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CONNECTICUT REPORTS

Vol. 349

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* TYHITT BEMBER
(SC 20708)

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

Syllabus

Convicted of felony murder, attempt to commit robbery in the first degree, and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, the defendant appealed to this court. On the night of the victim's murder, the defendant, armed with a .22 caliber revolver with black duct tape wrapped around its grip, was parked at a restaurant with H in H's car. When the defendant saw the victim walking nearby, he instructed H to follow the victim in the car. At some point, the defendant exited the car to pursue the victim on foot. After confronting the victim, the defendant decided to rob him, but, when the victim resisted, the defendant shot the victim five times. At trial, the state's case rested almost entirely on the testimony of H and B, who were both facing charges for their involvement in another homicide and had entered into cooperation agreements with the state. The defendant had allegedly confessed his involvement in the victim's murder to B, who was the defendant's close friend. Prior to trial, the defense moved to preclude the state from introducing the cooperation agreements during its direct examination of H and B. The trial court granted the motion but ruled that the prosecutor would be permitted to use leading questions to flesh out the terms of the agreements. The defense also moved for a pretrial hearing regarding the reliability of H's and B's proposed trial testimony pursuant to the statute (§ 54-86p) governing the reliability and admissibility of jailhouse informant testimony. Following a hearing, at which H and B testified, the trial court, over defense counsel's objection, granted the state's motion to open the hearing for the purpose of introducing five exhibits relating to evidence that the parties had referenced during their arguments at the hearing. Thereafter, the trial court found that H's and B's proposed trial testimony was sufficiently reliable to be admitted at trial. In reaching its decision, the trial court relied on, inter alia, its credibility assessment of H's and B's testimony in another criminal case. At trial, the prosecutor elicited testimony from H and B on direct examination regarding their coopera-

tion agreements, including their obligation to tell the truth under the terms of those agreements. *Held*:

1. The defendant could not prevail on his claim that the trial court had abused its discretion in permitting the prosecutor to question H and B during direct examination regarding the specific terms of their cooperation agreements with the state:

   The defendant waived this claim, as defense counsel expressly agreed that the state could use leading questions during direct examination to flesh out the terms of the cooperation agreements and H's and B's understanding of them, and, even if the claim was not waived, it still would have failed because defense counsel informed the trial court, prior to the start of the trial, that he intended to cross-examine H and B about their expectations under the cooperation agreements, and, therefore, it was within the trial court's discretion to permit the prosecutor to use the agreements to rehabilitate H and B in advance, during direct examination.

2. The defendant could not prevail on his claim that the prosecutor had impermissibly vouched for H's and B's credibility by introducing the truthfulness provisions of their cooperation agreements, eliciting testimony from H and B that their attorneys were present in the courtroom, and referencing their prior testimony in other criminal cases on behalf of the state:

   This court, relying on *State* v. *Calhoun* (346 Conn. 288) and *State* v. *Flores* (344 Conn. 713), concluded that the introduction of the truthfulness provisions of H's and B's cooperation agreements did not constitute improper vouching because they did not refer to facts not in evidence, explicitly or implicitly indicate that the state had verified the accuracy of their testimony, or offer the prosecutor's personal opinion regarding the truthfulness of their testimony, and those provisions merely stated that the witnesses had an obligation to testify truthfully and explained the consequences for a breach of that obligation.

   It was unnecessary for this court to decide whether the prosecutor's questions relating to H's and B's testimony in other cases and their attorneys' presence in the courtroom were improper because, even if they were, they did not deprive the defendant of a fair trial, as defense counsel did not raise any objection to these questions or ask the trial court to take any curative measures, and, accordingly, it could be inferred that defense counsel did not regard the questions as seriously prejudicial when they were posed to H and B.

   Moreover, the alleged improprieties were infrequent, as the challenged questions comprised only a small portion of the prosecutor's lengthy examination of both witnesses, this court did not perceive the questions as blatantly egregious or inexcusable, and, although H's and B's testimony was central to the state's case, the state presented evidence that corrobo-

rated their testimony, including cell site data and analysis placing the defendant near the crime scene close to the time that the victim was shot and a .22 caliber revolver with black duct tape wrapped around its grip, which the defendant had given to his then girlfriend for safe keeping after the victim's murder.

3. The trial court did not abuse its discretion in opening the reliability hearing to allow the state to introduce evidence that the parties had referenced during the hearing or in determining that H's and B's proposed trial testimony was sufficiently reliable to be admissible at trial under § 54-86p:

With respect to the trial court's opening of the reliability hearing, the defendant failed to identify any resulting prejudice, as the court found that the state had inadvertently failed to introduce the evidence referenced at the hearing and that the defendant was aware of that evidence, and as the court properly could have considered most, if not all, of the evidence under § 54-86p, even if it had not been admitted at the hearing.

With respect to the trial court's reliability determination, the trial court conducted a careful review of the record of the hearing, the legal arguments advanced by both parties, and the statutory factors enumerated in § 54-86p (a) in concluding that H's and B's proposed testimony was sufficiently reliable to be admitted at trial.

Moreover, although the trial court erroneously included its own assessment of H's and B's testimony in another case in determining that their proposed testimony was sufficiently reliable to be admitted at trial in the present case, that error was harmless because it was clear that the court would have found H's and B's testimony sufficiently reliable utilizing only permissible statutory factors under § 54-86p, as its prior credibility assessment was one of many factors that it considered in determining that the testimony was sufficiently reliable, there was nothing in the record to suggest that it was a dispositive factor or that the court's decision might have been different in its absence, and defense counsel had ample opportunity to impeach H's and B's credibility at trial and thoroughly availed himself of that opportunity through cross-examination and during closing argument.

This court instructed trial courts to rely on objective criteria, to which all parties would have access through the discovery process, in considering information disclosed pursuant to statute (§ 54-86o (a) (5)) for purposes of making a prima facie reliability determination under § 54-86p (a).

4. There was no merit to the defendant's claim that the trial court's denial of his motion to suppress a recording of a phone conversation he had had with his then girlfriend, D, while he was being held in pretrial detention on unrelated charges and to suppress the .22 caliber revolver seized by the police as a fruit of the information acquired from the recording violated his rights under the fourth amendment to the United States constitution:

The defendant failed to demonstrate that he maintained a subjective expectation of privacy in the content of his phone conversation with D, as he stipulated that, at the time of his admission to the correctional facility, he was notified and signed a waiver acknowledging that all nonprivileged calls were subject to recording and monitoring, there were signs posted near the phone area at the correctional facility, and a recorded message played throughout his call with D, reminding him that his call was subject to recording and monitoring, and nothing about the defendant's actions in placing a call under these conditions indicated an intent to preserve the contents of the call as private.

Moreover, in the absence of such an expectation of privacy, the defendant was not entitled to suppression of the recording of the phone conversation or the .22 caliber revolver.

Argued October 27, 2023—officially released June 25, 2024

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Vitale*, *J.*; subsequently, the court granted the defendant's motion for a judgment of acquittal as to the charge of conspiracy to commit robbery in the first degree; verdict and judgment of guilty of felony murder, attempt to commit robbery in the first degree, and carrying a pistol or revolver without a permit, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Meryl R. Gersz, assistant state's attorney, with whom were *John P. Doyle*, *Jr.*, state's attorney, and *Melissa Holmes*, assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. Following a jury trial, the defendant, Tyhitt Bember, was convicted of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35.[1] On appeal,[2] the defendant claims that (1) the trial court abused its discretion in permitting the state to question two of its witnesses about their cooperation agreements with the state during direct examination and that this questioning amounted to prosecutorial impropriety, (2) the trial court abused its discretion in concluding that the testimony of the cooperating witnesses was reliable and admissible pursuant to General Statutes § 54-86p,[3] and (3) the trial

[1] The jury found the defendant not guilty of the charge of murder in violation of General Statutes § 53a-54a (a). The trial court granted the defendant's motion for a judgment of acquittal as to the charge of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2).

[2] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

[3] General Statutes § 54-86p provides in relevant part: "(a) In any criminal prosecution of a defendant for a violation of section . . . 53a-54c . . . upon a motion of the defendant before the start of a trial on any such offense, the court shall conduct a hearing at which hearsay or secondary evidence shall be admissible to determine whether any jailhouse witness's testimony is reliable and admissible. The court shall make a prima facie determination concerning the reliability of such testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors:

"(1) The extent to which the jailhouse witness's testimony is confirmed by other evidence;

"(2) The specificity of the testimony;

"(3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense;

"(4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and

"(5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to . . . a prosecutorial official, including whether the jailhouse witness was responding to a leading question. . . ."

court's denial of his motion to suppress the recording of a jailhouse phone call and the .22 caliber revolver seized by the police as a result of information acquired from that recording violated his rights under the fourth amendment to the United States constitution. We reject the defendant's claims and affirm the judgment of the trial court.

The following facts are relevant to our analysis of the defendant's claims. On the evening of December 27, 2013, the defendant was driving around New Haven with John Helwig and Melvin Younger in Helwig's car. The three men were friends and often spent time together smoking, drinking, and engaging in criminal activity. On the night of the murder, the defendant was armed with an older model .22 caliber revolver that had black duct tape wrapped around the grip. Sometime around midnight, Helwig drove the men to a Taco Bell restaurant near exit 8 on Interstate 91. While parked at the restaurant, the defendant saw the victim, Javier Martinez, walking nearby. The defendant mistook the victim for someone he did not like and with whom he previously had fought. The defendant told Helwig to follow the victim so that he could confront him. At some point, the defendant and Younger exited Helwig's car to pursue the victim on foot. When the defendant caught up to him, he realized that the victim was not the person he thought he was but decided to rob him anyway. When the victim resisted, the defendant shot him five times. The victim died at the scene. Upon returning to Helwig's car, the defendant told Helwig that he had shot the victim because the victim disrespected him during the robbery by pushing his gun out of the way.

A nearby resident found the victim's body in the street and summoned the police. Five .22 caliber bullets were later removed from the victim's body. Investigators were able to determine that four of the bullets had been

fired from the same weapon. The remaining bullet was too damaged for an accurate comparison.

In 2017, after a lengthy investigation, the state charged the defendant with several offenses relating to the victim's death. The state's case turned primarily on the testimony of two cooperating witnesses, Otis Burton, a close friend of the defendant to whom the defendant had confessed after the murder, and Helwig, who was with the defendant on the night of the murder. The state also presented cell site data and analysis placing the defendant near the crime scene close to the time that the victim was shot, and a .22 caliber revolver with black duct tape wrapped around its grip, which the defendant had given to his girlfriend for safe keeping. The bullets recovered from the victim's body and crime scene were too damaged to be directly connected to the defendant's .22 caliber revolver.

I

The defendant first claims that the trial court abused its discretion in permitting the state to question Helwig and Burton regarding the specific terms of their cooperation agreements with the state[4] during direct examina-

[4] Helwig's cooperation agreement, which was identical to Burton's in all pertinent respects, provided in relevant part: "The [state] agrees to: (1) [u]pon Helwig's request, to provide information regarding his cooperation pursuant to his agreement to any government agency in any matter or to any court in any proceeding. The [s]tate will not make a specific sentence recommendation unless required to do so by the [c]ourt.

"Helwig agrees to: (1) truthfully disclose all information pertaining to his criminal activities, and/or the criminal activities of others, as these activities relate to matters about which the [state] and any investigating police officer or agency inquires of him; (2) truthfully testify before any investigatory grand jury, and/or at any trial, retrial, or other court proceeding concerning such criminal activity when requested to do so by the [state]. . . .

"It is understood that this agreement contemplates the following criminal activities, whether completed, attempted, or conspired: murder; hindering prosecution; the discharge, theft, possession and trafficking of firearms; and that it may include any other criminal activities that may arise upon further information and investigation.

"It is understood that this is not an immunity agreement and that, in providing information pursuant to this agreement, Helwig may be subject to prosecution for any applicable state criminal offense.

tion. The defendant contends that the state should have been precluded from introducing the bolstering aspects of the agreements, particularly the truthfulness provisions, until after Helwig's and Burton's credibility was attacked by the defense. The defendant further contends that the state's use of the cooperation agreements during its direct examination, and the testimony elicited as a result, amounted to prosecutorial impropriety because it impermissibly vouched for the witnesses' credibility.

The state argues that the defendant waived this claim because defense counsel affirmatively agreed that the state could question Helwig and Burton about their cooperation agreements during direct examination. The state further argues that, even if the claim was not waived, the trial court did not abuse its discretion in

"It is understood that the [state], in fulfilling its obligations pursuant to this agreement, makes no promises or representations regarding the actual sentence imposed in any future matter, or the certainty of concurrent time. The disposition of such matters rests entirely with the trial court. . . . Helwig understands that the charges for which he has entered pleas carry an exposure of thirty years incarceration.

"It is understood that Helwig is obligated pursuant to this agreement to at all times give complete and truthful information and testimony. In the event that the [state] in its discretion reasonably determines that Helwig has given incomplete, false or misleading information, the agreement shall become null and void and of no further effect, and Helwig may be subject to prosecution of perjury and/or any other applicable state criminal offense relating to the giving of such information.

"It is understood that if the [state] reasonably determines that Helwig has violated any provision of this agreement, the agreement shall become null and void and of no effect. In the event that the agreement is rendered null and void, for any reason, Helwig understands that any information that he has provided pursuant to [the] agreement may be used against him in court and he agrees to waive (1) any claim in law that his statements conveying such information are subject to suppression, and (2) any statutes of limitations defense.

"It is understood that this contract embodies the entirety of the agreement between the parties, and that any amendment of, or addition to, the terms hereof shall be executed in writing that is signed by the [state], Helwig, and Helwig's attorney. By signing this agreement, Helwig acknowledges that he has carefully considered each of its provision[s], discussed each with his counsel, and has no questions or concerns relating to entering into the agreement."

allowing the challenged testimony under *State* v. *Calhoun*, 346 Conn. 288, 289 A.3d 584 (2023), and *State* v. *Flores*, 344 Conn. 713, 281 A.3d 420 (2022), because defense counsel informed the court, prior to the start of trial, that Helwig's and Burton's expectations under their cooperation agreements would be "front and center" in his cross-examination of them. The state further argues that, because the trial court did not abuse its discretion in permitting the state to introduce the cooperation agreements, there was no prosecutorial impropriety.

The following additional facts are relevant to the resolution of this claim. Prior to trial, the defendant moved to preclude the state "from offering [Helwig's and Burton's] cooperation agreement[s] in its case-in-chief." Defense counsel argued that the state should be precluded from presenting the agreements because the prosecutor trying the case was the sole signatory on the agreements, which was inherently bolstering of the witnesses' credibility. Defense counsel further argued that, because "[t]he expectations of the witnesses under [the cooperation] agreement[s] [would] be front and center of some portion of . . . [his] cross-examination . . . [he] should have the right to introduce [the agreements] . . . if [he] choose[s] to go down that road."

In making this argument, defense counsel acknowledged that, under *State* v. *Gentile*, 75 Conn. App. 839, 851–52, 818 A.2d 88, cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003),[5] the trial court had discretion to admit

[5] In *Gentile*, the Appellate Court adopted the rule followed by the majority of federal appellate courts permitting courts to admit a cooperation agreement before the cooperating witness' credibility has been attacked. *State* v. *Gentile*, supra, 75 Conn. App. 851–52; see also id., 851 ("it is not improper bolstering for a prosecutor to question a witness on direct examination about [a] cooperation agreement's requirement that the witness testify truthfully to receive the benefits of the agreement"). We have not yet decided whether we agree with the Appellate Court's holding in *Gentile* on this issue, although we have held that the trial court may exercise its discretion to permit the state to question a witness about the terms of the witness' cooperation agreement during its direct examination, if defense counsel indicates that the

the cooperation agreements during the state's direct examination, before the cooperating witnesses' credibility was attacked. Defense counsel maintained, however, that, because Helwig's and Burton's credibility was pivotal to the success of the state's case, "this [was] the very sort of case [that] *Gentile* may have had in mind, [in which] the court ha[s] the ability to exercise its discretion and [to] say to the state, no, you don't get to offer [the agreements] in your case-in-chief. You can certainly mention [them]. . . . I don't think that's improper. But to . . . offer the document[s] [themselves] . . . especially when the [person who signed them] on behalf of the state . . . is the very [person] trying the case . . . [that is a bridge too] far. . . . [T]hat's implicit vouching that this court should prohibit . . . ."

The trial court thereafter granted the defense's request to preclude the state from introducing copies of the cooperation agreements during its direct examination. At that time, the court asked defense counsel if it correctly understood the defense's objection to the introduction of the agreements, stating in relevant part: "The [defense] has requested that the written agreement[s] be disallowed as . . . exhibit[s], but, as I understand the record, and I can be corrected shortly if I'm wrong . . . [the defense] has no objection to thorough and specific testimony by each witness as to the exact contents of the agreements and their understanding [of the agreements]. . . . There's no objection, as I understand it, to the [state's] examining the

defense intends to question the witness regarding the cooperation agreement during cross-examination. See *State* v. *Flores*, supra, 344 Conn. 748 ("[w]e need not decide today whether to follow the majority or the minority of jurisdictions regarding whether the admission of the agreements and their truthfulness provisions must await an attack on the witness' credibility because the trial court did not abuse its discretion under either approach"). Although *Flores* had not been decided at the time of the defendant's trial, it is controlling on appeal. See, e.g., *State* v. *Calhoun*, supra, 346 Conn. 302 n.4.

witnesses from a document not in evidence. . . . [Therefore], the state will be permitted leading questions on direct [examination] to fully [flesh] out the terms of the agreement[s]. The documents will be marked for [identification] purposes only."[6] When the trial court finished speaking, it asked defense counsel whether it had accurately conveyed for the record the defense's objection to the state's use of the cooperation agreements. Defense counsel responded, "Yes, I believe . . . that [the court has] stated [the defense's] position correctly . . . ."

Given this procedural history, we agree with the state that the defendant has waived the right to challenge the trial court's evidentiary ruling as it relates to the admission of the terms of the cooperation agreements on direct examination.[7] See, e.g., *State* v. *Hampton*, 293 Conn. 435, 449, 988 A.2d 167 (2009) ("[w]hen a party [or his counsel] consents to or expresses satisfaction with an issue at trial, claims arising from that issue are

[6] This procedure was initially proposed by defense counsel earlier at the hearing conducted pursuant to § 54-86p in response to a question from the trial court about how the jury would be made aware of the precise terms of Helwig's and Burton's cooperation agreements. Defense counsel then affirmatively stated: "I have consented to leading questions to avoid the harm that I'm complaining about here. . . . I would agree that leading questions would be appropriate there."

[7] With respect to his other evidentiary claims, the defendant contends that the trial court abused its discretion in permitting the state to use the text of the cooperation agreements to vouch for Helwig's and Burton's credibility. The defendant additionally contends that the trial court erred in allowing the state to further vouch for their credibility by eliciting testimony from them that they previously had testified on behalf of the state in other cases and that their attorneys were present in the courtroom at the defendant's trial. Defense counsel did not object at trial to the state's questioning relating to the text of the cooperation agreements, Helwig's and Burton's prior testimony, or their attorneys' presence in the courtroom. These claims are thus unpreserved, and we decline to review them on appeal. See, e.g., *State* v. *Qayyum*, 344 Conn. 302, 312, 279 A.3d 172 (2022) ("[D]efense counsel's failure to object to those questions necessarily means that he did not articulate his claim regarding those questions with sufficient clarity to put the trial court on notice. As a result, we conclude that the defendant failed to preserve this evidentiary claim, and, therefore, we do not review it.").

deemed waived and may not be reviewed on appeal" (internal quotation marks omitted)). The record leaves no reasonable question that defense counsel assented to the very procedure of which the defendant now complains. Defense counsel expressly agreed that the state could use "leading questions on direct [examination] to fully [flesh] out the terms of the agreement[s]" and the witnesses' understanding of them, which is exactly what occurred. Furthermore, even if the claim was not waived, it still would fail because defense counsel informed the trial court, prior to the start of trial, that Helwig's and Burton's expectations under their cooperation agreements would be "front and center" in his cross-examination of them. See, e.g., *State* v. *Calhoun*, supra, 346 Conn. 302 ("if defense counsel makes it clear that [the defense] intend[s] to cross-examine a witness on that witness' cooperation agreement, then the trial court has discretion to permit the state to use the text of the cooperation agreement to rehabilitate the witness in advance, during direct examination").

We now turn to the defendant's claims of prosecutorial impropriety. The defendant claims that the prosecutor impermissibly vouched for Helwig's and Burton's credibility by (1) introducing the truthfulness provisions of their cooperation agreements, (2) eliciting testimony from them that their attorneys were present in the courtroom, and (3) referencing their previous testimony in other cases on behalf of the state.[8] The state

[8] The state argues that these claims are merely a recharacterization of the defendant's evidentiary claims. See, e.g., *State* v. *Graham*, 344 Conn. 825, 858, 282 A.3d 435 (2022). We disagree. We previously have reviewed claims relating to the admission of truthfulness provisions as claims of prosecutorial impropriety. See, e.g., *State* v. *Flores*, supra, 344 Conn. 736, 742. We also disagree with the state's contention that the defendant's vouching claims relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom are strictly evidentiary. Although unpreserved challenges to the use of leading questions are unreviewable when the defendant "take[s] issue with the form of the prosecutor's questions and not the information elicited"; *State* v. *Morel-Vargas*, 343 Conn. 247, 273, 273 A.3d 661, cert. denied, U.S. , 143 S. Ct. 263, 214 L. Ed. 2d 114 (2022); in the present case, the defendant is not challenging the manner in

maintains that no impropriety occurred and, in the alternative, that the defendant was not deprived of a fair trial. Although defense counsel did not object to many of the questions the defendant now argues constituted impropriety, this court reviews unpreserved claims of prosecutorial impropriety under *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987), and *State* v. *Warholic*, 278 Conn. 354, 897 A.2d 569 (2006). In so doing, however, "we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's [question] when it was [asked] suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012). We conduct a two step inquiry in analyzing a claim of prosecutorial impropriety: "(1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.) Id., 761–62. "[I]n determining whether prosecutorial impropriety so infected the proceedings with unfairness as to deprive the defendant of a fair trial, this court applies the factors set forth in *State* v. *Williams*, [supra, 540]. These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Hinds*, 344 Conn. 541, 563–64, 280 A.3d 446 (2022).

