of the aforementioned elements of tortious interference with business expectancies. See id.

Finally, we note that "summary judgment [is] proper when [a] plaintiff alleging legal malpractice fails to establish [his] claim by expert testimony." (Internal quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 330. "Our review of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010).

We have determined that the court properly precluded the admission of the testimony of Stanger. Consequently, the plaintiff failed to present expert testimony regarding several material issues, including the applicable standard of care that the defendant owed to the plaintiff in his representation of him and whether he breached that standard of care; see *Grimm* v. *Fox*, supra, 303 Conn. 329–30; by not initiating on behalf of the plaintiff a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action—particularly in light of the fact that the

plaintiff already had prevailed on a breach of contract count against the hospital in the prior action and recovered $258,610 plus costs. Further, the plaintiff was unable to present expert testimony as to the causation element; see *Cammarota* v. *Guerrera*, supra, 148 Conn. App. 750; and to establish the "case-within-a-case" required to prevail on his legal malpractice claims. (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284. Put differently, the plaintiff could not present expert testimony as to the elements of CUTPA, including whether the defendant's actions qualified as " 'unfair' " pursuant to the cigarette rule;[25] *Ulbrich* v. *Groth*, supra, 310 Conn. 409; and whether he was entitled to additional relief above and beyond the damages he recovered for breach of contract. See id., 446. The plaintiff likewise could not present expert testimony as to the elements of tortious interference with business expectancies. See *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, supra, 255 Conn. 32–33. In light of the fact that the plaintiff was unable to present expert testimony as to the foregoing material issues, which the plaintiff was "required [to present] to establish a prima facie case of legal malpractice . . . the [defendant was] entitled to judgment as a matter of law." (Citation omitted.) *Grimm* v. *Fox*, supra, 337.

The judgment is affirmed.

In this opinion the other judges concurred.

[25] We note that it is doubtful that Stanger's testimony, had it not been precluded from admission at trial as a sanction for the plaintiff's noncompliance and discovery abuse, would have been sufficient to establish this element of CUTPA. During his deposition, Stanger was unable to articulate the specific conduct in which the hospital had engaged that "offend[ed] public policy . . . [was] immoral, unethical, oppressive, or unscrupulous . . . or cause[d] substantial injury to consumers, [competitors or other businesspersons]"; (internal quotation marks omitted) *Ulbrich* v. *Groth*, supra, 310 Conn. 409; and testified that counsel for the plaintiff instructed him to "assume" that such conduct existed.

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NOTICE

PUBLIC CENSURE July 20, 2022

In Re: Complaint against the Honorable Kathleen McNamara, Judge of the Superior Court.

On July 20, 2022, the Judicial Review Council held a public hearing pertaining to the self-reported complaint made by the Honorable Kathleen McNamara for her appearance in a television commercial and related advertisement displayed on the internet.

The Judicial Review Council determined that Judge McNamara's conduct was a violation of Rule 1.3 of the Judicial Code of Conduct which states, ''A judge shall not use the prestige of judicial office to advance the personal or economic interests of the judge, or others, or allow others to do so.''

The Judicial Review Council decided to issue a Public Censure for Judge McNamara's conduct. Judge McNamara acknowledged that her conduct violated the Judicial Code of Conduct and accepted the disciplinary action imposed by the Council.

Stephanie Z. Roberge
Chairman, Judicial Review Council

JUDICIAL REVIEW COUNCIL

Memorandum of Decision

In re: Hon. Kathleen McNamara July 20, 2022

I. **PROCEDURAL BACKGROUND:**

By Complaint dated February 4, 2022, and received by the Judicial Review Council on February 8, 2022, the Honorable Kathleen McNamara filed a Complaint against herself. The substance of the Complaint was Judge McNamara's appearance in an advertisement spot for Hartford Hospital, her spine surgeon and neurologist in connection with her surgical care. According to her Complaint, Judge McNamara recognized it was wrong to appear in the advertisement and contacted Hartford Healthcare to stop airing the ad. In addition, according to her Complaint, Judge McNamara recognized that her conduct was a violation of the Code of Judicial Conduct, expressed her apologies to the Council, the Judiciary and her colleagues.

Pursuant to Connecticut General Statutes § 51-51l the Judicial Review Council initiated an investigation of the Complaint through Executive Director, Kevin Dunn. On March 9, 2022, the Council received a Memorandum of Law with supporting Affidavit filed on Judge McNamara's behalf by her attorney Steven L. Seligman, Esq. According to her Affidavit, Judge McNamara was not compensated in any fashion for her appearance in the ad, she was never told that she would be identified

as a judge in the ad, and she never consented to being so identified. In addition to the foregoing, the Judicial Review Council recognized Judge McNamara's twelve years of distinguished service on the bench and that she had just one previous complaint filed with the Judicial Review Council that was dismissed for lack of factual basis.

After consideration of Judge McNamara's Complaint, the Respondent's Memorandum of Law, and the results of the investigation the Judicial Review Council found probable cause thatJudge McNamara violated the Code of Judicial Conduct. By written stipulation executed on June3, 2022, Judge McNamara stipulated that probable cause existed for violation of Rule 1.3 of the Code of Judicial Conduct, which provides: ''A judge shall not use or attempt to use the prestige of judicial office to advance the personal economic interests of the judge, or others or allow others to do so.''

The Judicial Review Council, pursuant to its statutory mandate conducted a public hearing on July 20, 2022, wherein Judge Kathleen McNamara appeared with her counsel. The Council's Exhibits 1 through 5 were entered into the record. There was no additional evidence offered on behalf of Judge McNamara. A full quorum of the Judicial Review Council, consisting of twelve members, were present and voted.

II. FINDINGS:

Based upon clear and convincing evidence, the Judicial Review Council unanimously found that Judge McNamara's conduct by appearing in the advertisement was a violation of Rule1.3 of the Code of Judicial Conduct and that such conduct warrants disciplinary action in the form of a public censure. The Judicial Review Council also recognized and appreciated Judge McNamara's candor, her self-referral, and her cooperation during the proceedings.

III. CONCLUSION:

On July 20, 2022, the Judicial Review Council imposed a public censure of Judge Kathleen McNamara. Said public censure will be published in the Connecticut Law Journal with this§ 51-51k-8(m) and § 51-51k-9(d).

The Judicial Review Council,
Stephanie Z. Roberge, *Chair*