"Vouching occurs when the state expressly or impliedly attests to the credibility of a witness. . . . Although

which the testimony relating to the witnesses' prior testimony and their attorneys' presence at trial was elicited but, rather, is challenging the substance of that testimony.

the state would not put on a witness it did not believe, the state's confidence in its witnesses may not be stated or implied to the jury." (Citation omitted.) *State* v. *Calhoun*, supra, 346 Conn. 300. To avoid impermissible vouching, the state may not express a personal opinion about witness credibility, imply a guarantee of truthful testimony, or make suggestions to the jury on the basis of facts not in evidence. See, e.g., *United States* v. *Roundtree*, 534 F.3d 876, 880 (8th Cir. 2008). To avoid such impropriety, "the state must take care in drafting its cooperation agreements, and trial courts must carefully examine their language before admitting them fully into evidence." (Internal quotation marks omitted.) *State* v. *Calhoun*, supra, 301.

Looking first to whether recitation of the truthfulness provisions of Helwig's and Burton's cooperation agreements constituted impropriety in the first instance, we note that, in both *Calhoun* and *Flores*, this court concluded that the state's use of nearly identical cooperation agreements did not constitute improper vouching. See id.; *State* v. *Flores*, supra, 344 Conn. 748–50. The truthfulness provisions at issue in those cases and in the present case "are similar to the kind of provisions considered permissible in the federal case law discussed and cited [in *Flores*]—specifically, the provisions stating that [the witness] had a duty to 'truthfully disclose' and 'truthfully testify' and that he may be charged with perjury if he lies. Under applicable case law, these provisions do not constitute impermissible vouching because they do not refer to facts not in evidence, do not explicitly or implicitly indicate that the state has verified the accuracy of the testimony, and do not offer the prosecutor's personal opinion regarding the truthfulness of the testimony. Rather, [they] merely state that [the witness] had an obligation to testify truthfully—a duty all witnesses are sworn to uphold—and [to] explain the consequences for a breach of that obli-

gation." *State* v. *Flores*, supra, 748–49; see also *State* v. *Calhoun*, supra, 301–302 (truthfulness provision that witness could be prosecuted for perjury if state later determines that witness lied under oath was not vouching because it "[did] not imply that the state or judge knows that the witness presently is telling the truth, or that they possess information or means, unavailable to the jury, to determine the veracity of the witness' testimony"). Our analysis in these cases is dispositive of the defendant's prosecutorial impropriety claim with respect to the introduction of the truthfulness provisions of Helwig's and Burton's cooperation agreements.

The defendant next claims that the prosecutor vouched for Helwig's and Burton's credibility by eliciting testimony from them that both previously had testified on behalf of the state in other cases. He argues that this testimony, "[although] not objected to, constituted vouching in effect when combined with the testimony concerning the cooperation agreements" because "[i]t suggested to the jury that the prosecutor had already verified the truth of the testimony . . . or [else] he wouldn't have used them as witnesses in subsequent proceedings." Further, the defendant contends that the prosecutor vouched for Helwig's and Burton's credibility by eliciting from them the fact that their attorneys were present in the courtroom during their testimony. The defendant asserts that the prosecutor's questioning in this regard constituted vouching because, otherwise, the jury would necessarily have to conclude that both the prosecutor and defense counsel would be "willing to sit idly by while Helwig and Burton lied under oath." We conclude that it is unnecessary to decide whether the prosecutor's questions relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom were improper because, even if they were, they did not deprive the defendant of a fair trial. See, e.g., *State* v. *Hinds*, supra, 344 Conn. 563 ("even

if the prosecutor's remarks were improper, there is no possibility that they deprived the defendant of a fair trial").

There is no indication in the record that the defense invited the questions relating to Helwig's and Burton's prior testimony and their attorneys' presence in the courtroom. However, defense counsel did not object, and we interpret defense counsel's lack of objection "as a strong indication that [the alleged improprieties] did not carry substantial weight in the course of the trial as a whole and were not so egregious that they caused the defendant harm." *State* v. *Weatherspoon*, 332 Conn. 531, 558, 212 A.3d 208 (2019). Although a lack of objection is not dispositive in our analysis, "[w]hen no objection is raised at trial, we infer that defense counsel did not regard the remarks as seriously prejudicial at the time the statements were made." *State* v. *Medrano*, 308 Conn. 604, 620, 65 A.3d 503 (2013). Furthermore, even though the trial court did not adopt any curative measures, "the absence of such measures is attributable to [defense counsel's] failure to object or request any curative instruction from the court." *State* v. *Ortiz*, 343 Conn. 566, 581, 275 A.3d 578 (2022).

Moreover, we do not view the prosecutor's questioning regarding Helwig's and Burton's prior testimony or their attorney's presence in the courtroom to be "blatantly egregious or inexcusable." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 59, 100 A.3d 779 (2014). The allegedly improper questions were asked in conjunction with the state's introduction of the terms of the witnesses' cooperation agreements, were isolated in nature, did not constitute significant evidence in the context of their entire testimony, and, again, resulted in no objection from defense counsel. Given this context, we do not perceive the questions as blatantly egregious or inexcusable.

Nor can these instances of alleged impropriety be characterized as frequent. See, e.g., *State* v. *Felix R.*, 319 Conn. 1, 17, 124 A.3d 871 (2015) ("[i]mproper statements that are minor and isolated will generally not taint the overall fairness of an entire trial" (internal quotation marks omitted)). The challenged questions comprised only a small portion of the state's lengthy examination of both witnesses. Moreover, the few isolated questions relating to their prior testimony revealed the name and nature of the cases in which they previously had testified on behalf of the state. The prosecutor asked Helwig and Burton whether their attorneys were present in the courtroom once and did so in confirming that both witnesses were represented by counsel when they entered the pleas related to their cooperation agreements. Finally, although Helwig's and Burton's testimony was important to the state's case, the extent to which their credibility was a central issue is mitigated by the other evidence of guilt presented at trial. Specifically, both witnesses' testimony was corroborated in many respects by cell site data and analysis, which coincided with the testimony about the defendant's movements on the night of the murder, placing him close to the crime scene around the time of the shooting. The jury was also presented with evidence that the defendant had given his unique .22 caliber revolver—the same caliber weapon used to shoot and kill the victim—to his then girlfriend to hold for him shortly after the murder took place. This corroborating evidence reinforces our conclusion that, even if we assume the existence of impropriety, the defendant was not deprived of a fair trial. See, e.g., *State* v. *Weatherspoon*, supra, 332 Conn. 558 ("[W]e do not doubt that the jury's assessment of witness credibility was a significant factor in determining its verdict. But the jury was also presented with substantial physical and testimonial evidence corroborating [the witness'] story . . . ."); *State*

v. *Thompson*, 266 Conn. 440, 482, 832 A.2d 626 (2003) ("we see no reason why the nature of the evidence as circumstantial rather than direct should bear on the assessment of the strength of the state's case"). Considering all of these factors, we cannot conclude that the prosecutor's questions relating to Helwig's and Burton's testimony and their attorneys' presence in the courtroom "so infected the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Hinds*, supra, 344 Conn. 556. Accordingly, the defendant cannot prevail on any of his claims of prosecutorial impropriety.

II

The defendant next claims that the trial court abused its discretion in concluding that Helwig's and Burton's testimony was sufficiently reliable to be admissible under § 54-86p. The defendant makes three arguments in support of this claim: (1) the court abused its discretion in opening the hearing conducted pursuant to § 54-86p (reliability hearing) to allow the state to introduce evidence corroborating Helwig's and Burton's testimony, (2) the court abused its discretion in determining that the state made a prima facie showing of reliability, as required by § 54-86p, and (3) the court improperly relied on its own credibility assessment of Helwig's and Burton's testimony in another case in concluding that their testimony was sufficiently reliable to be admissible in the present case. The state responds that the trial court did not abuse its discretion in granting the motion to open the reliability hearing and in finding Helwig's and Burton's testimony reliable under § 54-86p. With respect to the defendant's third argument, the state contends that it is not preserved because defense counsel did not object to this part of the court's ruling at the reliability hearing, even though he had the opportunity to do so.

The following additional facts are relevant to our resolution of this claim. At the reliability hearing, Burton testified that, at the time of the victim's murder, he was sixteen years old and spent almost every day "hanging out" with a group of teenagers in the basement of an apartment building where a friend, McKinney Davis, lived. Most of the teenagers, including the defendant, were members of a New Haven street gang known as "Piru." At the time of the murder, Burton had known the defendant for approximately three years. Burton testified that the defendant often carried a revolver that had tape around the handle. It was in Davis' basement that he heard the defendant discuss the victim's murder. According to Burton, several individuals were present when this conversation occurred, including Younger, Helwig, Davis, and Torrence Gamble. The defendant told them that, on the night of the murder, he had gone out to look for someone he "had a beef with," who was in a relationship with the mother of his child. The defendant said that he did not find the person and that, when he came across the victim, whom he did not know, he decided to rob him, but "the robbery didn't go right . . . [because the victim] reached for the gun."

Burton further testified that, after the murder, New Haven police officers came to his home and told him that a confidential informant had informed them that Burton was present in Davis' basement when the defendant discussed the murder. Burton told the officers that he was wearing headphones at the time and did not hear anything. Burton testified that he lied to the officers because "it's street code . . . . Nobody likes a snitch."

In 2016, Burton was arrested for conspiracy to commit murder in connection with the murder of Gamble, who was killed because members of their gang suspected him of being a snitch. Burton was also arrested for assault in the first degree in an unrelated case. Burton testified that, after his arrests, he implicated the

defendant in the victim's murder and entered into plea and cooperation agreements with the state in the hope of receiving a more lenient sentence. At the time of the defendant's trial, Burton was awaiting sentencing in both the murder and assault cases. Under the cooperation agreement, his sentence exposure was capped at twenty years. Without the agreement, he could have faced up to forty-six years of incarceration.

Helwig testified that he met the defendant at the end of 2012 or the beginning of 2013 through a mutual friend. They grew so close that Helwig hired the defendant to work for his family's business. Most of the people they socialized with were affiliated with the Piru street gang, although Helwig was not a member of the gang. As the only person with a car, Helwig regularly drove gang members where they needed to go. Helwig testified that the defendant carried an older .22 caliber revolver with black tape around the grip. The gun was unique because it held more rounds than a normal revolver.

Helwig further testified that, on the night of the murder, he, the defendant, and Younger began the evening near Goffe and Orchard streets in New Haven. Later, they drove to the Taco Bell restaurant near exit 8 on Interstate 91. While parked at the restaurant, the defendant "noticed an individual that he thought he had problems with . . . and he wanted to confront [him]." They then drove down the street in the direction they thought the individual was headed. As the individual approached, the defendant and Younger got out of the car to pursue him on foot. A short time later, Helwig heard several gunshots, after which the defendant and Younger came running back to the car. According to Helwig, the defendant had his .22 caliber revolver in his hand when he entered the car. When Helwig asked the defendant what had happened, the defendant said that, when he tried to rob the individual, "the kid tried to mush the gun out of his hand, [so] he shot him." They then drove

back to Goffe Street, to the home of Rayshawn Burrows, where they hung out, smoking, drinking, and discussing the events of the evening.

When initially questioned by the police, Helwig denied any knowledge of the victim's murder. It was only after he was arrested for conspiracy to commit murder in connection with the killing of Gamble that he gave a statement to the police implicating the defendant in the victim's murder. He did so pursuant to a plea agreement that subjected him to a maximum term of incarceration of thirty years, which was considerably shorter than the sentence he would have faced without the cooperation agreement.

After Helwig and Burton testified, the trial court heard arguments from the parties. Defense counsel argued that the testimony was not sufficiently reliable to be admissible because there was absolutely no evidence corroborating any of it, the testimony itself was vague and contradictory, and there was no forensic evidence linking the defendant's .22 caliber revolver to the murder.

Following the parties' arguments, the trial court observed that § 54-86p (a) (1) provides that, in making its reliability determination, the court may consider the extent to which the witness' testimony is confirmed by other evidence. The court noted that, during their arguments, both sides had referenced evidence that they expected to be admitted at trial. The court stated that, "if counsel has . . . reached an accommodation or an agreement because counsel knows what the evidence is and what would be produced, that's fine. But the record is not going to show that . . . the evidence . . . was introduced at [this] hearing . . . ." The court further stated: "[Y]ou're all proceeding under the assumption that you know what [the evidence] is because you've got the discovery, it's been referenced. I've heard about it, you made a proffer. [Defense counsel] doesn't seem to dispute it, so, as long as everybody is on board

with that, that's fine with me. I just want to make sure that the record is clear that that's how [we chose to proceed]." In response, defense counsel asked whether the parties could discuss the matter in chambers.

When the parties returned to the courtroom, the trial court, over the defense's objection, granted the state's motion to open the reliability hearing for the purpose of introducing five exhibits: a police report on the victim's murder (exhibit 3), the defendant's and Helwig's arrest warrant applications (exhibits 4 and 5), the victim's autopsy report (exhibit 6), and the ballistics report on the defendant's .22 caliber revolver (exhibit 7). The court found that the state's failure to introduce this evidence was the result of "inadvertence or assumption" about the statutory requirements. The court further found that there would be "[no] undue prejudice to the defense by allowing the state to [open the hearing] just to complete the record" and that it was within the court's discretion to do so.

The next day, the trial court found that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. In an oral ruling, the court stated that it had considered each of the factors set forth in § 54-86p (a) (1) through (5) in light of the evidence presented at the reliability hearing and the discovery provided pursuant to General Statutes § 54-86o (a) (1) through (5).[9] The court found Helwig's testimony to be

[9] General Statutes § 54-86o (a) provides in relevant part: "In any criminal prosecution . . . the defendant may request of the prosecutorial official whether such official intends to introduce testimony of a jailhouse witness. The prosecutorial official shall promptly . . . disclose to the defendant whether the official intends to introduce such testimony and, if so, the following information and material:

"(1) The complete criminal history of any such jailhouse witness, including any charges pending against such witness, or which were reduced or dismissed as part of a plea bargain;

"(2) The jailhouse witness's cooperation agreement with the prosecutorial official and any benefit that the official has provided, offered or may offer in the future to any such jailhouse witness;

"(3) The substance, time and place of any statement allegedly given by the defendant to a jailhouse witness, and the substance, time and place of

reliable because, at the time of the murder, he and the defendant had been friends for approximately eighteen months and saw each other nearly every day, and, thus, "[t]he night [the murder] occurred was . . . not an isolated occasion in which they were together." The court further noted that "Helwig's description of the general location of the crime scene, the number of shots he had heard, and the description of the gun he alleges that the defendant utilized was corroborated by state's exhibits 3, 5, and 6," that, consistent with Helwig's testimony, the victim suffered multiple gunshot wounds from a .22 caliber revolver, and that historical cell site data and analysis registered the defendant's phone in the vicinity of the murder scene at approximately 11:23 p.m., further corroborating Helwig's testimony. Finally, the court noted that Helwig statements to the police implicating the defendant in the victim's murder were statements against his own penal interest and that Helwig himself had been charged in the victim's murder.

The trial court reached similar conclusions with respect to Burton, stating: "Burton . . . had a close relationship with the defendant, they were similar in age, they associated with the same people, and [they] were fellow gang members. [Burton was] someone [in] whom the defendant would naturally confide as a result. Burton was . . . sixteen years of age at the time of the crime and the defendant's alleged admissions to him.

any statement given by a jailhouse witness implicating the defendant in an offense for which the defendant is indicted;

"(4) Whether at any time the jailhouse witness recanted any testimony subject to the disclosure, and, if so, the time and place of the recantation, the nature of the recantation and the name of any person present at the recantation; and

"(5) Information concerning any other criminal prosecution in which the jailhouse witness testified, or offered to testify, against a person suspected as the perpetrator of an offense or defendant with whom the jailhouse witness was imprisoned or otherwise confined, including any cooperation agreement with a prosecutorial official or any benefit provided or offered to such witness by a prosecutorial official."

The defendant and Burton had known each other since they were thirteen or fourteen years of age. [Burton] confirmed the defendant's association with . . . Helwig . . . [and], although . . . Burton denied knowing anything about the [victim's murder] when first approached by [the] police, citing what he called a 'street code,' . . . [h]e later provided specific information to [the] police [implicating the defendant in the victim's murder], which he has never recanted. He also described seeing the defendant in possession . . . of a .22 caliber revolver with tape on the handle."

In reaching its decision, the trial court addressed the defense's argument that Burton's testimony was unreliable because the information he provided was vague and could have come from sources other than the defendant, such as the police. The court concluded that, if Burton had acquired his information from other sources "in an effort to obtain favorable treatment . . . his account of the defendant's admissions [would] have been far more detailed and incriminating, and [would] have involved claims of multiple confessions by the defendant [and] everyone involved, or [it would have been] tailored to match [the testimony of] other witnesses."

Finally, the trial court observed: "Each of these witnesses has testified before this court on a prior occasion in [*State* v. *Bunn*, Superior Court, judicial district of New Haven, Docket No. NNH-CR15-0158844-T], and were among the witnesses that, in light of the verdict, were credited by a jury. This court found their testimony in that case to be credible." The court further observed that, "even if the state had not presented any corroboration [of the witnesses' testimony], their testimony standing alone was credible and reliable enough, and [therefore] worth[y] of consideration by the jury."

After issuing its ruling, the trial court asked both parties whether there was anything else they needed

to address. Defense counsel requested "a specific ruling as to one of the claims" made during the previous day. The court issued the ruling, which is not at issue in this appeal, and indicated that it understood that defense counsel "ha[s] to make the record for any future proceedings, if there are any." The court then gave the parties an additional opportunity to raise further questions or objections before concluding the hearing.

As a preliminary matter, we set forth the standard of review. It is well established that a trial court's ruling on evidentiary matters will not be disturbed unless the court abused its discretion. See, e.g., *State* v. *Mark T.*, 339 Conn. 225, 232, 260 A.3d 402 (2021) ("[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling" (internal quotation marks omitted)). We likewise review a trial court's decision to open the evidence under the abuse of discretion standard. See, e.g., *State* v. *Allen*, 205 Conn. 370, 380, 533 A.2d 559 (1987) ("[t]he reopening of a criminal case either to present omitted evidence or to add further testimony after either of the parties has rested is within the sound discretion of the [t]rial [c]ourt" (internal quotation marks omitted)).

We disagree with the defendant that the trial court abused its discretion in granting the state's motion to open the reliability hearing to allow the state to introduce evidence that the parties had referenced during the hearing. The court found that the state's failure to introduce this evidence was merely attributable to "inadvertence" and that the defendant was aware of the evidence the state sought to admit. See, e.g., *State* v. *Freeman*, 132 Conn. App. 438, 446, 33 A.3d 256 (2011) (court did not abuse its discretion in opening pretrial hearing when state "inadvertently excluded . . . testimony from the . . . hearing" and "[t]he additional testimony offered . . . [came] as no surprise to the

defendant" (internal quotation marks omitted)), aff'd, 310 Conn. 370, 77 A.3d 745 (2013). We note that most, if not all, of the admitted evidence was part of the discovery turned over to the defense pursuant to § 54-86o, which, under § 54-86p (a), the court properly could have considered, even if it had not been admitted at the reliability hearing. See General Statutes § 54-86p (a) ("[t]he court shall make a prima facie determination concerning the reliability of [a jailhouse witness'] testimony after evaluation of the evidence submitted at the hearing *and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o*" (emphasis added)). In light of the foregoing, and because the defendant has not identified any prejudice resulting from the trial court's ruling, we cannot conclude that the trial court abused its discretion in opening the reliability hearing for the purpose of completing the record.

We also disagree with the defendant that the trial court erred in concluding that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. Section 54-86p (a) provides in relevant part: "The court shall make a prima facie determination concerning the reliability of [a jailhouse witness'] testimony after evaluation of the evidence submitted at the hearing and the information or material disclosed pursuant to subdivisions (1) to (5), inclusive, of subsection (a) of section 54-86o, and may consider the following factors: (1) The extent to which the . . . testimony is confirmed by other evidence; (2) The specificity of the testimony; (3) The extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) The extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) The circumstances under which the jailhouse witness initially provided information supporting such testimony to . . . a prosecutorial

official, including whether the jailhouse witness was responding to a leading question." Importantly, the statute does not provide that any one of the enumerated factors is dispositive or that any are mandatory considerations. See *State* v. *Christopher S.*, 338 Conn. 255, 288, 257 A.3d 912 (2021) ("[a]lthough corroborating evidence is included in the list [of factors in § 54-86p (a)], it is only one factor that the court may consider").

In considering Helwig's testimony, the trial court made explicit findings under subdivisions (1), (2), (3), and (5) of § 54-86p (a) in concluding that his testimony was sufficiently reliable to be admitted at trial. The court made similar explicit findings relating to Burton's testimony. Although Burton could offer very little information about the murder, the court noted that his account was largely corroborated by Helwig's testimony in that both men described what was essentially a robbery gone wrong, and both stated that the defendant did not know the victim. The court further found that Burton provided a detailed description of the alleged murder weapon and testified to having handled the weapon himself on occasion. In short, the record reveals that the court underwent a careful review of the hearing record, the legal arguments advanced by both parties, and the statutory factors enumerated in § 54-86p (a) in concluding that Helwig's and Burton's testimony was sufficiently reliable to be admissible.

We turn, therefore, to the defendant's contention that the trial court abused its discretion in considering its own assessment of Helwig's and Burton's testimony in *Bunn* in concluding that their testimony was sufficiently reliable to be admitted in the present case. Although we agree that the trial court erroneously included this assessment in its pretrial ruling, we conclude that this error was harmless. See, e.g., *State* v. *Raynor*, 337 Conn. 527, 541, 254 A.3d 874 (2020) ("[i]n order to establish the harmfulness of a trial court ruling, the defendant

must show that it is more probable than not that the improper action affected the result" (internal quotation marks omitted)).

We begin our analysis by noting that § 54-86p (a) permits a court, in making its prima facie reliability determination, to evaluate not only evidence submitted at the hearing, but also "the information . . . disclosed pursuant to . . . subsection (a) of section 54-86o . . . ." General Statutes § 54-86p (a). This includes "[i]nformation concerning *any other criminal prosecution* in which the jailhouse witness testified . . . against a person suspected as the perpetrator of an offense . . . ." (Emphasis added.) General Statutes § 54-86o (a) (5). Thus, the trial court was clearly authorized to consider "information" concerning Helwig's and Burton's participation in *Bunn*.

Although the trial court likely understood "information" to include its own prior credibility assessment, we do not interpret the statute's use of the term "information" so broadly. Section 54-86o (a) sets forth the state's disclosure obligations when it seeks to introduce testimony of a jailhouse witness in a criminal prosecution. Section 54-86o (a) (5) requires the state to disclose to the defendant information relating to the other prosecutions in which the witness may have participated on behalf of the state. This includes, if applicable, the fact that the witness has testified previously and details about how many other proceedings in which the witness has participated. It follows that the defendant could use this information in attacking the witness' credibility both at a § 54-86p reliability hearing and, potentially, later during cross-examination at trial. Thus, the trial court's prior credibility assessment of a testifying witness in a jury trial, in which the court was not serving as the fact finder, is not relevant information under § 54-86o (a) (5). This credibility assessment of a witness could not be utilized by both parties in the same manner

as the information properly discoverable under § 54-86o (a) (5), including the number of times the witness previously has testified and the verdicts in those cases.

We therefore instruct trial courts to rely on objective criteria, to which all parties would have access through the discovery process, in considering information disclosed pursuant to § 54-86o (a) (5) for purposes of making a prima facie reliability determination under § 54-86p (a). This is consistent with the language of the statute, which allows the parties and the trial court to consider the witness' participation on behalf of the state but does not include this type of collateral assessment of a witness' testimony.

However, because it is clear that the trial court would have found Helwig's and Burton's testimony sufficiently reliable to be admitted utilizing only permissible statutory factors under § 54-86p, we conclude that the error was harmless. The trial court's prior credibility assessment was one of many factors that the court considered in determining that Helwig's and Burton's testimony was sufficiently reliable to be presented to the jury. There is nothing in the record to suggest that it was a dispositive factor or that the court's decision might have been different in its absence. Moreover, defense counsel had ample opportunity to impeach Helwig's and Burton's credibility at trial and thoroughly availed himself of that opportunity through cross-examination and in closing argument, during which he cataloged every conceivable reason why their testimony should not be credited. For all of these reasons, there is no error warranting reversal of the judgment.

III

The defendant finally claims that the trial court erred in denying his motion to suppress the recording of a phone call that he had made while incarcerated and the .22 caliber revolver that the police had seized as

a result of information acquired from the recording. Although the defendant acknowledges that inmate phone calls may be monitored and recorded for purposes of prison safety, he contends that the fourth amendment to the United States constitution[10] prohibits the state from using pretrial detainee phone call recordings for investigative purposes.[11] The state argues that the defendant had no reasonable expectation of privacy in his nonprivileged phone calls, and, thus, the subsequent use of the recording did not implicate the fourth amendment.

The following additional facts are relevant to our resolution of this claim. In March, 2014, the defendant placed a phone call to his then girlfriend, Lavenia Darden, while being held in pretrial detention on unrelated charges. During the call, which was recorded and monitored by the Department of Correction, the defendant referred to a .22 caliber firearm that he had given to Darden for safekeeping. At the time of the call, Darden lived at her grandmother's home in New Haven. In April, 2014, the Department of Correction sent the recording to the New Haven Police Department, which obtained

[10] 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's protection 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. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[11] The defendant additionally claims that monitoring inmate calls "may have a chilling effect on speech" and "can give rise to first amendment concerns." Because this statement constitutes the entirety of the defendant's argument concerning this issue, we agree with the state that the claim is inadequately briefed, and, therefore, we decline to review it. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 726, 138 A.3d 868 (2016) ("[The] relative sparsity [of briefing] weighs in favor of concluding that the argument has been inadequately briefed. This is especially so with regard to first amendment and other constitutional claims, which are often analytically complex.").

permission from Darden's grandmother to search her residence for the firearm. During the search, the police located a small .22 caliber revolver with black tape on the handle and eight rounds of ammunition in a closet in Darden's bedroom. The next day, Darden gave a statement to the police identifying the revolver as belonging to the defendant.

Before trial, the defendant filed a motion to suppress the recording of his phone conversation with Darden as an illegal search in violation of the fourth amendment. He also sought to suppress the .22 caliber revolver and ammunition as fruits of the allegedly unlawful search. At the hearing on the motion to suppress, the defendant stipulated that, at the time of his admission to the correctional facility, he was notified and signed a waiver acknowledging that all his nonprivileged phone calls were subject to recording and monitoring. The defendant further stipulated that, at the time of his call to Darden, he was aware that the phone calls of all inmates, pretrial detainees and convicted inmates alike, were subject to recording and monitoring, and that there were signs posted near the phones reminding inmates of this policy. Finally, the defendant stipulated that, at the beginning of his call to Darden, a recorded message notified him that the call was subject to recording and monitoring, and that this message repeated at regular intervals throughout the call.

After stipulating to the foregoing facts, defense counsel argued that the defense "[did] not dispute the legitimate penological interests of the Department of Correction, as reflected in its regulations and its practice, to monitor the calls . . . of all inmates." Defense counsel further acknowledged that the Department of Correction was responsible for the protection and safety of all inmates, pretrial detainees and convicted inmates alike, and that the recording and monitoring policy furthered institutional safety concerns. Defense

counsel argued, however, that, in the case of pretrial detainees still "cloaked in the presumption of innocence, unable to make bond," the Department of Correction has "no right to become adjuncts to the investigative process" and that "a presumption of privacy for pretrial detainees at least with respect to law enforcement purposes" should prevail and preclude the department from turning recordings of their phone calls over to the police.

At the conclusion of the hearing, the trial court denied the defendant's motion to suppress. The court observed that, in applying the federal constitution, courts uniformly have held that an inmate's limited privacy rights do not include a right to make unmonitored, nonprivileged phone calls. The court explained that, without a reasonable expectation of privacy, there can be no fourth amendment violation. The court further observed that, although defense counsel had argued that a distinction should be drawn between the privacy rights of pretrial detainees and convicted inmates with respect to their phone calls, he had not cited a single case in which such a distinction had been drawn, whereas the court was aware of many cases rejecting the existence of any such distinction.

We agree with the trial court that the defendant's claim is without merit. Whether the defendant had a right to privacy in his nonprivileged prison phone calls presents a question of law, over which we exercise plenary review. See, e.g., *State* v. *Houghtaling*, 326 Conn. 330, 340–41, 163 A.3d 563 (2017), cert. denied, 584 U.S. 949, 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). "To receive fourth amendment protection against unreasonable searches and seizures, a defendant must have a legitimate expectation of privacy in the [subject of the search]. . . . [In the absence of] such an expectation, the subsequent police action has no constitutional ramifications." (Internal quotation marks omitted.)

State v. *Russo*, 259 Conn. 436, 441 n.7, 790 A.2d 1132, cert. denied, 537 U.S. 879, 123 S. Ct. 79, 154 L. Ed. 2d 134 (2002); see also *State* v. *Houghtaling*, supra, 341 ("[t]o determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy [both the subjective and objective prongs of] the *Katz*[12] test"). "The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Jacques*, 332 Conn. 271, 279, 210 A.3d 533 (2019).

In *Washington* v. *Meachum*, 238 Conn. 692, 680 A.2d 262 (1996), this court held that "[t]he inmates of Connecticut's correctional institutions . . . have no reasonable expectation of privacy in their nonprivileged telephone calls and [that] those calls may be monitored and recorded." Id., 725. We concluded that, even if inmates retain a subjective privacy interest in their nonprivileged calls, "[t]he general law of privacy attendant upon incarceration, and the recognized need for institutional security, clearly do not legitimize such an expectation." Id., 724.

The defendant does not ask this court to reconsider *Meachum* but, instead, urges us to recognize a fourth amendment distinction between the privacy expectations of pretrial detainees and convicted inmates in their nonprivileged phone calls. We need not reach this issue because we conclude that the defendant in the present case maintained no subjective expectation of privacy. See *State* v. *Houghtaling*, supra, 326 Conn 341–42 ("In analyzing the subjective prong of the *Katz* test, we look for actions or conduct demonstrating that the defendant sought to preserve the property or location as private. . . . Although this prong is the subjec-

[12] *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d. 576 (1967) (Harlan, J., concurring).

tive portion of the test, it does not rest solely on the defendant's actual beliefs." (Citations omitted; internal quotation marks omitted.)).

As he stipulated to at the hearing on his motion to suppress, the defendant was notified and signed a waiver acknowledging that all nonprivileged calls were subject to recording and monitoring. Further, there were signs posted near the phone area at the correctional facility and a recorded message played throughout the defendant's call with Darden, reminding him that his call was subject to recording and monitoring. Nothing about the defendant's actions in placing a call under these conditions indicates an intent to preserve the contents of the call as private. See id., 348 ("we reaffirm that courts should properly test a defendant's subjective expectations by looking for conduct demonstrating an intent to preserve [something] as private and free from knowing exposure to the view of others" (internal quotation marks omitted)). Because the defendant failed to demonstrate that he maintained a subjective expectation of privacy in the content of his phone call to Darden, "the subsequent police action ha[d] no constitutional ramifications." (Internal quotation marks omitted.) *State* v. *Correa*, 340 Conn. 619, 640, 264 A.3d 894 (2021); cf. *United States* v. *Eggleston*, 165 F.3d 624, 626 (8th Cir.) ("The defendant concedes that he agreed to the recording and monitoring of the calls, but argued that he did not consent to their use in evidence against him. We do not think that the loaf can be sliced so thin. If someone agrees that the police may listen to his conversations and may record them, all reasonable expectation of privacy is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible."), cert. denied, 526 U.S. 1031, 119 S. Ct. 1280, 143 L. Ed. 2d 373 (1999); *People* v. *Diaz*, 33 N.Y.3d 92, 99–100, 122 N.E.3d 61, 98 N.Y.S.3d 544 ("[when pretrial] detainees

are aware that their phone calls are being [monitored and] recorded, all reasonable expectation of privacy in the content of those phone calls is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" (internal quotation marks omitted)), cert. denied, U.S. , 140 S. Ct. 394, 205 L. Ed. 2d 215 (2019). In light of the foregoing, the defendant cannot prevail on his claim that the trial court erred in denying his motion to suppress.

The judgment is affirmed.

In this opinion the other justices concurred.

IAN T. COOKE *v.* JOHN R. WILLIAMS ET AL. (SC 20719)

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

Syllabus

The plaintiff, who previously had been convicted of murder, among other crimes, sought to recover damages from the defendants, his former attorney and his law firm, for, inter alia, their alleged legal malpractice and fraud while representing him in connection with a federal civil rights action and a separate, state habeas action. In his unsuccessful habeas action, the plaintiff alleged that the attorney who had represented him at his murder trial provided ineffective assistance of counsel. In the present malpractice action, the plaintiff claimed, inter alia, that the defendants had failed to prosecute his habeas petition fully and properly. The trial court granted the defendants' motion to dismiss the plaintiff's claims relating to the habeas action, concluding that those claims sounded in legal malpractice and were not ripe for adjudication because the plaintiff's underlying criminal conviction had not been invalidated either on appeal or in a postconviction proceeding. The plaintiff appealed to the Appellate Court, asserting that the trial court had improperly dismissed his legal malpractice claim. The plaintiff also contended that the Appellate Court had improperly dismissed his fraud claim because it was distinct from any claim of legal malpractice. The Appellate Court affirmed the trial court's judgment with respect to the plaintiff's legal malpractice claim, but it reversed with respect to the fraud claim, reasoning that the fraud claim was distinct from the legal malpractice claim because the former did not challenge the validity of the plaintiff's under-

lying conviction. The plaintiff, on the granting of certification, appealed to this court.

Held that, as a matter of form, the Appellate Court improperly affirmed the trial court's dismissal of the plaintiff's legal malpractice claim for lack of subject matter jurisdiction, this court having concluded that appellate or postconviction relief from the plaintiff's underlying conviction was a necessary element of his claim for malpractice against his former attorneys and that the plaintiff's failure to plead or prove that he had obtained such relief meant that his malpractice claim was insufficient as a matter of law rather than subject to dismissal for lack of jurisdiction:

This court disagreed with the holding in *Taylor* v. *Wallace* (184 Conn. App. 43), on which the Appellate Court relied in the present case, that a criminally convicted plaintiff's failure to obtain appellate or postconviction relief from his conviction prior to commencing a criminal malpractice action, that is, a legal malpractice action against an attorney who previously had represented the criminally convicted plaintiff in a criminal or habeas case, renders the action unripe and presents an issue of justiciability that implicates a court's subject matter jurisdiction.

Rather, this court determined that, because legal malpractice claims are of the type of claims that courts have the authority to adjudicate, the question was not whether a court is competent to adjudicate the controversy between the parties or whether there is a live controversy between the parties but, rather, whether a criminally convicted plaintiff who had not obtained appellate or postconviction relief from his conviction has alleged facts sufficient to state a valid cause of action for criminal malpractice, and whether that requirement has been met is a matter concerning sufficiency of the pleadings.

In determining the necessary elements of a criminal malpractice claim, this court observed that the adjudication of causation and harm in a criminal malpractice action ordinarily will necessarily implicate the finding of the criminally convicted plaintiff's guilt in the underlying criminal case, and a verdict in favor of the plaintiff in the criminal malpractice action would undermine the validity of his criminal conviction.

Accordingly, this court joined the majority of other jurisdictions that have addressed the issue and adopted the exoneration rule, and, pursuant to that rule, when proof of a criminal malpractice claim requires a plaintiff to prove that his former attorney's negligence was a proximate cause of his underlying criminal conviction, the claim is insufficient as a matter of law unless the plaintiff has obtained appellate or postconviction relief from his underlying conviction.

In adopting the exoneration rule, this court reasoned that such a rule supports the judicial policy against inconsistent judgments arising out of the same transaction, which would occur if a plaintiff whose criminal

conviction had not been overturned were to prevail in a criminal malpractice action alleging that, in the absence of the attorney's negligence, the plaintiff would not have been convicted.

This court also reasoned that there are other mechanisms to obtain redress for the negligence of criminal defense counsel, including the elaborate remedial system embodied in Connecticut's postconviction review laws, which provide comprehensive and robust procedures that are intended to address allegations that a criminal conviction was the result of the ineffective assistance of counsel, thereby ensuring that any wrongs resulting from such ineffective assistance will be identified and addressed.

This court made clear that, if a plaintiff's claim in a criminal malpractice action does not require findings that would undermine the validity of the underlying conviction, such a claim would not be barred for lack of exoneration, and, in the present case, the Appellate Court correctly concluded that the plaintiff's fraud claim, which related to the plaintiff's fee dispute with the defendants, could proceed, as that claim did not challenge the validity of the plaintiff's conviction.

To prevail on his malpractice claim, however, the plaintiff was required to prove that the defendants' conduct was the proximate cause of his harm, namely, the denial of his habeas petition and continued incarceration, the plaintiff necessarily would have had to prove that he would have prevailed in his habeas action if the defendants' negligence had not occurred, and such a claim necessarily challenged the validity of the plaintiff's underlying conviction.

Accordingly, because the plaintiff could not establish that he had obtained appellate or postconviction relief from his conviction, he failed to state a cognizable claim of criminal malpractice against the defendants, and, accordingly, the plaintiff's criminal malpractice claim should have been the subject of a motion to strike rather than a motion to dismiss.

(*One justice concurring separately*)

Argued September 14, 2023—officially released June 25, 2024

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Markle*, *J.*, granted in part the defendants' motion to dismiss and rendered judgment thereon; thereafter, the plaintiff withdrew the remaining counts of his complaint and appealed to the Appellate Court, *Bright*, *C. J.*, and *Suarez* and *DiPentima*, *Js.*, which reversed in

part the trial court's judgment and remanded the case to that court with direction to deny the motion to dismiss only as to the plaintiff's claim of fraud relating solely to a fee dispute, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings.*

Michael W. Brown, for the appellant (plaintiff).

William Tong, attorney general, and *Stephen R. Finucane*, assistant attorney general, filed a brief for the state of Connecticut as amicus curiae.

Kenneth Rosenthal and *Audrey Felsen* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

MULLINS, J. In *Taylor* v. *Wallace*, 184 Conn. App. 43, 51–52, 194 A.3d 343 (2018), the Appellate Court adopted what is generally referred to as the exoneration rule for civil claims seeking relief against a plaintiff's former criminal defense or habeas counsel for harm allegedly caused by the lawyer's legal malpractice.[1] The exoneration rule[2] provides that appellate or postconviction relief is a necessary element of a claim for criminal malpractice if that claim challenges the validity of an underlying conviction by requiring proof that the attorney's negligence was the cause of the plaintiff's conviction as a defendant in the underlying criminal case. Id. The Appellate Court in *Taylor* further explained that the failure to obtain appellate or postconviction relief renders the criminal malpractice claim unripe and, therefore, not justiciable. Id. Applying the exoneration rule to the present case,

[1] We use the term "criminal malpractice" to refer to claims in which a lawyer is sued for legal malpractice by a client he or she has previously represented in a criminal or habeas case.

[2] "Exoneration," as the term is used in this context, means that a convicted person has obtained appellate or postconviction relief from his or her conviction.

the Appellate Court upheld the trial court's dismissal of the claim of criminal malpractice filed by the plaintiff, Ian T. Cooke, against the defendants, John R. Williams and John R. Williams and Associates, LLC, the attorney and law firm that represented the plaintiff in his habeas case.[3] *Cooke* v. *Williams*, 206 Conn. App. 151, 165, 259 A.3d 1211 (2021).

This case presents our first opportunity to address whether to adopt the exoneration rule in Connecticut. After review, we join the majority of other jurisdictions that also have adopted the exoneration rule. In doing so, we explain herein that appellate or postconviction relief from the underlying criminal conviction is a necessary element of a criminal malpractice claim if that claim requires findings that would undermine the validity of the criminal conviction. To avoid this unacceptable scenario, we hold that a plaintiff must plead and prove that he or she has obtained a favorable resolution of the underlying criminal case to state a cognizable claim of criminal malpractice. We also clarify that the failure to plead and prove exoneration is not an issue of justiciability and, thus, does not implicate the subject matter jurisdiction of the court. Instead, under our rules of practice, the failure to state a legally sufficient claim is subject to a motion to strike, rather than a motion to dismiss.

In the present case, we conclude that, because the plaintiff's claim of criminal malpractice necessarily requires findings that would undermine the validity of his underlying conviction and he has not obtained appellate or postconviction relief, he has not alleged a cognizable claim of criminal malpractice. We reverse the Appellate

[3] The defendants did not participate in this appeal. Pursuant to Practice Book § 67-7, we granted the application of the state of Connecticut and the Connecticut Criminal Defense Lawyers Association to appear and file briefs as amici curiae and to appear at oral argument to respond to questions by this court.

Court's judgment dismissing the criminal malpractice claim for lack of subject matter jurisdiction and remand for further proceedings consistent with this opinion.

The following facts and procedural history, as set forth by the Appellate Court, are relevant to our resolution of this appeal. In 2006, the plaintiff shot and killed two people with a sawed-off shotgun. See *State* v. *Cooke*, 134 Conn. App. 573, 575–76, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012). Four years later, he was convicted, after a jury trial, of two counts of murder, among other crimes, and sentenced to a term of life imprisonment without the possibility of release. Id., 576–77. The plaintiff appealed his conviction, which the Appellate Court affirmed. Id., 581.

In 2011, as a self-represented party, the plaintiff filed a petition in state court for a writ of habeas corpus, alleging ineffective assistance of his criminal trial counsel. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. In that petition, the plaintiff had alleged that his criminal trial counsel was ineffective due to "his failures to investigate and to present a defense, to use expert witnesses, particularly experts in forensic science, and to ensure the plaintiff's competency to stand trial." Id., 157. Shortly after he filed the petition, the plaintiff retained the defendants to represent him. Id.

Around the same time, the plaintiff, also initially as a self-represented party, commenced a civil rights action in federal court, alleging numerous constitutional and tort claims stemming from the conditions of his pretrial incarceration. Id., 153. The state habeas petition did not proceed while proceedings concerning the federal petition were ongoing. See id., 153–54. Ultimately, the defendants agreed to represent the plaintiff in the federal civil rights action as well. Id., 153. In 2014, the federal civil rights action was settled. Id.

After the federal action settled, the habeas court proceeded with the trial on the plaintiff's pending 2011 state habeas petition. Id., 154. At the habeas trial, the plaintiff wanted to call an expert witness who would present evidence of a third-party perpetrator and ballistics suggesting that a firearm other than that posited by the prosecution was the murder weapon. Id., 157. The defendants, however, presented no such evidence. Id. Following the trial, the habeas court rejected the plaintiff's claim of ineffective assistance of counsel and consequently denied the petition for a writ of habeas corpus. See id., 154.

Thereafter, the plaintiff, as a self-represented party, commenced the present action against the defendants based on their representation of him in both the federal civil rights action and the habeas proceeding. Id. In his amended eight count complaint, the plaintiff asserted claims for legal malpractice, negligence, fraud, breach of the covenant of good faith and fair dealing, and breach of contract.[4] See id. He alleged that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly.

Specifically, the plaintiff alleged that the defendants' failures "in investigation and comprehension of the facts of the case yielded a failure to present and prove

[4] The plaintiff's complaint included the following counts against the defendants: (1) legal malpractice for their representation of him in his federal civil rights action; (2) criminal malpractice for their representation of him in his state habeas action; (3) negligence for their representation of him in his federal civil rights action; (4) negligence for their representation of him in his state habeas action; (5) fraud/unjust enrichment for their representation of him in his federal civil rights action; (6) fraud for their representation of him in his state habeas action; (7) breach of the implied covenant of good faith and fair dealing for their representation of him in his federal civil rights action; and (8) breach of contract for their representation of him in both the federal civil rights action and the state habeas proceeding. All of the claims regarding the federal civil rights action have subsequently been withdrawn. See footnote 5 of this opinion.

prejudice" pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He further alleged that the defendants failed to prosecute his habeas action fully and properly because the "aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy . . . ." The plaintiff also alleged that the "defendants failed to adequately prepare the plaintiff for trial," "failed to develop evidence in support of the habeas case," and "failed to properly prepare and present court documents, [including] . . . motions, posttrial briefs, and postjudgment remedies." The plaintiff claimed that he "suffered financial loss and/or hardship and/or mental and emotional distress as a result."

For these alleged failures, the plaintiff sought monetary damages, as well as injunctive and declaratory relief. In particular, he requested that the defendants be suspended or disbarred from the practice of law and that the trial court "[i]ssue a declaratory ruling stating that the plaintiff's right to counsel pursuant to the sixth amendment to the [United States] constitution and article first, § 8, of the Connecticut constitution, as well as the common-law rights to counsel, [had] been violated wherein the defendant[s] provided ineffective assistance of counsel."

The defendants filed a motion to dismiss the plaintiff's action. They argued that the plaintiff's claims relating to the state habeas proceedings were not justiciable because his underlying criminal conviction had not been vacated through either a direct appeal or a successful petition for a writ of habeas corpus.[5]

[5] The defendants also asserted that the plaintiff's claims related to his federal civil rights action should be dismissed because they were barred by the statute of limitations. Ultimately, the trial court denied the motion to dismiss for the counts related to his federal civil rights action (counts one, three, five, and seven and count eight "to the extent it is based on the

After hearing argument, the trial court issued its memorandum of decision, granting the motion to dismiss as to all of the plaintiff's claims relating to the habeas proceedings. The court rejected the plaintiff's argument that his present action was independent of his underlying criminal conviction because he was not challenging his conviction but was, instead, seeking monetary damages, in part, for the fraudulent billing by the defendants for work they had not done.[6] Ultimately, relying on *Taylor*, the trial court concluded that all of the plaintiff's claims against the defendants sounded in legal malpractice and were not ripe for adjudication because his underlying criminal conviction had not been invalidated.

The plaintiff appealed to the Appellate Court. He claimed that the trial court improperly dismissed (1) his criminal malpractice claim by misapplying the justiciability bar to criminal malpractice claims set forth in *Taylor*, a bar originally articulated in *Heck* v. *Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and (2) his fraud claim because it was distinct from his claim of criminal malpractice. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. With respect to the criminal malpractice claim, the Appellate Court affirmed the judgment of the trial court. Id., 165, 177. The Appellate Court reasoned that, "[t]o prove his malpractice action, [the plaintiff] presumably would have [had] to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper. Inconsistency of

circumstances of the plaintiff's federal civil rights action"). The trial court reasoned that a statute of limitations special defense must be specially pleaded and cannot be raised by a motion to dismiss. Ultimately, the plaintiff withdrew the counts of his complaint related to his federal civil rights action, and, therefore, those claims are not the subject of this appeal.

[6] The plaintiff alleged that, in total, he incurred $258,442.65 in charges that were fraudulent.

judgments is avoided by the requirement that the conviction first be vacated." (Internal quotation marks omitted.) Id., 162. The Appellate Court explained that "the plaintiff's [criminal] malpractice claim [was] a collateral attack on his underlying conviction that ha[d] not been invalidated either on direct appeal . . . or through habeas proceedings." (Citation omitted.) Id., 162–63. On the basis of this analysis, the Appellate Court concluded that the plaintiff's criminal malpractice claim was not ripe for adjudication. Id., 165.

The Appellate Court reached a different conclusion with respect to the plaintiff's claim of fraud relating to the fee dispute. Id., 165–66. The Appellate Court reasoned that the plaintiff's fraud claim was distinct from his criminal malpractice claim because proof of the fraud claim did not challenge the validity of his underlying conviction. Id., 166. As a result, the Appellate Court reversed the judgment of the trial court with respect to the claim of fraud and remanded the case to the trial court with direction to deny the motion to dismiss as to the fraud claim.[7] Id., 177. This appeal followed.

We granted the plaintiff's petition for certification to appeal from the judgment of the Appellate Court. *Cooke* v. *Williams*, 343 Conn. 919, 919–20, 275 A.3d 213 (2022). Our grant of certification was limited to the following issue: "Did the Appellate Court correctly conclude that the justiciability bar set forth in *Heck* v. *Humphrey*, [supra, 512 U.S. 477], which the Appellate Court adopted in *Taylor* v. *Wallace*, [supra, 184 Conn. App. 43], required dismissal of the plaintiff's [criminal] malpractice claims against his former habeas counsel as unripe in the absence of prior invalidation of the plaintiff's underlying criminal conviction?" *Cooke* v. *Williams*, supra, 343 Conn. 920.

[7] The plaintiff's claim of fraud is not part of the present appeal.

After having reviewed the plaintiff's brief and the briefs of the amici curiae, we recognize that the certified question does not adequately frame the more fundamental issue posed by the present case, that is, what elements must a criminally convicted plaintiff plead and prove to assert a cognizable cause of action of criminal malpractice against his habeas or criminal trial counsel. Consequently, we reformulate the certified question to conform to the issue actually presented. See, e.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191–92, 884 A.2d 981 (2005) (this court may reframe certified question to more accurately reflect issue presented). The specific issue before us is one of first impression for this court: whether appellate or postconviction relief from the underlying conviction is a necessary element of a claim of criminal malpractice filed by a criminally convicted plaintiff.

Before we tackle that issue, and to provide some clarity on our ultimate conclusion, it is helpful to first examine *Heck* v. *Humphrey*, supra, 512 U.S. 477, and its relationship to the Appellate Court's adoption of what it called a "justiciability bar" for criminal malpractice claims filed by criminally convicted plaintiffs. *Cooke* v. *Williams*, supra, 206 Conn. App. 153. In *Heck*, the United States Supreme Court examined whether a prisoner may challenge the constitutionality of his conviction in an action for damages under 42 U.S.C. § 1983. *Heck* v. *Humphrey*, supra, 487. In that case, the petitioner, Roy Heck, had been convicted in an Indiana state court of voluntary manslaughter. Id., 478. At the time of his appeal, he was serving a fifteen year prison sentence. Id. While the appeal from his conviction was pending, Heck filed an action in federal court under 42 U.S.C. § 1983, against two of the prosecutors and an investigator involved in his criminal action, claiming that they had engaged in an "unlawful, unreasonable, and arbitrary investigation leading to [his] arrest; know-

ingly destroyed [exculpatory] evidence . . . and caused an illegal and unlawful voice identification procedure to be used at [his] trial." (Internal quotation marks omitted.) Id., 479. Heck sought compensatory and punitive monetary damages but did not seek injunctive relief or release from custody. Id. While the appeal in his § 1983 action was pending, the Indiana Supreme Court upheld his conviction and sentence in his direct appeal. Id.

Analogizing Heck's claims of legal malfeasance to a common-law claim of malicious prosecution, the United States Supreme Court explained that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. . . . This requirement avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the [plaintiff's] . . . succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. . . . Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit. . . . [The United States Supreme] Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack . . . . We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 484–86.

Accordingly, the court held that, "in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such [a] determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . [pursuant to] 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under [42 U.S.C.] § 1983." (Emphasis altered; footnote omitted.) Id., 486–87.

Although *Heck* involved a civil rights complaint brought under § 1983, alleging that Heck's prosecution violated his civil rights; see id., 479; courts have relied on its reasoning when addressing claims of criminal malpractice brought by convicted criminal defendants against their criminal defense attorneys. See, e.g., *Britt* v. *Legal Aid Society, Inc.*, 95 N.Y.2d 443, 448, 741 N.E.2d 109, 718 N.Y.S.2d 264 (2000) ("[t]he principle . . . that 'civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments' . . . applies with equal force to [criminal malpractice claims]" (citation omitted)); *Gibson* v. *Trant*, 58 S.W.3d 103, 108–109 (Tenn. 2001) (citing *Heck* as analogous authority for proposition that plaintiff in criminal malpractice action must obtain exoneration before bringing action). Among those courts that have applied the rationale of *Heck* outside of the § 1983 context is our own Appellate Court.

In *Taylor* v. *Wallace*, supra, 184 Conn. App. 43, the criminally convicted plaintiff brought a criminal malpractice action against the lawyer who represented him in his unsuccessful habeas trial. See id., 45–46. The Appellate Court relied on the policy rationale applied

in *Heck* and concluded that it lacked subject matter jurisdiction over a claim of criminal malpractice against the plaintiff's former habeas counsel because the plaintiff had not obtained appellate or postconviction relief from his conviction. Id., 49. The Appellate Court "agree[d] with the policy enunciated in *Heck*: if success in a tort action would necessarily imply the invalidity of a conviction [by requiring a finding that the underlying conviction was the result of the attorney's negligence], the action is to be dismissed unless the underlying conviction has been invalidated." Id., 51. The court held that, because the plaintiff's conviction had withstood multiple attacks, as "long as the conviction stands, an action collaterally attacking the conviction may not be maintained." (Footnote omitted.) Id., 52. The Appellate Court concluded that the claim was nonjusticiable and dismissed it. See id., 51–52 and n.5.

One observation is immediately apparent. The United States Supreme Court in *Heck* determined that the plaintiff failed to state a legally cognizable claim in the absence of a favorable disposition of the underlying conviction. *Heck* v. *Humphrey*, supra, 512 U.S. 486–87. The court did not conclude that the failure to state a claim rendered the claim nonjusticiable. Indeed, it is "firmly established . . . that the absence of a valid . . . cause of action does not implicate [subject matter] jurisdiction . . . ." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Unlike in *Heck*, in which the United States Supreme Court interpreted the failure to obtain a favorable resolution of the underlying conviction as a failure to state a claim; *Heck* v. *Humphrey*, supra, 486–87; the Appellate Court in *Taylor* analyzed the issue as one of justiciability, concluding that the plaintiff's claim was not ripe because his criminal conviction had not been invalidated. *Taylor* v. *Wallace*, supra, 184 Conn. App. 51–52. In doing so, the Appellate Court relied on the

rationale that "[a] tort case is not ripe for adjudication if resolution of an unresolved underlying case is necessary for reliable adjudication." Id., 51.

Having reviewed *Heck* and *Taylor*, we find the analyses in both cases instructive. Although not directly on point, we agree that the rationale of *Heck* helps inform our resolution of the issue of whether a plaintiff must obtain postconviction or appellate relief from an underlying criminal conviction before he or she can state a cognizable claim of criminal malpractice. To the extent that *Taylor* adopts the underlying reasoning of *Heck*, we agree.

We disagree, however, with the Appellate Court's determination in *Taylor* that the failure to obtain appellate or postconviction relief presents an issue of justiciability that implicates a court's subject matter jurisdiction. "[J]usticiability . . . implicate[s] a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358, 258 A.3d 71 (2021). Because legal malpractice claims are of the type that courts have the power to adjudicate, the issue is not whether the court is competent to adjudicate the controversy between the parties or whether there is a live controversy between the parties. Rather, the issue is whether a criminally convicted plaintiff who has not obtained appellate or postconviction relief from the underlying conviction has alleged facts that are sufficient to state a valid cause of action for criminal malpractice. Consequently, whether that requirement is met is a matter of the sufficiency of the pleadings, not the power of the court to entertain the action.

Having clarified that the issue is not one of justiciability, we now turn to the question of whether appellate or postconviction relief from the underlying criminal

case is a necessary element of a claim of criminal malpractice relating to representation in the underlying criminal or habeas case.[8] We begin our analysis by looking at the elements of a traditional legal malpractice claim.

"In general, the plaintiff in [a legal] 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*, 303 Conn. 322, 329, 33 A.3d 205 (2012). "The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the [attorney's] conduct . . . . The second component, proximate causation, requires us to determine whether the [attorney's] conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typi-

[8] The plaintiff asserts that this court already has decided that favorable resolution of an underlying criminal conviction is not required to sustain a cause of action for malpractice for criminally convicted plaintiffs. Specifically, the plaintiff asserts that, in *Bozelko* v. *Papastavros*, 323 Conn. 275, 283–85, 147 A.3d 1023 (2016), this court examined what was required to prove causation in a criminal malpractice claim against a criminal defense attorney and did not suggest that exoneration was necessary. We disagree that this issue was decided in *Bozelko*.

In *Bozelko*, the convicted plaintiff brought a claim of criminal malpractice against her criminal defense attorney. Id., 278–79. The issue before this court was whether the trial court properly had granted the defendant's motion for summary judgment because the plaintiff failed to disclose an expert witness. Id., 277. This court concluded that expert testimony was required for a legal malpractice action. Id., 289–90. None of the parties raised the claim presented in the present case, namely, that the plaintiff had not alleged a valid cause of action for criminal malpractice because she had not obtained a favorable resolution of her underlying criminal case. Therefore, that issue was not before the court in *Bozelko* and, thus, was not decided in that case.

cally proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying 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 underlying action." (Citations omitted; internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 283–84, 147 A.3d 1023 (2016); see, e.g., *Mayer* v. *Biafore, Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998) ("[i]n 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").

We agree with the Oregon Supreme Court that "[l]egal malpractice is a common-law tort claim. In the absence of any pertinent legislation, it is for this court to define what constitutes legally cognizable harm in a tort case. The legislature has not addressed directly the question of when a person whose lawyer in a criminal case is guilty of professional negligence has been harmed for the purposes of a professional negligence action; [the] court therefore must do so." *Stevens* v. *Bispham*, 316 Or. 221, 229, 851 P.2d 556 (1993).

Having carefully considered the issue, we conclude that the adjudication of causation and harm in a criminal malpractice case ordinarily will necessarily implicate the finding of guilt in the underlying criminal case, and a verdict in favor of the plaintiff will thereby undermine the legitimacy of the criminal conviction, as the courts in *Heck* and *Taylor* explained. See *Heck* v. *Humphrey*, supra, 512 U.S. 484–85; *Taylor* v. *Wallace*, supra, 184

Conn. App. 51–52. We join the jurisdictions that have reached the same conclusion and, as a result, require that a convicted criminal defendant turned civil plaintiff must prove that he or she has obtained either postconviction or appellate relief from his or her conviction before pursuing a criminal malpractice action. See, e.g., *Trigg* v. *Farese*, 266 So. 3d 611, 616 (Miss. 2018) ("We join the substantial majority of courts in holding that, because these allegations would entitle the plaintiff to relief from his underlying conviction, he must first pursue them through the [criminal justice] process. In other words, a convict must 'exonerate' himself by obtaining relief from his conviction or sentence before he may pursue a claim against his defense attorney for causing him to be convicted or sentenced more harshly than he should have been."); *Gibson* v. *Trant*, supra, 58 S.W.3d 108 ("The large majority of courts [that have] address[ed] this issue have held that some form of exoneration is a precondition to maintaining a criminal malpractice claim. A plaintiff must meet this exoneration requirement before he can sue his defense lawyer.").

Although the majority of jurisdictions adhere to this requirement and have imposed an exoneration rule, they are far from uniform in their approach. Some jurisdictions require plaintiffs to prove only that they have obtained appellate or postconviction relief, i.e., having the conviction overturned or being granted habeas relief.[9]

[9] See, e.g., *Hastings* v. *Wilbur Smith Law Firm*, Docket No. 20-10313, 2021 WL 3207320, *3 (11th Cir. July 29, 2021) ("a convicted criminal defendant must obtain appellate or [postconviction] relief as a precondition to maintaining a legal malpractice action"); *Shaw* v. *State, Dept. of Administration*, 816 P.2d 1358, 1360 (Alaska 1991) ("[w]e hold that a convicted criminal defendant must obtain [postconviction] relief before pursuing an action for legal malpractice against his or her attorney"); *Steele* v. *Kehoe*, 747 So. 2d 931, 933 (Fla. 1999) ("a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action"); *Noske* v. *Friedberg*, 656 N.W.2d 409, 414 (Minn. App.) (date of conviction relief triggers accrual of criminal malpractice action), aff'd, 670 N.W.2d 740 (Minn. 2003); *Johnson* v. *Schmidt*, 719 S.W.2d 825, 826 (Mo. App. 1986) ("[i]n order for [the] appellant to proceed on his alleged claim of legal malpractice, he must first allege and establish that the actions or

Others take a more stringent approach and require that plaintiffs in criminal malpractice actions not only prove that they have obtained appellate or postconviction relief but also prove by a preponderance of the evidence that they are actually innocent of the crimes of which they were convicted (actual innocence).[10] Under either approach,

omissions by [the] respondent prevented his acquittal"); *Clark* v. *Robison*, 113 Nev. 949, 951, 944 P.2d 788 (1997) (once relief from conviction is granted, criminal malpractice claim may be brought); *Stevens* v. *Bispham*, supra, 316 Or. 230–31 (reversal through direct appeal, postconviction relief or otherwise is required to bring professional negligence claim against criminal defense counsel); *Gibson* v. *Trant*, supra, 58 S.W.3d 116 (adopting requirement that plaintiff must prove exoneration to bring criminal malpractice action); *Peeler* v. *Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995) ("[b]ecause of public policy, we side with the majority of courts and hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through [postconviction] relief, or otherwise"); *Adkins* v. *Dixon*, 253 Va. 275, 281–82, 482 S.E.2d 797 ("a [postconviction] ruling adverse to the defendant will prevent a recovery for legal malpractice"), cert. denied, 522 U.S. 937, 118 S. Ct. 348, 139 L. Ed. 2d 270 (1997); *Falkner* v. *Foshaug*, 108 Wn. App. 113, 118–19, 29 P.3d 771 (2001) (appellate court's reversal of conviction on ineffective assistance grounds gave rise to criminal malpractice action).

[10] See, e.g., *Coscia* v. *McKenna & Cuneo*, 25 Cal. 4th 1194, 1200, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) ("[i]n a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence"); *Ray* v. *Stone*, 952 S.W.2d 220, 224 (Ky. App. 1997) ("[b]efore it can be demonstrated that the attorney's actions were the proximate cause of his damages, the plaintiff must establish his innocence"); *Glenn* v. *Aiken*, 409 Mass. 699, 707, 569 N.E.2d 783 (1991) ("in order to justify a right to recover, a plaintiff . . . must prove by a preponderance of the evidence, not only that the negligence of the attorney defendant caused him harm, but also that he is innocent of the crime charged"); *Rodriguez* v. *Nielsen*, 259 Neb. 264, 273, 609 N.W.2d 368 (2000) ("[w]e therefore hold that a convicted criminal who files a legal malpractice claim against his or her defense counsel must allege and prove that he or she is innocent of the underlying crime"); *Morgano* v. *Smith*, 110 Nev. 1025, 1029, 879 P.2d 735 (1994) ("to prevail at trial, the plaintiff must prove actual innocence of the underlying charge"); *Mahoney* v. *Shaheen*, *Cappiello*, *Stein & Gordon*, *P.A.*, 143 N.H. 491, 496, 727 A.2d 996 (1999) ("It is not sufficient for a [plaintiff] to allege and prove that if counsel had acted differently, legal guilt would not have been established. As a matter of law, the gateway to damages will remain closed unless a [plaintiff] can establish that he or she is, in fact, innocent of the conduct underlying the criminal charge." (Emphasis omitted.)); *Carmel* v. *Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987) ("[t]o state a cause of action for legal

most jurisdictions make proof of appellate or postconviction relief—whether it be solely appellate or postconviction relief or such relief and proof of actual innocence—an additional element of a criminal malpractice claim. Some states employ the exoneration rule in a way that does not require a plaintiff to demonstrate actual innocence but allows the defendant in the criminal malpractice action to raise the actual guilt of the plaintiff as an affirmative defense.[11]

Many jurisdictions justify adopting the exoneration rule on the ground that it is not unfair to require that the plaintiff first obtain relief from the judgment of conviction precisely because the criminally convicted person, unlike a plaintiff alleging malpractice in an underlying civil case, has other mechanisms to obtain redress for the incompetence of counsel, namely, a claim of ineffective assistance of counsel through habeas actions available at both the state and federal level. See, e.g., *Winniczek* v. *Nagelberg*, 394 F.3d 505, 507 (7th Cir. 2005) ("[a] criminal defendant can establish ineffective assistance of counsel, the counterpart to malpractice"). These courts reason that, without exoneration, the criminal conviction is a determination by the

malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense"); *Bailey* v. *Tucker*, 533 Pa. 237, 247, 621 A.2d 108 (1993) ("[i]f a person is found guilty of a crime, and that person is indeed innocent of any degree of that crime, and it is established that the wrongful conviction was proximately caused by counsel's gross dereliction in his duty to represent the defendant, only then will the defendant be able to collect monetary damages").

[11] See *Shaw* v. *State, Dept. of Administration*, 861 P.2d 566, 572 (Alaska 1993) ("[r]ather than require the plaintiff to prove his actual innocence in order to succeed, we hold that the defendant may raise the issue of the plaintiff's actual guilt as an affirmative defense"). In a similar vein, some courts allow malpractice cases to proceed without exoneration but require proof of actual innocence at trial. See, e.g., *Rodriguez* v. *Nielsen*, 259 Neb. 264, 273, 609 N.W.2d 368 (2000); *Gaylor* v. *Jeffco*, 160 N.H. 367, 369–71, 999 A.2d 290 (2010), citing *Mahoney* v. *Shaheen, Cappiello, Stein & Gordon, P.A.*, 143 N.H. 491, 727 A.2d 996 (1999).

criminal court that the cause of the imprisonment is the plaintiff's criminal wrongdoing, not the negligence of his or her attorney.[12] Requiring a plaintiff to obtain appellate or postconviction relief as an element of his or her criminal malpractice claim demonstrates that, at the very least, the plaintiff is legally innocent and any conviction is not the result of the plaintiff's own criminal wrongdoing, but of the negligence of his or her attorney.[13]

Another closely related rationale for the rule is that it prevents collateral attacks on a judgment of conviction in another court. See, e.g., *Gaines* v. *Manson*, 194 Conn. 510, 516, 481 A.2d 1084 (1984) (explaining that, "[a]lthough collateral attacks on criminal judgments are

[12] Not all courts that have adopted the exoneration rule apply it to a plaintiff who has pleaded guilty, rather than having been adjudicated guilty after a trial. See, e.g., *Mrozek* v. *Intra Financial Corp.*, 281 Wis. 2d 448, 467–68, 699 N.W.2d 54 (2005) (rejecting idea that canvass for guilty plea was akin to adjudication on merits).

[13] Many courts rely on this same rationale for imposing the more stringent actual innocence requirement, as well. As the Supreme Judicial Court of Massachusetts has explained, "[w]hen a plaintiff is a former criminal defendant claiming that his or her defense attorney negligently defended the plaintiff against a criminal charge, [t]he causal requirement between the lawyer's negligence and damage then becomes twofold . . . . The plaintiff must prove by a preponderance of the evidence, not only that the negligence of the attorney defendant caused [the plaintiff] harm, but also that [the plaintiff] is innocent of the crime charged. . . . Thus, the attorney's negligence is not the cause of the former client's injury as a matter of law, unless the plaintiff former client proves that he [or she] did not commit the crime." (Citations omitted; internal quotation marks omitted.) *Correia* v. *Fagan*, 452 Mass. 120, 127, 891 N.E.2d 227 (2008). In other words, "[u]nless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm." *Ang* v. *Martin*, 154 Wn. 2d 477, 485, 114 P.3d 637 (2005). These courts explain that the purpose behind our tort law does not support permitting a person who is guilty of a crime to profit from his or her own wrongdoing. "Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss." *Wiley* v. *San Diego*, 19 Cal. 4th 532, 539, 966 P.2d 883, 79 Cal. Rptr. 2d 672 (1998).

generally disfavored, the writ of habeas corpus holds an honored position in our jurisprudence . . . [as] a bulwark against convictions that violate fundamental fairness" (internal quotation marks omitted)). Because a plaintiff in a criminal malpractice action must demonstrate that, in the absence of his or her attorney's negligence, he or she would not have been convicted, the civil action acts as a collateral attack on the criminal conviction. Therefore, most courts have concluded that, "by operation of the doctrine of collateral estoppel, a valid criminal conviction acts as a bar to overturning that conviction in a civil damages suit." *Levine* v. *Kling*, 123 F.3d 580, 583 (7th Cir. 1997); accord *Trigg* v. *Farese*, supra, 266 So. 3d 622. Moreover, because other avenues of relief—both direct and collateral—are available to criminally convicted persons, allowing such plaintiffs to challenge the propriety of their convictions in a criminal malpractice action after they have been unsuccessful in challenging their convictions through direct appeals or habeas corpus proceedings would allow challenges to the correctness of judgments of other courts and conflict with the well established doctrine of collateral estoppel. Put differently, if individuals with criminal convictions are permitted to bring claims of criminal malpractice without having to demonstrate that they have obtained appellate or postconviction relief, they can essentially take another bite of the apple and ask the civil court to weigh in on whether their convictions were caused by the negligence of their lawyers, even if habeas review has resulted in the consideration of that very issue and a finding of no merit. Indeed, the rationale of the United States Supreme Court in *Heck* supports precluding such a scenario.

Specifically, the court in *Heck* explained that, in a claim of malicious prosecution, requiring invalidation of the underlying conviction "avoids parallel litigation over the issues of probable cause and guilt . . . and it

precludes the possibility of the [plaintiff's] . . . succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. . . . Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." (Citation omitted; internal quotation marks omitted.) *Heck* v. *Humphrey*, supra, 512 U.S. 484. The United States Supreme Court further explained that it believes that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . . [Therefore] when a state prisoner seeks damages in a § 1983 [action], the [D]istrict [C]ourt must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." (Footnotes omitted.) Id., 486–87; see also *Wiley* v. *San Diego*, 19 Cal. 4th 532, 544, 966 P.2d 983, 79 Cal. Rptr. 2d 672 (1998) (requiring exoneration as element of criminal malpractice action is consistent with "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction" (internal quotation marks omitted)). The inconsistency of the judgments would sow doubt in the legitimacy of the criminal conviction.

Admittedly, there is an opposing view regarding whether to impose an exoneration rule for criminally convicted plaintiffs in criminal malpractice actions, and it is not without some merit. A minority of courts that have considered the issue have rejected the requirement of

appellate or postconviction relief and have chosen to impose no additional elements in connection with criminal malpractice claims.[14] The courts that have rejected the exoneration requirement have explained that there is no reason to treat criminal and civil plaintiffs differently because both types of plaintiffs can be harmed by their attorney's malpractice. See, e.g., *Duncan* v. *Campbell*, 123 N.M. 181, 186, 936 P.2d 863 (App.), cert. denied, 123 N.M. 168, 936 P.2d 337 (1997).

Although we understand this argument for treating the negligence of criminal defense or habeas counsel in the same manner that we treat the negligence of civil counsel, we find the minority view unpersuasive because it does not account for the real differences between civil and criminal cases. These jurisdictions do not adequately consider the important policy reasons underlying the exoneration requirement, in particular, the substantial harm that may result from an inconsistent tort judgment casting doubt on the validity of a criminal conviction that has not been vacated or reversed through the established mechanisms of postconviction relief that are specifically intended to safeguard the integrity of criminal convictions in our system of justice.

We recognize that there is an argument that it is unfair to require someone whose conviction is caused by the

[14] See, e.g., *Molen* v. *Christian*, 161 Idaho 577, 582, 388 P.3d 591 (2017) ("[a]ctual innocence is not an element of a criminal malpractice cause of action"); *Gebhardt* v. *O'Rourke*, 444 Mich. 535, 552, 510 N.W.2d 900 (1994) ("a cause of action for malpractice could well exist regardless of the outcome of [postjudgment] proceedings" (internal quotation marks omitted)); *Jepson* v. *Stubbs*, 555 S.W.2d 307, 313–14 (Mo. 1977) (explaining that, like plaintiff in civil malpractice case, who would not be collaterally estopped from bringing action by judgment that he was negligent, plaintiff in criminal malpractice case would not be collaterally estopped from bringing action by judgment of conviction); *Duncan* v. *Campbell*, 123 N.M. 181, 184–86, 936 P.2d 863 (App.) (rejecting reasoning behind exoneration rule), cert. denied, 123 N.M. 168, 936 P.2d 337 (1997); *Krahn* v. *Kinney*, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058 (1989) (rejecting rule that plaintiff must allege reversal of his conviction to state cause of action for criminal malpractice).

negligence of his or her criminal defense or habeas counsel to obtain appellate or postconviction relief before seeking damages for criminal malpractice, particularly when the negligence is extreme. We do not take this concern lightly. We are confident, however, that the substantial protections already in place in our criminal justice system—both direct appellate and collateral relief—adequately ensure that these types of wrongs would be identified and addressed, particularly in light of the right to appellate and postconviction representation. Accordingly, we are not persuaded that this is a reason not to adopt the exoneration rule.

Having considered these various opinions and the policies that underlie both the majority position and the minority position, we find the majority position more persuasive. The main reasons for adopting this approach are interrelated: first, the judicial policy against inconsistent judgments arising out of the same transaction; and, second, the elaborate remedial system embodied in Connecticut's habeas laws providing comprehensive and robust postconviction procedures intended to address, among other things, allegations that a criminal conviction was the result of the ineffective assistance of criminal defense counsel. Specifically, the legislature has created a statutory entitlement to counsel in "any habeas corpus proceeding arising from a criminal matter . . . ." General Statutes § 51-296 (a). This statutory right includes the right to " 'effective and competent' " habeas counsel. *Lozada* v. *Warden*, 223 Conn. 834, 838–39, 613 A.2d 818 (1992). Connecticut takes that statutory right so seriously that habeas petitioners in this state are afforded the opportunity to challenge their convictions through successive petitions based on inadequate performance by habeas counsel. See, e.g., *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 559, 153 A.3d 1233 (2017) ("a third habeas petition is available as a matter of fundamental fairness to vindicate the statu-

tory right under § 51-296 (a) to competent counsel in litigating a second habeas petition").

We are confident that Connecticut's rights to appeal and to postconviction proceedings, along with the availability of federal habeas remedies, provide an efficient structure for obtaining relief from a criminal conviction or the denial of habeas relief caused by the negligence of counsel. Accordingly, the protections afforded to criminal defendants to challenge their convictions through the habeas process in Connecticut lend even more support to our adoption of the exoneration rule for claims of criminal malpractice.

In fact, the elaborate and comprehensive nature of our criminal justice system's scheme to address convictions resulting from negligent lawyers "also appears to establish something else, [namely], that it is the public policy of this state to treat any person who has been convicted of [a] criminal offense as validly convicted unless and until the person's conviction has been reversed, whether on appeal or through [postconviction] relief, or the person otherwise has been exonerated. Any policy choice that [the] court might make concerning when a person [who has been convicted of a crime] . . . should be deemed to have been harmed by legal malpractice on the part of the person's criminal defense counsel should respect, and not hinder, the valid policy choices already made by the legislature. Respecting the legislature's comprehensive criminal justice construct means, at a minimum, that it is inappropriate to permit a person who has been convicted of a criminal offense to assert in the courts a claim for legal malpractice in connection with that conviction unless and until the person has challenged successfully the conviction through the direct appeal or [postconviction] processes [provided by state law] . . . ." *Stevens* v. *Bispham*, supra, 316 Or. 230–31.

Accordingly, we now hold that, when proof of a criminal malpractice claim requires a plaintiff to prove that the attorney's negligence was a proximate cause of the

underlying criminal conviction, the claim is insufficient as a matter of law unless the plaintiff has obtained appellate or postconviction relief for the underlying conviction. Having adopted the exoneration rule, we now must decide which version of that rule will best serve the interests that we have articulated, i.e., whether it is adequate to require that the would-be plaintiff must first obtain appellate or postconviction relief overturning the conviction, or must also demonstrate actual innocence, as some courts require. Because of the procedural posture of this case, in which the plaintiff has not even pleaded that he has obtained appellate or postconviction relief for his underlying criminal conviction, the issue of whether we will not only require exoneration, but also that a plaintiff prove his or her actual innocence, is not necessary to our resolution of this appeal. Therefore, we save for another day the question of whether to adopt the actual innocence rule.[15]

Importantly, notwithstanding our adoption of the exoneration rule, it should be clear that, if the plaintiff's criminal malpractice claim does not require findings that would undermine the validity of the underlying conviction, our holding today does not mean that such a claim would be barred for lack of exoneration. See, e.g., *Cortez* v. *Gindhart*, 435 N.J. Super. 589, 603, 90 A.3d 653 (App. Div. 2014) (concluding that criminal malpractice claim did not require proof of exoneration when allegation did not depend on invalidity of plaintiff's conviction or his admission of guilt), cert. denied, 220 N.J. 269, 105 A.3d 1102 (2015). Indeed, the Appellate Court correctly concluded that the plaintiff's claim of fraud in the present case could proceed; see *Cooke* v.

[15] We recognize that there are concerns regarding the applicability of the statute of limitations to claims of criminal malpractice. See General Statutes § 52-577 (three year statute of repose). We also appreciate Justice McDonald's effort to highlight those concerns. Because those issues were not raised and are thus not at issue in this appeal, however, we leave resolution of those concerns for another day.

Williams, supra, 206 Conn. App. 177; and that claim is not the subject of this appeal. Such claims do not directly or indirectly challenge the validity of the conviction and, thus, are not subject to the exoneration rule.

In the present case, the only claim of criminal malpractice before this court relates to the alleged professional negligence in connection with the defendants' representation of the plaintiff in his habeas proceeding. The plaintiff was not successful in that habeas action and has unsuccessfully challenged his conviction through direct appeals. See *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 810, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020); *State* v. *Cooke*, supra, 134 Conn. App. 574. The plaintiff is currently challenging his conviction in yet another habeas action that is scheduled for trial later this year. In his criminal malpractice action at issue here, the plaintiff alleges that the defendants' failures resulted in his inability to prove ineffective assistance of his trial counsel.

Therefore, to prove that the defendants' conduct was the proximate cause of the plaintiff's harm, namely, the denial of his habeas petition and continued incarceration, the plaintiff necessarily would have to prove that the defendants' negligence was a substantial cause of his conviction and that he probably would have prevailed on his habeas petition if the negligence had not occurred. Because the plaintiff has not obtained any appellate or postconviction relief, we conclude that the plaintiff's claim of criminal malpractice fails to state a cognizable claim of criminal malpractice.

To the extent that the plaintiff asserts that, even if we adopt the exoneration rule, it should not apply to his claim of criminal malpractice because he is alleging that his habeas counsel, instead of defense counsel in his criminal case, committed malpractice, we disagree.

Instead of focusing on whether the claim of criminal malpractice is brought against trial, appellate, or habeas counsel, the focus of whether the exoneration rule applies is on whether the claim of criminal malpractice challenges the validity of the underlying conviction. As the Appellate Court aptly explained: "In his amended complaint, the plaintiff alleges that the defendants, in violation of their duties, neglected to prosecute his habeas petition fully and properly because the 'aspects of the case that were investigated were misused by the defendants due to failures to comprehend the requisite law, facts and issues, and to have any coherent trial strategy,' the 'defendants failed to adequately prepare the plaintiff for trial,' the 'defendants failed to develop evidence in support of the habeas case,' and the 'defendants failed to properly prepare and present court documents, [including] . . . motions, posttrial briefs, and postjudgment remedies.' He further alleges that the defendants' failures 'in investigation and comprehension of the facts of the case yielded a failure to present and prove prejudice' pursuant to *Strickland* v. *Washington*, supra, 466 U.S. 668. These allegations clearly implicate the sufficiency of the defendants' representation in the habeas proceedings and, to prove these allegations [in a negligence case], the plaintiff presumably would have to demonstrate that he would not have sustained an injury of continued incarceration had professional negligence not occurred. . . . The allegations in the plaintiff's legal malpractice claim thus necessarily imply the invalidity of the plaintiff's conviction." (Citation omitted.) *Cooke* v. *Williams*, supra, 206 Conn. App. 163. Given that the plaintiff's claim of criminal malpractice necessarily challenges the validity of his underlying conviction, his claim fails for failure to plead and prove that he has obtained appellate or postconviction relief from his criminal conviction.

Having adopted the exoneration rule today and explained that it is not an issue of justiciability but,

instead, requires an additional element to be alleged and proven in a cause of action for criminal malpractice, we conclude that the plaintiff's claim of criminal malpractice should not have been the subject of a motion to dismiss, but was more properly the subject of a motion to strike. Compare Practice Book § 10-30 (a) ("[a] motion to dismiss shall be used to assert . . . lack of jurisdiction over the subject matter"), with Practice Book § 10-39 (a) ("[a] motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof, to state a claim upon which relief can be granted"). Therefore, we conclude as a matter of form that the Appellate Court improperly affirmed the judgment of the trial court dismissing the plaintiff's claim of criminal malpractice for lack of subject matter jurisdiction.

The judgment of the Appellate Court is reversed with respect to the plaintiff's claim of criminal malpractice and the case is remanded to that court with direction to remand to the trial court with direction to deny the defendants' motion to dismiss and for further proceedings consistent with this opinion; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

McDONALD, J., concurring. I agree with and join the majority's well reasoned opinion. I also agree with the result the majority reaches. I write separately to highlight a likely problem posed by the applicability of the statute of limitations to a claim of criminal malpractice and to provide guidance to litigants and trial courts on how the problem may perhaps be minimized.

It is undisputed that General Statutes § 52-577 governs claims of legal malpractice in Connecticut. See, e.g., *Doe* v. *Boy Scouts of America Corp.*, 323 Conn.

303, 340 n.25, 147 A.3d 104 (2016) (recognizing § 52-577 "applies, for example, to legal malpractice actions"); *DeLeo* v. *Nusbaum*, 263 Conn. 588, 589–90, 821 A.2d 744 (2003) (applying statute of limitations in § 52-577 to legal malpractice action); *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 714, 145 A.3d 292 ("[a]n action alleging legal malpractice or negligence is a tort claim subject to the three year statute of limitations set forth in § 52-577"), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

Section 52-577 provides: "No action founded upon a tort shall be brought but within three years *from the date of the act or omission complained of*." (Emphasis added.) "This court has explained that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred. . . . The date of the act or omission complained of is the date when the . . . conduct of the defendant occurs . . . . *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 408, 957 A.2d 836 (2008); see also *Rosato* v. *Mascardo*, 82 Conn. App. 396, 407, 844 A.2d 893 (2004) (characterizing § 52-577 as statute of repose). As such, an action commenced more than three years from the date of the negligent act or omission complained of is [time] barred . . . regardless of whether the plaintiff had not, or in the exercise of [reasonable] care could not reasonably have discovered the nature of the injuries within that time period. . . . *Martinelli* v. *Fusi*, 290 Conn. 347, 355, 963 A.2d 640 (2009)." (Internal quotation marks omitted.) *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 503, 205 A.3d 534 (2019).

As the Appellate Court has recognized, "[§] 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and in some cases will serve to bar an action before it accrues."

(Internal quotation marks omitted.) *Piteo* v. *Gottier*, 112 Conn. App. 441, 445, 963 A.2d 83 (2009). Moreover, "[i]gnorance of his rights on the part of the person against whom the statute has begun to run . . . will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy." *Bank of Hartford County* v. *Waterman*, 26 Conn. 324, 329 (1857).

In light of the majority's conclusion that exoneration from the underlying conviction is an element of a cause of action for criminal malpractice, I foresee § 52-577 presenting a significant issue for plaintiffs. In other words, if one waits to obtain appellate or postconviction relief before bringing a meritorious cause of action for criminal malpractice, it is unlikely that he or she will be able to do so within three years of the act or omission constituting malpractice, given the time frames usually associated with such postconviction litigation efforts. Some courts, however, have provided guidance on how to avoid the unfortunate circumstance of the running of a statute of limitations before the plaintiff's cause of action even accrues: a plaintiff claiming to be injured by the criminal malpractice of his defense attorney may file a timely cause of action for criminal malpractice and seek an immediate stay of that action while he pursues appellate or postconviction relief relating to his underlying conviction. See, e.g., *Coscia* v. *McKenna & Cuneo*, 25 Cal. 4th 1194, 1210–11, 25 P.3d 670, 108 Cal. Rptr. 2d 471 (2001) ("[T]he plaintiff must file a malpractice claim within the . . . [limitation] period set forth in [the code of civil procedure]. Although such an action is subject to [a motion to strike] or summary judgment while a plaintiff's conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies."); see also, e.g., *Gibson* v. *Trant*, 58 S.W.3d 103, 117 (Tenn. 2001).

Accordingly, I concur in the judgment.

SUSANNE P. WAHBA *v.* JPMORGAN CHASE BANK, N.A.
(SC 20807)

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

Syllabus

The plaintiff appealed to the Appellate Court from the judgment of the trial court, which had rendered a judgment of strict foreclosure in favor of the defendant bank. The Appellate Court subsequently affirmed the trial court's judgment and remanded the case for the setting of new law days. On remand, the plaintiff objected to the defendant's motion to reset the law days, claiming that the judgment of strict foreclosure did not account for the substantial increase in property values that had occurred during the pendency of the appeal. The plaintiff sought, inter alia, a determination by the trial court regarding whether a foreclosure by sale would be appropriate at that point in light of the increase in the value of the subject property. The trial court concluded, however, that it had no authority to revisit the merits of the strict foreclosure judgment, as it was bound by the Appellate Court's rescript order requiring the setting of new law days. The plaintiff then filed a second appeal with the Appellate Court, claiming that the trial court had incorrectly determined that it had no authority on remand to order a foreclosure by sale. The Appellate Court affirmed, concluding that the plaintiff's claim was barred by the court's earlier decision in *Connecticut National Bank* v. *Zuckerman* (31 Conn. App. 440), in which it held that, when an appellate court affirms a judgment of strict foreclosure and remands to the trial court for the setting of new law days, the trial court has no authority on remand to deviate from the appellate court's remand order. The Appellate Court also concluded that, even if a trial court had the authority to order a foreclosure by sale, the plaintiff failed to file a motion to open the judgment for such a purpose or to adduce evidence that a judgment of strict foreclosure, rather than a judgment of foreclosure by sale, would have resulted in a substantial windfall for the defendant. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The defendant could not prevail on its claim, as an alternative ground for affirming the Appellate Court's judgment, that the doctrine of res judicata barred the trial court from entertaining the plaintiff's request that the court modify the judgment of strict foreclosure and order a foreclosure by sale:

   There was support in the case law for the conclusion that, when law days have passed and the trial court must reset them, the parties to the foreclosure proceedings are not barred from seeking updated findings

on the amount of the debt and the value of the subject property, or from requesting a foreclosure by sale in lieu of strict foreclosure if the updated findings warrant it, and the Appellate Court also had recently suggested in dictum in *U.S. Bank National Assn.* v. *Rago* (216 Conn. App. 200) that, in such circumstances, sound policy reasons weigh in favor of allowing a trial court to consider whether it should order a foreclosure by sale without regard to whether doing so would run afoul of res judicata principles.

Because a judgment of strict foreclosure is uniquely susceptible to becoming ineffective and stale over the course of time, insofar as the amount of the mortgage debt can change and property values can fluctuate, and because foreclosure is peculiarly an equitable action, this court deemed it necessary, in cases in which an appellate court has affirmed a judgment of strict foreclosure and remanded for the setting of new law days, for a trial court to make a new finding as to the amount of the debt so that the parties know what the mortgagor must pay to redeem the property, at least in the absence of any contrary direction by the appellate court.

In such cases, equity demands that the trial court ascertain the current value of the subject property in order to determine whether strict foreclosure would result in a potential windfall to the mortgagee, and, if such a potential windfall exists, equity also demands that the trial court exercise its discretion and decide whether to modify the form of the judgment and to order a foreclosure by sale, and these practical and equitable considerations outweigh the interests in finality and repose that underlie the doctrine of res judicata.

2. The Appellate Court incorrectly concluded that the trial court lacked authority to entertain the plaintiff's request that the trial court modify the judgment of strict foreclosure and order a foreclosure by sale:

When, as in the present case, the claim on appeal from the judgment of strict foreclosure is not that the trial court had abused its discretion by ordering a strict foreclosure but, rather, that the trial court improperly had rendered a judgment of foreclosure in any form, there is no reason to conclude that a reviewing court's affirmance of the judgment of strict foreclosure and remand for the setting of new law days reflect an intent to prohibit a foreclosure by sale if such a modification is warranted by new findings as to the value of the subject property.

Accordingly, in the absence of any evidence that a reviewing court's remand order reflects an actual intent to limit the trial court's equitable discretion to modify the form of the judgment of foreclosure, an order remanding the case with direction to set new law days merely embodies a rebuttable presumption that the original form of the foreclosure judgment should stand, and that presumption may be rebutted if the trial court,

upon an adequately supported request by a party, makes new findings warranting a foreclosure by sale.

To the extent that the Appellate Court in *Connecticut National Bank* v. *Zuckerman* held that an appellate court's order affirming a judgment of strict foreclosure and remanding the case to the trial court for the purpose of setting new law days precludes the trial court from opening the judgment and ordering a foreclosure by sale, it was hereby overruled.

In the present case, the Appellate Court's affirmance of the judgment of strict foreclosure and remand for new law days did not strip the trial court of authority to order a foreclosure by sale when the plaintiff sought such a modification, and the plaintiff was not required to ask the Appellate Court to reconsider and modify the form of its remand order before asking the trial court to consider modifying the judgment and ordering a foreclosure by sale.

This court nevertheless noted that an appellate court that has affirmed a judgment of strict foreclosure and remanded the case to the trial court for the setting of new law days may, in appropriate cases, indicate in its remand order that the trial court should not modify the form of the original judgment, even under circumstances in which the equity in the property is significantly greater than the amount of the debt, such as in the case of a frivolous appeal filed by the mortgagor solely for the purpose of delay, and, if an appellate court so indicates, the trial court would lack authority to entertain, on remand, a request for a foreclosure by sale.

3. The Appellate Court incorrectly concluded that, even if the trial court had the authority on remand to order a foreclosure by sale, the plaintiff was required to file a motion to open the judgment of strict foreclosure and to present evidence that the value of the subject property had substantially increased since the date of the original judgment before the trial court could exercise that authority:

The Appellate Court had held in a prior decision that a remand in a foreclosure appeal with direction to set new law days is the functional equivalent of an order to open the judgment, the defendant in the present case did not move to open the judgment before asking the trial court to reset the law days, presumably because it believed that there was no need for such a motion in light of the Appellate Court's remand order, and, thus, there also was no need for the plaintiff to move to open the judgment before the trial court could entertain her request to order a foreclosure by sale.

Moreover, the plaintiff made an adequate proffer to support her request that the trial court order the defendant to provide an updated amount of the debt owed and a property appraisal, and, if warranted by the new information obtained, a foreclosure by sale, as the plaintiff represented

in her objection to the defendant's motion to reset the law days that the original appraisal was almost four years old, that property values had increased dramatically in the area of the subject property, and that the estimated current value of the subject property was approximately $2 million greater than the amount of the debt owed.

Furthermore, the plaintiff's representations in her objection to the defendant's motion to reset the law days were sufficient to establish the need for a hearing at which the parties could offer evidence to establish the value of the subject property, and the plaintiff was not required to prove that the value of the property had increased before she could request an evidentiary hearing on that issue.

Argued December 18, 2023—officially released June 25, 2024

Procedural History

Action to recover damages for the defendant's alleged unfair trade practices, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the plaintiff's claim was tried to the jury before *Povodator*, *J.*; verdict for the defendant; subsequently, the counterclaim was tried to the court; judgment for the defendant on the complaint and on the counterclaim, from which the plaintiff appealed to the Appellate Court, *Lavine*, *Alvord* and *Harper*, *Js.*, which dismissed the appeal in part and remanded the case to the trial court for the purpose of setting new law days; thereafter, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment of strict foreclosure, and the plaintiff appealed to the Appellate Court, *Elgo*, *Moll* and *Suarez*, *Js.*, which affirmed the trial court's judgment and remanded the case to the trial court for the purpose of setting new law days, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Thomas P. Willcutts, for the appellant (plaintiff).

Brian D. Rich, for the appellee (defendant).

Opinion

D'AURIA, J. The primary issue before us in this appeal is whether, after an appellate court has affirmed a trial court's judgment of strict foreclosure and remanded the case to the trial court to set new law days, the trial court has authority to open that judgment and render instead a judgment of foreclosure by sale based on changed market conditions. The Appellate Court, in the second appeal taken in this case, answered this question in the negative and further concluded that, even if the trial court had such authority, the plaintiff, Susanne P. Wahba, did not provide an adequate evidentiary foundation for her request that the court consider ordering a foreclosure by sale. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 216 Conn. App. 236, 239–40, 283 A.3d 1095 (2022) (*Wahba II*). We granted the plaintiff's petition for certification to appeal to this court from these rulings. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 346 Conn. 912, 289 A.3d 597 (2023).[1] We conclude that, contrary to the contention of the defendant, JPMorgan Chase Bank, N.A., the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that the trial court consider ordering a foreclosure by sale instead of simply resetting the law days. We further conclude

[1] We certified the following two issues for appeal: "1. Did the Appellate Court properly uphold the trial court's determination that the trial court was precluded on remand from ordering a foreclosure by sale after the Appellate Court had previously affirmed a judgment of strict foreclosure and remanded the case to the trial court 'solely for the purpose of setting new law days.' *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 869, 241 A.3d 706 (2020), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021)?

"2. If the answer to the first question is 'no,' did the Appellate Court correctly conclude that the plaintiff nonetheless could not prevail on appeal because, after remand, she did not file a motion to open the judgment to request a foreclosure by sale and failed to preserve her claim on appeal because she did not provide the trial court with an evidentiary foundation to support her argument that the market value of the property had increased in value by more than $2 million since the judgment of strict foreclosure was rendered?" *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 346 Conn. 912.

that the Appellate Court incorrectly determined that (1) its remand order directing the trial court to set new law days deprived the trial court of authority to entertain the plaintiff's request, and (2) even if the trial court had such authority, the plaintiff's request was not supported by an adequate evidentiary foundation. We therefore reverse the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. In 2003, the plaintiff obtained a loan from Washington Mutual that was secured by a mortgage on property located at 111 Byram Shore Road in Greenwich (property). See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 855, 241 A.3d 706 (2020) (*Wahba I*), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021). The defendant acquired the loan from Washington Mutual in 2008. Id., 856.

The plaintiff later sought a loan modification. It was her failed efforts to obtain that modification that led to this action alleging that the defendant had engaged in deceptive and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Id. The defendant counterclaimed to foreclose the mortgage. Id., 854 n.1. The parties tried the CUTPA claim to a jury, which returned a verdict in the defendant's favor. Id., 856–57. They tried the foreclosure counterclaim to the court on October 26, 2017. On June 28, 2018, the court issued a memorandum of decision, concluding that the defendant was entitled to a judgment of foreclosure and ordering a hearing on the issues of attorney's fees and whether the court should order a strict foreclosure or a foreclosure by sale. That hearing was held on July 30, 2018. The court issued a supplemental memorandum of decision on November 28, 2018, rendering a judgment of strict foreclosure. The court determined that, as of the date of trial, October 26, 2017, the fair market value of the property was $6,700,000, that, as of November 27,

2018, the outstanding mortgage debt was $6,179,199.57, and that the defendant was entitled to fees and expenses in the amount of $121,305.80.

The plaintiff appealed to the Appellate Court, challenging the verdict on her CUTPA claim and the judgment of strict foreclosure. Id., 854 n.1, 857. The Appellate Court upheld the verdict on the CUTPA claim, affirmed the judgment of strict foreclosure and remanded the case to the trial court "solely for the purpose of setting new law days." Id., 869. The plaintiff then moved for reconsideration, requesting that the Appellate Court reconsider its ruling that the trial court properly had barred her from presenting certain evidence at trial. The Appellate Court denied the motion.

On remand, the defendant moved the trial court to reset the law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 238. The plaintiff objected, arguing that the original judgment of strict foreclosure did "not take into account the steep rise in Connecticut property values that has occurred since the court determined to enter a judgment of strict foreclosure, rather than a foreclosure by sale.[2] The steep rise in property values has been most dramatic for high-end shoreline properties, which describes the [plaintiff's] property . . . ." (Footnote added; internal quotation marks omitted.) Id. The plaintiff requested that the court require the defendant to file a motion to open the judgment and to provide an updated appraisal and updated debt figures to allow the court to determine whether a foreclosure by sale would be appropriate. Id. The court concluded that, under *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 689 A.2d 1097 (1997), it was bound by the Appellate Court's rescript order in *Wahba I*, requiring

[2] When the plaintiff filed her objection, almost four years had elapsed since the original appraisal and almost three years had elapsed since the date that the trial court ordered a strict foreclosure.

it to set new law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 238–29; see also *Rizzo Pool Co.* v. *Del Grosso*, supra, 65 ("[i]t is the duty of the trial court on remand to comply strictly with the mandate of [an] appellate court according to its true intent and meaning" (internal quotation marks omitted)). Accordingly, the court denied the plaintiff's request and granted the defendant's request to reset the law days. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 240.

The plaintiff moved the trial court for reargument and reconsideration, contending that *Rizzo Pool Co.* did not prohibit the court from exercising its discretion to render an equitable decision in a foreclosure proceeding. She also requested that the court take judicial notice that Zillow Group, Inc. (Zillow),[3] estimated the current value of the property at $8,817,600, approximately $2 million more than the appraisal the court had relied on when it rendered the judgment of strict foreclosure. She also represented that, even after adding an additional three years of interest to the 2018 debt amount, the current estimated value of the property was approximately $2 million greater than the debt. The trial court denied the motion, again noting that it had no authority to revisit the merits of the strict foreclosure judgment in light of the Appellate Court's rescript remanding the case solely for the purpose of setting new law days. The court also noted that the plaintiff had not sought to expand the scope of the remand order in her motion for reconsideration of the Appellate Court's decision.

The plaintiff appealed again to the Appellate Court, claiming that the trial court had incorrectly determined

[3] Zillow is an online real estate marketplace website that offers comprehensive real estate market data, including estimated values of real property. See *Pickett Fence Preview, Inc.* v. *Zillow, Inc.*, Docket No. 22-2066-cv, 2023 WL 4852971, *1 (2d Cir. July 31, 2023).

that it had no authority on remand to order a foreclosure by sale. See id., 238. The Appellate Court rejected the claim for two reasons. First, it concluded that the claim was barred by its decision in *Connecticut National Bank* v. *Zuckerman*, 31 Conn. App. 440, 441, 624 A.2d 1163 (1993), which held that, when an appellate court has affirmed a judgment of strict foreclosure and remanded the case for the setting of new law days, the "trial court cannot deviate from the directions given by the appellate court." (Internal quotation marks omitted.) *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 240. Second, the Appellate Court concluded that, even if the trial court had authority to order a foreclosure by sale, the plaintiff neither moved to open the judgment for such a purpose nor preserved her claim by providing the trial court with evidence that a judgment of strict foreclosure would result in a windfall of more than $2 million to the defendant. See id. Accordingly, the Appellate Court affirmed the trial court's judgment and again remanded the case to set new law days. See id.

The plaintiff then filed this certified appeal challenging the Appellate Court's conclusions. The defendant claims as an alternative ground for affirmance that, even if the Appellate Court's rescript in *Wahba I* did not deprive the trial court of its authority to entertain a request for a judgment of foreclosure by sale on remand, the trial court was barred from doing so by the doctrine of res judicata.[4] Relatedly, the defendant

[4] The defendant did not expressly characterize this claim as an alternative ground for affirmance and did not file a preliminary statement identifying the issue pursuant to Practice Book § 63-4 (a) (1) (A). Nevertheless, the defendant raised the claim in its brief to the Appellate Court, as well as in its brief to this court, and the plaintiff has responded to the claim in her reply brief. "Given the fact that neither party would be prejudiced by our doing so, we treat [this claim] as if [it] had been properly raised as . . . [an alternative ground] for affirmance." (Internal quotation marks omitted.) *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010).

contends that the plaintiff had to appeal from the original judgment of strict foreclosure before the Appellate Court could authorize the trial court to modify the judgment and order a foreclosure by sale. We conclude that the doctrine of res judicata did not bar the trial court from modifying the judgment, that the Appellate Court's remand order did not deprive the trial court of its authority to do so, and that the plaintiff adequately raised and preserved her claim that the trial court had such authority. We therefore reverse the judgment of the Appellate Court.

I

Because the defendant's claim that the doctrine of res judicata barred the trial court from modifying the judgment of strict foreclosure and ordering a foreclosure by sale is potentially dispositive and has some bearing on our analysis of the plaintiff's claims on appeal, we address it first. We conclude that, under the circumstances of the present case, the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request on remand that it order a foreclosure by sale.

"[T]he doctrine of res judicata provides that [a] judgment is final not only as to every matter which was offered to sustain the claim, *but also as to any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Emphasis in original; internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 463, 998 A.2d 766 (2010). The doctrine provides that "[a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same par-

ties . . . upon the same claim or demand." (Internal quotation marks omitted.) Id., 459.

"Because [res judicata is a] judicially created [rule] of reason that [is] enforced on public policy grounds . . . we have observed that whether to apply [the] doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (Citation omitted; internal quotation marks omitted.) Id., 460. The doctrine is "flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) Id.

Our analysis must begin by examining the unusual status of a judgment of strict foreclosure when execution of that judgment has been stayed pending appeal pursuant to Practice Book § 61-11 and the original law days have passed. On the one hand, this court has held that, when law days have passed "[b]ecause of delays incident to the legal process of appeal, the judgment of the trial court [becomes] ineffective in an essential respect . . . ." (Internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 683, 899 A.2d 586 (2006); see also *Bank of New York Mellon* v. *Francois*, 198 Conn. App. 885, 896, 234 A.3d 1089 (2020) ("[w]ithout the setting of law days, the time for redemption has not been limited and the parties' rights remain unconcluded as to that issue"

(internal quotation marks omitted)). On the other hand, the passing of the law days during an appellate stay does not deprive the judgment of all vitality, which would render the appeal moot. Cf. *RAL Management, Inc.* v. *Valley View Associates*, supra, 685 (opening of judgment of strict foreclosure to modify certain terms during pendency of appeal does not necessarily render judgment void and appeal moot). Instead, even when an appellate court affirms the judgment of strict foreclosure, it must remand the case to the trial court to effectively render a new judgment. See id., 683 (when law days pass, "what is in effect a new judgment [becomes] necessary" (internal quotation marks omitted)); *L & R Realty* v. *Connecticut National Bank*, 53 Conn. App. 524, 548–49, 732 A.2d 181 ("One of the distinguishing features of a defendant's appeal from a judgment of strict foreclosure is that a remand to the trial court is almost always required, even if the appeal resulted in a finding of no error in the entry of the original judgment. Since the taking of an appeal stays the passing of the law days, once the appeal is concluded the trial court must once again act on the case and set new law days." (Internal quotation marks omitted.)), cert. denied, 250 Conn. 901, 734 A.2d 984 (1999); see also Practice Book § 17-10 ("[i]f a judgment fixing a set time for the performance of an act is affirmed on appeal by the Supreme Court and such time has elapsed pending the appeal, the judicial authority which rendered the judgment appealed from may, on motion and after due notice, modify it by extending the time"). Thus, after the law days have passed while an appellate stay is in effect, a judgment of strict foreclosure is effectively in limbo: although it is " 'ineffective in an essential respect,' " it retains sufficient vitality to prevent the appeal from becoming moot. *RAL Management, Inc.* v. *Valley View Associates*, supra, 683. The question that we must address in the present case is whether the judgment

has sufficient vitality to act as an absolute bar to the modification of any terms of the judgment other than the law days.

Although it is not directly on point, we find instructive this court's decision in *Hartford National Bank & Trust Co.* v. *Tucker*, 195 Conn. 218, 487 A.2d 528, cert. denied, 474 U.S. 845, 106 S. Ct. 135, 88 L. Ed. 2d 111 (1985). In *Tucker*, this court initially remanded the case to the trial court "for the setting of a new date for a public sale of the mortgaged premises and other formalities not inconsistent with our decision." Id., 220–21. On remand, the plaintiff moved for the setting of a new date for the public sale. Id., 221. The trial court conducted a hearing at which it ascertained the amount due on the mortgage and undertook an "extended inquiry into the value of the mortgaged premises . . . ." Id., 221–22. The court then set a new date for foreclosure by sale. Id., 222.

The defendant again appealed, claiming that the trial court had not followed the specific direction of this court's mandate. Id. This court concluded that, to the contrary, it was "proper for the trial court in the new judgment to confirm the original one in all respects *except as modification was made necessary by the delays incident to the appellate process*." (Emphasis added.) Id., 222–23. Accordingly, this court concluded that, in addition to setting a new date for a public sale, the trial court had the authority "to ascertain the amount due the plaintiff, and to add to that amount interest and reimbursement for expenses, costs, attorney['s] fees and appraiser's fees." Id., 223.

Unlike the trial court in the present case, the trial court in *Tucker* was not asked to change the *form* of the foreclosure judgment on remand. The Appellate Court has recognized in a different context, however, that, when law days have passed during the course of

an appeal from a foreclosure judgment, requiring that the trial court render a new judgment, the trial court has the authority to entertain a request for a foreclosure by sale. See *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 391–93, 180 A.3d 611, cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018). Although *Christophersen* is distinguishable from the present case because it involved the opening of a judgment of strict foreclosure by operation of General Statutes § 49-15 (b),[5] and not a judgment that had become ineffective as the result of the passing of law days during the course of an appeal, the case provides some support for the conclusion that, when law days have passed and the trial court must reset them, the parties are not barred from seeking updated findings on the amount of the debt and the value of the property or from requesting a foreclosure by sale, if the updated findings warrant it. We further note that the Appellate Court has held that, just as when a judgment of strict foreclosure has been opened as the result of a bankruptcy filing, when law days have passed during the pendency of an appeal and the case is remanded to the trial court to set new law days, the trial court "ha[s] jurisdiction over the matter and properly set[s] law days *pursuant to § 49-*

[5] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection.

* * *

"(b) Upon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. . . ."

15 [*(a) (1)*]." (Emphasis added.) *L & R Realty* v. *Connecticut National Bank*, supra, 53 Conn. App. 549. In other words, a remand order to set new law days is the functional equivalent of an order to open the judgment of strict foreclosure. See *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 683 ("a *new judgment* [becomes] necessary" when law days have passed during pendency of appeal (emphasis added; internal quotation marks omitted).

More recently, the Appellate Court has suggested in dictum that, when a judgment of strict foreclosure has been affirmed and the case has been remanded to the trial court to set new law days, "sound policy reasons" weigh in favor of allowing a trial court to consider whether it should order a foreclosure by sale without expressing any concerns that doing so would run afoul of principles of res judicata. *U.S. Bank National Assn.* v. *Rago*, 216 Conn. App. 200, 207 n.9, 284 A.3d 629 (2022). The court in *Rago* noted that it is well established that, to prevent a windfall to the mortgagee, foreclosure by sale is the preferred form of judgment in cases in which the value of the property exceeds the amount of the debt. Id., 208. Critically, it further noted that "foreclosure is peculiarly an equitable action . . . ." (Citations omitted; internal quotation marks omitted.) Id. The court acknowledged that "it is not difficult to conceive"; id.; contrary to the holding of *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 441, that the "trial court cannot deviate" from a remand order directing the trial court only to set new law days; (internal quotation marks omitted); *U.S. Bank National Assn.* v. *Rago*, supra, 207 n.9; that, "on a proper motion with an evidentiary showing and due notice and an opportunity to be heard," the trial court could make new findings and order a foreclosure by sale. Id., 208–209. The Appellate Court concluded in *Rago* that there was no need to resolve this issue, however, because, regardless

of whether there are circumstances under which a trial court would have such authority, the trial court in that case improperly had made updated findings concerning the value of the property and the amount of the debt "sua sponte and without providing to the parties adequate notice and an opportunity to be heard." Id., 209; see also id., 207–208 n.9.

With these precedents in mind, we conclude that, when a reviewing court affirms a judgment of strict foreclosure and remands the case to the trial court for the setting of new law days, mechanically applying the doctrine of res judicata to bar the trial court from modifying the judgment of strict foreclosure in any other respect would "frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) *Weiss* v. *Weiss*, supra, 297 Conn. 466. As the foregoing discussion makes clear, a judgment of strict foreclosure is uniquely susceptible to becoming ineffective and stale over the course of time. Law days pass, the amount of the debt changes, and the property's value fluctuates. It is also axiomatic that "foreclosure is peculiarly an equitable action . . . ." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 208; see also *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 374, 260 A.3d 1187 (2021) ("[b]ecause foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done" (internal quotation marks omitted)). Thus, when an appellate court has affirmed a judgment of strict foreclosure and remanded the case to the trial court with direction to set new law days—perhaps years after the original judgment—we deem it necessary, unless expressly prohibited for some reason by the reviewing court's remand order, for the trial court to

make a new finding as to the amount of the debt so that the parties know what the mortgagor must pay to redeem the property. See *US Bank National Assn.* v. *Christophersen*, supra, 179 Conn. App. 394 ("[the] case law is clear that the governing principle is that a mortgagee is . . . entitled to the payment of the debt owing him" and to no more (internal quotation marks omitted)). That being the case, we see no reason why, if the mortgagor makes an adequate proffer, equity would not also demand that the court determine the property's current value so that the court knows whether a strict foreclosure would result in potential windfall to the mortgagee. And, if a windfall to the mortgagee would result, we also see no reason why, in an appropriate case, equity would not demand that the court exercise its discretion and determine whether to modify the form of the judgment and to order a foreclosure by sale. See *Toro Credit Co.* v. *Zeytoonjian*, 341 Conn. 316, 330, 267 A.3d 71 (2021) ("foreclosure by sale is the preferred decree in situations in which the property's fair market value exceeds the debt" (internal quotation marks omitted)); *Caliber Home Loans, Inc.* v. *Zeller*, 205 Conn. App. 642, 659, 259 A.3d 1 ("[w]e have recognized that when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale" (internal quotation marks omitted)), cert. denied, 338 Conn. 914, 259 A.3d 1179 (2021); *US Bank National Assn.* v. *Christophersen*, supra, 179 Conn. App. 394 ("[s]ince a mortgage foreclosure is an equitable proceeding . . . a windfall should be avoided if possible" (internal quotation marks omitted)). In our view, these practical and equitable considerations outweigh the interests in finality and repose that underlie the doctrine of res judicata.

This analysis disposes of the defendant's claim that, because the plaintiff failed to challenge the judgment

of strict foreclosure in her initial appeal, even though there was some equity in the property at that time, the trial court was barred from entertaining the plaintiff's request for a foreclosure by sale on remand from the Appellate Court after it had resolved the first appeal. As we have explained, the justification for the exception to the doctrine of res judicata in this specific situation is that relevant circumstances have changed during the course of the appeal. The fact that the plaintiff failed to challenge the form of the original judgment on appeal, despite having some equity in the property, does not mean that she was barred from seeking a foreclosure by sale on remand years later, at which time she claimed that the property's value had increased by more than $2 million.[6] We conclude, therefore, that the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that it modify the judgment and order a foreclosure by sale.

II

For similar reasons, we agree with the plaintiff that the Appellate Court incorrectly determined that the trial court had no authority to entertain the plaintiff's request that it modify the judgment and order a foreclosure by sale on the ground that the Appellate Court remanded the case to the trial court "solely for the purpose of

[6] We note that the trial court stated in its November 26, 2018 ruling rendering the judgment of strict foreclosure that "the equity may be perceived as substantial insofar as, at the time of the foreclosure trial, the apparent equity was in the hundreds of thousands of dollars, but as measured against the overall value of the property, in the millions of dollars, the equity is a relatively small percentage of the value, and, unless a foreclosure by sale were to realize some 90 [percent, plus or minus] of the value of the property (seemingly an optimistic viewpoint), a foreclosure by sale might well be deemed counterproductive. (As reflected by a supplemental submission by the defendant, the amount of the debt ha[d] increased by approximately $200,000, since the time of the foreclosure trial (and still further since July 30, 2018), further diminishing the possibly available equity were a sale to be ordered.)"

setting new law days." *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 200 Conn. App. 869.

The following well established principles govern proceedings in the trial court after a remand by an appellate court. "In carrying out a mandate of [the reviewing] court, the trial court is limited to the specific direction of the mandate as interpreted *in light of the opinion.* . . . This is the guiding principle that the trial court must observe. . . . Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and *the opinion of the reviewing court and proceed in conformity with the views expressed therein.* . . .

"We have also cautioned, however, that . . . remand orders should not be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 65–66.

"Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is

akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016).

Purporting to apply these principles, the Appellate Court in *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 442, held in no uncertain terms that its earlier order in that case affirming a judgment of strict foreclosure and remanding the case to the trial court "for the purpose of setting new law days" precluded the trial court from opening the judgment and ordering a foreclosure by sale. The Appellate Court dismissed the defendant's appeal claiming otherwise as purely dilatory. See id. As we suggested in part I of this opinion, however, the Appellate Court recently has expressed concern that it might have wrongly decided *Zuckerman*. See *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 207–208 n.9. In *Rago*, published on the same date as the Appellate Court's decision in *Wahba II*, the decision presently under review, the court recognized, as we have in part I of this opinion, that there are "important policy reasons that are not extraneous to the purposes of a remand in the foreclosure context"; id., 207; that might justify opening a judgment of strict foreclosure and ordering a foreclosure by sale, "notwithstanding a prior affirmance of [the] judgment of strict foreclosure and an attendant remand for the purpose of setting new law days." Id., 209; see also *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 239 n.3 (citing *Rago* and noting that for Appellate Court to overrule *Zuckerman* would require en banc consideration by that court).

We agree with the Appellate Court in *Rago* that, to the extent *Zuckerman* held that a remand order that solely directs the trial court to set new law days always

bars the trial court from making new findings as to the value of the property and the amount of the debt and, if warranted by those findings, ordering a foreclosure of sale, the case was wrongly decided, and it is hereby overruled. When, as in the present case, the claim on appeal is not that the trial court abused its equitable discretion by ordering a strict foreclosure but that the trial court improperly rendered a judgment of foreclosure *in any form*, there simply is no reason to conclude that a reviewing court's affirmance of a judgment of strict foreclosure and remand of the case to set new law days reflected an intent to prohibit a foreclosure by sale if justified by new findings as to the value of the property. Indeed, the defendant concedes that "the issue of whether the underlying foreclosure judgment should have been a strict foreclosure or a foreclosure by sale was not put to [the Appellate Court] in [*Wahba I*]." Under these circumstances, an interpretation of the remand order to set new law days as prohibiting the court from considering a request for a foreclosure by sale would not reflect any actual decision by the reviewing court that a foreclosure by sale is unwarranted. See 5 Am. Jur. 2d, Appellate Review § 689 (2024) (mandate rule precludes further consideration only of "issues actually decided on appeal"); see also *United States* v. *Perez*, 475 F.3d 1110, 1113 (9th Cir. 2007) (when applying mandate rule, "[t]he ultimate task is to distinguish matters that have been decided on appeal, and *are therefore beyond the jurisdiction of the lower court*, from matters that have not" (emphasis in original; internal quotation marks omitted)). Thus, as the Appellate Court aptly observed in *Rago*, such an interpretation of the remand order would interfere with the trial court's obligation to do equity and potentially result in an unwarranted windfall to the mortgagee for no discernable reason.

In the absence of any evidence that the reviewing court's remand order reflected an actual intent to limit

the trial court's equitable discretion as to the form of the order, we find it far more reasonable to conclude that an order remanding the case with direction to set new law days merely embodies a rebuttable presumption that the original form of the foreclosure judgment should stand. That presumption may be rebutted if *the trial court, upon an adequately supported request by a party, makes new findings warranting a foreclosure by sale.* Such an interpretation would be consistent with the well established principle that trial courts may consider "matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 65–66; see also *State* v. *Brundage*, supra, 320 Conn. 749 ("A reviewing court . . . cannot and should not attempt to anticipate in its decision every procedural and factual eventuality that could arise upon remand to the trial court. By contrast, the trial court is in the best position to deal with procedural and factual developments in a case on remand and is the proper court to address such eventualities as they arise."); 5 Am. Jur. 2d, supra, § 689 ("lower courts are free as to anything not foreclosed by the mandate, and, under certain circumstances, an order issued after remand may deviate from the mandate if it is not counter to the spirit of the higher court's decision"); id. ("a court on remand . . . is ordinarily free to make an order or direction on questions not presented or settled by [an] appellate court which is not inconsistent with the appellate court's opinion" (footnote omitted)); cf. *Rizzo Pool Co.* v. *Del Grosso*, supra, 69 (trial court properly followed "standard operating procedure" when it awarded attorney's fees pursuant to General Statutes § 42-150bb on remand despite lack of specific direction in Supreme Court's rescript); *Hartford National Bank & Trust Co.* v. *Tucker*, supra, 195 Conn. 221 (when case was

remanded to trial court "for the setting of a new date for a public sale of the mortgaged premises and any other necessary orders not inconsistent with this opinion," trial court had implicit authority to make new findings as to amount of debt and value of property (internal quotation marks omitted)); *Mazzotta* v. *Bornstein*, 105 Conn. 242, 244, 135 A. 38 (1926) ("[w]hile the rescript did not specify that the judgment as directed bore [mandatory statutory] interest from the date of the judgment appealed from, it can bear no other interpretation"). We conclude, therefore, that the Appellate Court incorrectly determined that its rescript in *Wahba I* stripped the trial court of authority to order a foreclosure by sale if a party so requests and it is warranted by a change in circumstances. It follows that, contrary to the defendant's claim, the plaintiff was not required to ask the Appellate Court to reconsider and modify the form of the remand order before she could ask the trial court to consider a foreclosure by sale.

In reaching its conclusion that the trial court had no such authority, the Appellate Court appears to have concluded that the trial court was required to apply a version of the plain meaning rule[7] to interpret the rescript in *Wahba I*. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 216 Conn. App. 239–40 (because rescript in *Wahba I* directed trial court only to set new law days, trial court could not take any other action). That is, it appears to have concluded that, because the plain meaning of the rescript in *Wahba I* was clear and unambiguous, the trial court could not, based on the

[7] The plain meaning rule, embodied in General Statutes § 1-2z, is a principle of statutory construction that precludes courts from considering extratextual evidence as to the meaning of statutory language if, after first examining the statute and its relationship to the broader statutory scheme of which it is part, the court determines that the language at issue is plain and unambiguous and does not yield absurd or unworkable results. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827–28, 251 A.3d 56 (2020).

plaintiff's request to consider a foreclosure by sale, inquire into the actual intent of the Appellate Court as revealed in its decision as a whole, including the facts and procedural history of the case, the nature of the claims made by the plaintiff on appeal and whether there was any evidence that the Appellate Court intended that the trial court should deviate from standard operating procedures on remand.[8] The weight of authority clearly indicates, however, that trial courts are not strictly bound by the plain meaning of the rescript language but may consider all evidence of the reviewing court's intent when determining what the rescript authorizes and what it prohibits.

Although we have concluded that neither the language of the Appellate Court's remand order nor the doctrine of res judicata barred the trial court from entertaining the plaintiff's request for a foreclosure by sale, we emphasize that nothing in this opinion would prevent a reviewing court that has affirmed a judgment of strict foreclosure from, in an appropriate case, indicating in its remand order that the trial court should not modify the form of the original judgment on remand merely because it makes a finding that the equity in the property is now significantly greater than the amount of the debt. For example, if the reviewing court were to conclude that the mortgagor brought a meritless appeal from a judgment of strict foreclosure *solely* for the purpose of delay, the court might reasonably conclude that the mortgagee, which presumably would have taken absolute title to the property upon the passage of the original law day if not for the meritless appeal, is equitably entitled to the benefit of any increase in the value of the property resulting from the

[8] In taking this approach, the Appellate Court in *Wahba II* relied on its decision in *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 440, the correctness of which it has now acknowledged to be doubtful. See *U.S. Bank National Assn.* v. *Rago*, supra, 216 Conn. App. 207–208 n.9.

delay.[9] Obviously, if the reviewing court so determines, and signals as much, the trial court would lack authority to entertain a request to order a foreclosure by sale on remand. Nothing in *Wahba I*, however, indicates that the Appellate Court intended to limit the exercise of the trial court's equitable powers on remand in this way. See 5 Am. Jur. 2d, supra, § 689 ("a court on remand . . . is ordinarily free to make an order or direction on questions not presented or settled by [an] appellate court which is not inconsistent with the appellate court's opinion" (footnote omitted)). We therefore conclude that the Appellate Court's remand order in *Wahba I* did not deprive the trial court of its equitable discretion to order a foreclosure by sale.

Although we have concluded that an appellate court's affirmance of a judgment of strict foreclosure and remand of the case to the trial court with direction only to set new law days does not necessarily preclude the trial court from considering a request to order a foreclosure by sale, we take this opportunity to instruct reviewing courts (including ourselves) that they should take care to craft remand orders that accurately reflect the scope of the court's ruling and its intent. Our goal should be

[9] We are not persuaded by the defendant's contention at oral argument before this court that allowing the trial court to entertain a request for a judgment of foreclosure by sale when a reviewing court has affirmed a judgment of strict foreclosure and remanded the case with direction to set new law days would result in a "perpetual motion" machine. If there is evidence that a mortgagor is using successive appeals merely for the purpose of delay, there are tools to prevent such behavior. For example, Practice Book § 61-11 (g) provides that, if a mortgagor files more than two motions to open, "no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion." In addition, the rule provides that, even if the mortgagor files such an affidavit, the mortgagee may seek to terminate the automatic stay of execution pending appeal "by filing a motion requesting such relief accompanied by an affidavit stating the basis for [its] claim." Practice Book § 61-11 (g). Finally, most mortgages contain provisions requiring the mortgagor to pay the mortgagee's attorney's fees in the event of a foreclosure.

to provide trial courts with precise guidance about what action we expect them to undertake on remand and not to require them to parse opinions or to speculate about an appellate court's intent to determine what actions are or are not permitted on remand. For example, if a reviewing court affirms a judgment of strict foreclosure and remands the case to the trial court to set new law days but does not intend to prohibit the trial court from considering a party's request to order a judgment by sale if warranted by a change in circumstances, the reviewing court should expressly manifest that intent in the rescript by remanding the case for further proceedings consistent with our opinion in the present case.[10]

III

Finally, we address the plaintiff's claim that the Appellate Court incorrectly determined that, even if the trial court had the authority on remand to order a foreclosure by sale, she was required to file a motion to open the judgment of strict foreclosure and to present evidence that the property's value had substantially increased since the date of the original judgment before the court could exercise that authority. We agree with the plaintiff.

This claim presents a question of law subject to plenary review. See, e.g., *Traystman, Coric & Keramidas, P.C.* v. *Daigle*, 282 Conn. 418, 428–29, 922 A.2d 1056 (2007) (whether party followed proper procedure under governing statutes and rules of practice is question of law subject to plenary review).

[10] We recommend that courts use the following rescript language in such situations: "The judgment is affirmed and the case is remanded for the purpose of making a new finding as to the amount of the debt, for the setting of new law days, and for other proceedings according to law." We also recommend including a citation to this decision, "See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 349 Conn. 483, A.3d (2024)," in a footnote appended to the end of the rescript as support for the foregoing rescript language.

Although our case law supports the proposition that a judgment of strict foreclosure may be modified on remand, even when the reviewing court has affirmed the judgment, the plaintiff points out that our statutes and rules of practice do not contain any express provisions governing the procedure for seeking a modification at that time. As we explained in part I of this opinion, however, upon the passing of the law days while an appellate stay of execution is in effect, a judgment of strict foreclosure becomes "ineffective in an essential respect"; (internal quotation marks omitted) *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 683; leaving that judgment in a state of limbo. As we also explained, the Appellate Court has held that a remand to the trial court with direction to set new law days is the functional equivalent of an order to open the judgment. See *L & R Realty* v. *Connecticut National Bank*, supra, 53 Conn. App. 549. Indeed, the defendant did not see fit to move to open the judgment before asking the trial court to reset the law days, presumably because it believed that there was no need for such a motion in light of the remand order. We therefore conclude that there was also no need for the plaintiff to move to open the judgment before the court could entertain her request to order a foreclosure by sale.

We also conclude that the plaintiff made an adequate proffer to support her request that the trial court order the defendant to provide an updated amount of the debt and property appraisal and, if warranted by the new information obtained, order a foreclosure by sale. In her objection to the defendant's motion to set new law days, the plaintiff represented to the court that the original appraisal was almost four years old, property values had increased statewide during that time, and the increase in values "ha[d] been most dramatic for high-end shoreline properties" such as the plaintiff's. The defendant did not contradict the plaintiff on these

points. In her motion for reconsideration of the trial court's denial of that request, the plaintiff represented that Zillow had estimated the current value of the property at $8,817,600, an increase of more than $2 million over the amount of the original appraisal. She also represented that the current estimated value of the property was approximately $2 million greater than the current amount of the debt.

This court has held that "[o]ffers of proof are allegations by the attorney . . . in which he represents to the court that he could prove them if granted an evidentiary hearing. . . . The purpose of an offer of proof has been well established by our courts. First, it informs the court of the legal theory under which the evidence is admissible. Second, it should inform the trial [court] of the specific nature of the evidence so that the court can judge its admissibility. Third, it creates a record for appellate review. . . . Additionally, an offer of proof should contain specific evidence rather than vague assertions and sheer speculation." (Internal quotation marks omitted.) *State* v. *Anderson*, 318 Conn. 680, 689–90, 122 A.3d 254 (2015).

These principles apply equally to the plaintiff's filings requesting that the trial court consider rendering a judgment for a foreclosure by sale, in which she effectively advised the trial court what she *could prove* about the property's value if the court agreed to entertain her request. We conclude that the plaintiff's representations were adequate for this purpose. Although it would have been preferable if the plaintiff, in support of her request, had cited admissible evidence as to the property's value, her failure to do so does not mean that her representation was inadequate to establish the need for a hearing at which the parties could offer such evidence to establish the property's value, including a new appraisal if either party wanted to offer one. This opportunity was all that the plaintiff requested. Indeed, there is authority

for the proposition that an owner and occupant of real property is competent to testify as to its market value. See *Misisco* v. *La Maita*, 150 Conn. 680, 684, 192 A.2d 891 (1963). We conclude, therefore, that the plaintiff's representations concerning the property's value sufficed to establish the need for a hearing. This is especially so considering that the previous appraisal was more than four years old,[11] and it was widely reported in 2020 and 2021 that residential values in Connecticut were skyrocketing in the wake of the COVID-19 pandemic, particularly in the southwest corner of the state where the subject property was located. See, e.g., A. Soule, Home Prices Continue To Surge in Connecticut, Where Real Estate Is Already Red-Hot, Conn. Post, June 3, 2021, available at https://www.ctpost.com/business/article/Home-prices-continue-to-surge-in-Connecticut-16220322.php) (last visited June 21, 2024); A. Soule, Study: Real Estate Prices in CT Set To Continue Increasing in 2021, Conn. Post, December 4, 2020, available at https://www.ctpost.com/business/article/Study-Real-estate-prices-in-CT-set-to-continue-15774394.php (last visited June 21, 2024); see also *Moore* v. *Moore*, 173 Conn. 120, 123, 376 A.2d 1085 (1977) ("fact of inflation . . . could be judicially noticed without affording an opportunity to be heard," but plaintiff was required to present evidence that inflation justified increasing amount of child support order); *Quanah, Acme & Pacific Railway Co.* v. *Eblen*, 87 S.W.2d 540, 543 (Tex. Civ. App.

[11] We note that paragraph 1 of the court issued Foreclosure Worksheet, Form JD-CV-77 (Rev. 12-16), provides that "[t]he appraisal report (NOT merely the affidavit of the appraiser) MUST be dated within *120 days* of the date of judgment, regardless of whether an initial judgment is being entered or a judgment is being reopened." (Emphasis in original.) In addition, Paragraph F of the Uniform Foreclosure Standing Orders, Form JD-CV-104 (Rev. 11-20), issued by the Superior Court provides that, after a bankruptcy stay has been lifted allowing a foreclosure action to proceed, "if the last finding made by the court as to the fair market value of the premises is more than 120 days old, then the plaintiff must also present to the court an updated appraisal for the court to make an updated finding of the fair market value of the premises on the date of the hearing."

1935, writ ref'd) (court can take judicial notice of "general economical conditions"). We further note that the defendant, a bank in the business of issuing mortgage loans, and therefore in a position to know about statewide changes in real estate values and general economic conditions, did not contest the plaintiff's claim. Nor did the trial court indicate that it believed that there was an inadequate proffer for the plaintiff's claim that the value of the property had substantially increased when it denied the plaintiff's initial request that the court consider a foreclosure by sale and her later motion for reconsideration. Rather, the court based both decisions solely on its belief that the Appellate Court's remand order in *Wahba I* precluded it from entertaining the request. We therefore reject the defendant's contention that the plaintiff's request was based on an "entirely unsupported assumption as to this purported increase in the property value" and that remanding the case to the trial court for further proceedings would give the plaintiff "yet another bite of the apple . . . ." (Internal quotation marks omitted.) The plaintiff was not required to *prove* that the value of the property had increased before she could request an evidentiary hearing on that issue.

IV

In summary, we conclude that the doctrine of res judicata did not bar the trial court from entertaining the plaintiff's request that it order a new appraisal of the property and consider ordering a foreclosure by sale. We further conclude the Appellate Court incorrectly determined that (1) the trial court's ruling that the rescript in *Wahba I* deprived the trial court of the authority to entertain the plaintiff's request was correct, and (2) even if the trial court had such authority, the plaintiff provided an inadequate evidentiary foundation for the trial court to exercise that authority. We therefore reverse the judgment of the Appellate Court

affirming the judgment of the trial court. We, of course, express no opinion here as to the merits of the plaintiff's request for a foreclosure by sale but leave that issue to be determined by the trial court on remand.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for the purpose of making a new finding as to the amount of the debt, for the setting of new law days, and for other proceedings consistent with this opinion.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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KRISTEN KUSELIAS *v.* ZINGARO & CRETELLA, LLC, ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 224 Conn. App. 192 (AC 45952), is denied.

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

Kenneth A. Votre, in support of the petition.

Kerry R. Callahan and *Valerie M. Ferdon*, in opposition.

Decided June 11, 2024

IN RE ZAYDEN J.

The respondent mother's petition for certification to appeal from the Appellate Court, 224 Conn. App. 848 (AC 46639), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Alma Rose Nunley, assistant attorney general, in opposition.

Decided June 11, 2024

IN RE WENDY G.-R.

The respondent mother's petition for certification to appeal from the Appellate Court, 225 Conn. App. 194 (AC 46641), is denied.

Matthew C. Eagan, assigned counsel, in support of the petition.

Evan O'Roark, assistant solicitor general, in opposition.

Decided June 11, 2024

JAI L. SMITH *v.* WILLIAM T. GERACE

The plaintiff's petition for certification to appeal from the Appellate Court (AC 47185) is denied.

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

Jai L. Smith, self-represented, in support of the petition.

Decided June 11, 2024

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CONNECTICUT APPELLATE REPORTS

Vol. 226

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE P. M.*
(AC 47076)

Alvord, Cradle and Suarez, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court adjudicating his minor child, P, neglected and ordering a six month period of protective supervision. *Held*:

1. Contrary to the assertion of the petitioner, the Commissioner of Children and Families, that the respondent father's claim was moot, this court concluded that his claim was reviewable under the collateral consequences exception to the mootness doctrine; although the period of protective supervision had expired, there was a reasonable possibility that P's neglect adjudication would have prejudicial collateral consequences, as the Superior Court could, at some time in the future, rely on the neglect adjudication, pursuant to the applicable statute (§ 17a-112 (j) (3) (B) (i)), in granting a petition to terminate the father's parental rights as to P.
2. The respondent father could not prevail on his claim that there was insufficient evidence to support the trial court's determination that P was neglected; the court's factual findings, which were supported by sufficient evidence in the record, demonstrated that the homemade infant formula that the father had been feeding P caused P's severe malnutrition and his failure to thrive, and the father's failure to follow medical recommendations to regularly take P to a medical provider for well-baby checkups prevented detection of P's failure to thrive.

Argued April 8—officially released June 18, 2024**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters, and tried to the court, *McLaughlin, J.*; judgment adjudicating the minor

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

** June 18, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

child neglected, from which the respondent father appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

Albert J. Oneto IV, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee (petitioner).

Catherine L. Williams, assigned counsel, for the minor child.

Opinion

CRADLE, J. The respondent father, I. M. (respondent), appeals from the judgment of the trial court adjudicating his minor child, P. M. (P), neglected.[1] On appeal, the respondent claims that the court erred in adjudicating P neglected because the evidence relied upon by the court is not sufficient to support its determination that P was denied proper care and attention and was permitted to live under conditions and circumstances injurious to his well-being. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. P was born healthy and without complications in August, 2022, to T. T. (mother) and the respondent (collectively, parents). P's parents believe in an alkaline, plant-based diet for their family, so they created a homemade infant formula when their first child, C. M. (C), was born in May, 2021. Neha Kaushik, a naturopathic doctor, first met the family and became C's primary care provider when C was approximately six months old. Kaushik had no information about C's growth

[1] The respondent mother, T. T., also was named in the neglect petition and appeared in the trial court, but she did not file an appeal. We therefore refer in this opinion to the respondent father as the respondent.

before that time but subsequently worked with the respondent to help him alter the homemade infant formula to ensure that C received necessary nutrients.

About six days after P was born, his parents took him to see Kaushik for his first well-baby visit. At his initial visit in August, 2022, Kaushik spoke to P's parents about their homemade infant formula, and they provided her with a list of ingredients in the formula. Kaushik reviewed the list and made a recommendation to add certain nutrients to the formula. Although P is the youngest patient Kaushik had treated in her career and she did not have experience or specialized training in treating infants, Kaushik indicated that she had no concerns that the homemade infant formula would provide P with the nutrients that he, as an infant, needed in order to develop.

Kaushik followed up with P's parents about the need to bring him in for monthly infant wellness checkups, but they failed to do so. Kaushik did not see P again until December, 2022, when he was ill and present for a virtual appointment during which she diagnosed him with respiratory syncytial virus (RSV) and provided his parents with some naturopathic treatments.

Kaushik next saw P virtually on January 27, 2023. At that visit, P's parents told Kaushik that he had been having breathing difficulties starting on January 25, 2023, and that he was not eating. His parents also indicated that they had provided him with ginger and cucumber water along with other naturopathic treatments. Kaushik gave the parents treatment advice and further explained that they would need to bring him to an urgent care facility if his breathing did not improve in the following two to three hours. When she called P's parents a few hours later, his condition had not improved, and they had not taken him to urgent care. Kaushik told them that she would call the authorities

if they did not take him. Later that evening, P's parents brought him to St. Vincent's Medical Center (St. Vincent's). By the time P arrived at St. Vincent's, he was critically ill, and St. Vincent's transferred him to Yale New Haven Children's Hospital (Yale), where the Yale medical team admitted him and diagnosed him with croup, COVID-19, anemia, and severe metabolic acidosis. The Yale medical team also noted that, despite being five and one-half months old, he presented, in weight, length, and head circumference, as a two month old.

The Yale medical team worked diligently and urgently to stabilize him. On January 28, 2023, the Yale medical team intubated P to treat acute hypoxemia. The Yale medical team later told P's parents that a blood transfusion would be medically necessary to save his life. At first, P's parents would not consent. Even after P's mother consented, the respondent, who was disruptive and aggressive at the hospital, refused to consent. The Yale medical team notified P's parents that they were initiating legal action to obtain a court order to allow the blood transfusion, and the respondent eventually consented to the blood transfusion without a court order being issued. Following the blood transfusion, P started to stabilize.

On January 29, 2023, the petitioner, the Commissioner of Children and Families, invoked a ninety-six hour hold on P and C due to concerns regarding the children's nutritional status.[2] On January 30, 2023, additional members of the Yale medical team became involved with P as it related to his growth and nutrition. Sharon Bertrand, a registered, board-certified dietician

[2] The petitioner released the ninety-six hour hold on C when it was determined that he was not malnourished. The petitioner also filed a neglect petition on behalf of C, but the court later granted the respondent's motion to strike the neglect petition. Because the petitioner did not file an amended petition after the court granted the motion to strike, the court dismissed the neglect petition relating to C.

with a specialty certification in pediatric critical care nutrition, diagnosed P as severely malnourished based on his " 'z-scores,' "[3] which were considerably below the standard and placed him barely at the first percentile for growth. In addition, P's lab results revealed that he was deficient in vitamin A, carnitine, and seven essential amino acids.

Bertrand met with the respondent to discuss the ingredients in the homemade infant formula. Although the respondent had given the Yale medical team a list of the formula's ingredients, the list did not provide the measurement of each ingredient or the sources that produced the ingredients. It was also unclear to the Yale medical team how the respondent was making the formula, so there was no way of knowing if the homemade infant formula was contaminated. It was later determined that the homemade infant formula was nutritionally deficient. Bertrand, who found that P's homemade infant formula lacked amino acids, fatty acids, and vitamins, attempted to speak to the respondent about her concerns, but he refused to engage in conversation, talked over her, and was combative. The Yale medical team made the decision to stop using the homemade infant formula and switched to Neocate, a commercially made, vegan, non-soy formula.[4]

On February 2, 2023, the petitioner filed the present neglect petition, alleging that P was neglected in that he

[3] Z-scores, which "measure the growth and nutritional status of infants and children based on weight, length, and head circumference," are "plotted on a standard growth chart provided by the [World Health Organization] and/or the [Centers for Disease Control]." P's z-scores upon his admission to Yale were -3 or -3.4 for weight, -3.45 for length, and -2.6 for head circumference.

[4] At first, the Yale medical team provided P with the homemade infant formula, but it was too thick to pass through the feeding tube once P was intubated. They consulted with Kaushik about possible ways to dilute the formula. The Yale medical team then began feeding P both Neocate and the homemade infant formula but switched exclusively to Neocate in light of their increasing concerns about the homemade infant formula.

had been denied proper care and attention, physically, educationally, emotionally or morally, or that he had been permitted to live under conditions, circumstances or associations injurious to his well-being.[5] On the same day, the court, *Maronich*, *J.*, granted the petitioner's motion for an ex parte order of temporary custody (OTC), vesting temporary custody of P in the petitioner, and vacated the ninety-six hour hold. On February 22, 2023, the court, *Hon. William Holden*, judge trial referee, sustained the OTC until further order of the court.

On February 10, 2023, the Yale medical team extubated P, but he remained in critical condition, in part, due to his malnutrition. He was steadily gaining weight on the Neocate and his iron and vitamin numbers were stabilizing. On February 27, 2023, the Yale medical team discharged P from the hospital, and the petitioner placed him in the care of his paternal grandmother.

During the neglect trial, which took place on September 21, 25 and 27, 2023, the court, *McLaughlin*, *J.*, admitted into evidence, inter alia, Yale medical records dated January 28 and February 27, 2023, the affidavits of Chelsea Lepus, an attending physician at the Department of Pediatric Gastroenterology, Hepatology and Nutrition at Yale, and Lisa Pavlovic, the attending pediatrician with the child abuse program at Yale, and a chart made by Kaushik comparing the nutritional content of infant formulas, including the homemade infant formula and Neocate. The petitioner offered the testimony of, among others, Bertrand, Lepus, and Pavlovic. P's mother offered the testimony of Kaushik, and the

[5] The petitioner also alleged that P had been abused in that he had physical injuries inflicted by other than accidental means or that he was in a condition that was the result of maltreatment including but not limited to malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment or cruel punishment. The court did not find that P was abused or maltreated, and the abuse allegation is not at issue in this appeal.

respondent offered the testimony of P's paternal grandmother. The court issued a memorandum of decision, dated September 29, 2023, in which it held that "[t]he overwhelming credible evidence established by more than a fair preponderance that, as of the filing of the neglect petition on February 2, 2023, [P] was neglected in that he was denied proper care and attention physically and medically and in that he was permitted to live under conditions or circumstances injurious to his well-being."

In so holding, the court credited the testimony of Bertrand, Lepus, and Pavlovic. Specifically, the court credited their testimony that, based on the severity of P's condition when he was admitted to Yale, he had been malnourished for at least three months prior to his hospitalization. Moreover, the court found Kaushik's testimony unpersuasive and unreliable as to the adequacy of P's growth and found equally unreliable her comparison of the respondent's homemade infant formula with Neocate. The court further found that P was critically ill when he arrived at Yale, had been malnourished well before his admission, and was failing to thrive. The court then concluded that the petitioner had established by more than a fair preponderance of the evidence that P was malnourished because he was not receiving necessary nutrients from the homemade infant formula supplied by his parents.

The court also found that P's parents failed to comply with Kaushik's recommendation of monthly visits as a part of a well-baby care plan. It found that P's parents "simply did not follow up. No doctor saw [P] during the early months of his life. It was not until [P] was sick with RSV that [his] parents reached out to . . . Kaushik. Thereafter, [P's] parents did not seek out medical care for [him] until he was so critically ill that he stayed in the hospital for a month after being intubated and received a blood transfusion." The court concluded

that the evidence established "by more than a fair preponderance that, as of the filing of the neglect petition, [P] had not seen a doctor for at least three months despite repeated attempts by . . . Kaushik to have [his] parents bring [him] in for a required visit." On the basis of these conclusions, the court adjudicated P neglected in that he was denied proper care and attention physically and medically and in that he was permitted to live under conditions or circumstances injurious to his well-being. The court then found, by a fair preponderance of the evidence, that it was "in [P's] best interest to return to his parents' care under a period of six months of protective supervision." This appeal followed.[6]

On appeal, the respondent claims that, in light of the record as a whole, the evidence relied upon by the trial court is not sufficient to support the court's adjudication of neglect.[7] As a preliminary matter, the petitioner

[6] The attorney for the minor child, P, filed a statement adopting the petitioner's brief.

[7] The respondent also cites, in his principal appellate brief, cases that he contends stand for the proposition that parents have a constitutional right to maintain the integrity of their family without state interference. See *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Teagan K.-O.*, 335 Conn. 745, 755–56, 242 A.3d 59 (2020); *In re Delilah G.*, 214 Conn. App. 604, 613–14, 280 A.3d 1168, cert. denied, 345 Conn. 911, 282 A.3d 1277 (2022). Because the respondent does not engage in any substantive discussion or clearly set forth any argument as to a constitutional violation, we decline to review any such claim. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("[f]or a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs" (internal quotation marks omitted)). The respondent's efforts, in his reply brief and at oral argument before this court, to further address a potential constitutional claim do not remedy his failure to raise the claim in his principal appellate brief. *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 797 n.12, 256 A.3d 655 (2021) ("[i]t is well settled that a claim cannot be raised for the first time at oral argument" (internal quotation marks omitted)); *Doctor's Associates, Inc.* v. *Keating*, 72 Conn. App. 310, 316, 805 A.2d 120 (2002) ("a reply brief is not the proper vehicle for curing an omission in the appellant's brief"), aff'd, 266 Conn. 851, 836 A.2d 412 (2003).

challenges this court's subject matter jurisdiction by asserting that the respondent's claim is moot now that the period of protective supervision has expired. The respondent counters that the court's adjudication of neglect has prejudicial collateral consequences that nonetheless entitle his claim to appellate review. We agree with the respondent that his claim is reviewable under the collateral consequences exception to the mootness doctrine, but we nonetheless conclude that the evidence is sufficient to support the court's neglect adjudication.

"Mootness is an exception to the general rule that jurisdiction, once acquired, is not lost by the occurrence of subsequent events. . . . Because mootness goes to the power of this court to entertain an appeal, we address the issue as a threshold matter." (Citation omitted.) *In re Alba P.-V.*, 135 Conn. App. 744, 747, 42 A.3d 393, cert. denied, 305 Conn. 917, 46 A.3d 170 (2012). "Since mootness implicates subject matter jurisdiction . . . [and] raises a question of law . . . our review of that issue is plenary. . . .

"When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Nevertheless, the court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these conse-

quences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Whe[n] there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Citations omitted; internal quotation marks omitted.) *In re Claudia F.*, 93 Conn. App. 343, 345–46, 888 A.2d 1138, cert. denied, 277 Conn. 924, 895 A.2d 796 (2006); see also *Williams* v. *Ragaglia*, 261 Conn. 219, 226–27, 802 A.2d 778 (2002).

In the present case, there is a reasonable possibility that P's neglect adjudication will have prejudicial collateral consequences. Specifically, the Superior Court, at some time in the future, could rely on the present adjudication of neglect in granting a petition to terminate the respondent's parental rights as to P. See *In re Alba P.-V.*, supra, 135 Conn. App. 750 ("[General Statutes § 17a-112 (j) (3) (B) (i)] requires only a single prior adjudication of neglect as to the child who is the subject of a termination of parental rights petition"); see also General Statutes § 17a-112 (j) (3) (B) (i).

The present case is distinguishable from cases in which this court has concluded that a challenge to a neglect adjudication was moot where the parent or guardian of the neglected or uncared for child argued that the adjudication would have collateral consequences for the status of *other* children. See, e.g., *In re Tiarra O.*, 160 Conn. App. 807, 812–13, 125 A.3d 1094 (2015); *In re Claudia F.*, supra, 93 Conn. App. 348. Here, the neglect adjudication could reasonably have collateral consequences for the respondent's parental rights as to the neglected child himself. The present case is also distinguishable from cases in which the neglected child soon would reach the age of majority. See, e.g., *In re Rabia K.*, 212 Conn. App. 556, 562, 275

A.3d 249 (2022) ("the respondent fails to address why there is a reasonable possibility that a future child protection proceeding would be initiated" given that child would turn eighteen in matter of months). Here, P is a toddler, so there exists a reasonable possibility that the neglect adjudication would yield prejudicial consequences before he reaches the age of majority. Last, the present case is distinguishable from cases in which there had been a previous adjudication of neglect of the same child. See, e.g., *In re Alba P.-V.*, supra, 135 Conn. App. 750 ("review of the present [neglect adjudication] would provide the respondent with no practical relief" from collateral consequences for future proceedings because neglected children "would be exposed to a subsequent termination of parental rights proceeding predicated on [earlier neglect adjudications]"). Before September 29, 2023, P had not been adjudicated neglected.[8] Because a court may grant a petition for the termination of parental rights if it finds, among other things, that "the child . . . has been found by the Superior Court or the Probate Court to have been neglected . . . in a prior proceeding"; General Statutes § 17a-112 (j) (3) (B);[9] the present adjudication constitutes a step toward

[8] There is evidence in the record of two previous reports of medical neglect involving this family: one related to C in 2021, and another related to P in August, 2022. Both reports raised medical and nutritional concerns, but the petitioner closed its case in September, 2022, and neither child was adjudicated neglected.

[9] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . ."

the termination of the respondent's parental rights as to P that had not previously been taken. Accordingly, we conclude that the respondent's claim is reviewable.[10]

To support his claim on appeal that the evidence was not sufficient to support the court's neglect adjudication, the respondent argues that (1) P did, in fact, receive medical care between the time of his birth and his admission to Yale,(2) the respondent's behavior at Yale reflected his concern for P's treatment and did not interfere with the implementation of medical procedures, (3) P's condition upon admission to Yale was due to "an unfortunate confluence of events starting with the RSV, leading into the COVID-19 and croup infections, and the consequent lack of eating by the child,"; (4) P's family has a history of "small growth" and P's older brother, C, was found to be healthy despite living in the same home and sharing the same diet, and (5) P is progressing well in his overall development. We are not persuaded.

"Neglect proceedings, under . . . [General Statutes] § 46b-129, are comprised of two parts, adjudication and disposition. . . . The standard of proof applicable to nonpermanent custody proceedings, such as neglect proceedings, is a fair preponderance of the evidence. . . .

[10] In addition to raising the mootness issue in her appellate brief, the petitioner filed, with this court, a motion to dismiss the appeal as moot. The respondent filed an opposing memorandum in which he argued, inter alia, that his claim is reviewable under the "capable of repetition, yet evading review" exception to the mootness doctrine. This court issued an order for the parties to argue the issue of mootness before this court during oral argument. Counsel for the respondent argued, during oral argument before this court, that the respondent's claim was not moot under the "capable of repetition, yet evading review" exception. Because we determine that the respondent's claim is reviewable under the collateral consequences exception to mootness, we need not address the respondent's "capable of repetition, yet evading review" argument. Accordingly, we deny the petitioner's motion to dismiss.

"During the adjudicatory phase, the court determines if the child was neglected. Practice Book § 35a-7 (a) provides in relevant part: In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment. . . . [General Statutes § 46b-120 (4)] provides that a child may be found neglected if the child is being denied proper care and attention, physically, educationally, emotionally or morally, or is being permitted to live under conditions, circumstances, or associations injurious to the well-being of the child or youth . . . .

"When considering a challenge to the sufficiency of the evidence, the function of an appellate court is to review the findings of the trial court, not to retry the case. . . . [W]e must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment. . . . [W]e give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . ." (Citation omitted; internal quotation marks omitted.) *In re Olivia W.*, 223 Conn. App. 173, 183–84, 308 A.3d 571 (2024).

We conclude that the court's factual findings with regard to its neglect determination were supported by sufficient evidence in the record, including, but not limited to, the testimony of witnesses that the court found credible. Contrary to the respondent's assertion that P's malnutrition was related to his RSV, COVID-19, and croup infections, the court credited the testimony of Bertrand, Lepus, and Pavlovic that P's malnourishment began well before his illnesses and credited

Bertrand's assessment that the homemade infant formula that P's parents had been feeding him prior to his admission to Yale was nutritionally deficient. The Yale medical records in evidence support the court's findings that P's weight, height, and head circumference at the time of the filing of the neglect petition were considerably below the standard for an infant of his age, in contrast with Kaushik's testimony that P's growth was adequate in the early months of his life, which the court explicitly discredited. Moreover, the respondent's assertion that P's older brother, C, had been healthy when being fed a similar diet is belied by the court's discrediting of Kaushik's testimony to that end. The court did, however, credit Kaushik's testimony that she repeatedly recommended to P's parents that they bring him to her office for medical care, and her testimony supports the court's finding that, nonetheless, P had not seen a doctor for months prior to his admission to Yale. Because this court does not retry the facts or pass upon the credibility of witnesses; *In re Niya B.*, 223 Conn. App. 471, 499, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024); we conclude that there was sufficient evidence to support the court's findings of fact.

Finally, to the extent that the respondent claims that the court's findings were insufficient to support an adjudication of neglect, we disagree. We conclude that the facts properly found by the court, which demonstrate that (1) the homemade infant formula that P's parents had been feeding him was the cause of his severe malnutrition and his failure to thrive and (2) the respondent's failure to follow medical recommendations prevented the detection of P's failure to thrive, were sufficient to support the court's neglect determination. See, e.g., *In re Amber B.*, Docket Nos. CP-16-016537-A, CP-16-6016538-A, 2017 WL 1239470, *6 (Conn. Super. February 8, 2017) (adjudicating child neglected on basis of, in

part, findings that child was diagnosed with failure to thrive due to malnutrition and that parent failed to follow through with medical recommendations); see also 2 Dept. of Children & Families, Policy Manual (effective April 12, 2023) § 22-3 ("[e]vidence of physical neglect includes . . . malnutrition . . . [or] action/inaction resulting in the child's failure to thrive"). The respondent's arguments regarding his own behavior at Yale and P's progress after being discharged from Yale are of no moment to the court's adjudication determination, given that "[a] judgment of neglect is not directed at the respondent as a parent, but rather is directed at the condition of the [child]"; *In re Claudia F.*, supra, 93 Conn. App. 347; and that the court considered only "evidence of events preceding the filing of the petition," as it was required to do. Practice Book § 35a-7 (a).

The judgment is affirmed.

In this opinion the other judges concurred.

DANIEL A. MARTIN *v.* CHRISTOPHER R. OLSON, EXECUTOR (ESTATE OF ROBERT K. OLSON) (AC 46483)

Alvord, Cradle and Westbrook, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court rendered for the defendant on his claims of, inter alia, breach of contract. The plaintiff had been living with his grandfather, R, for approximately thirteen years prior to R's death, during which time he provided certain caregiving services to R. After R's death, the defendant was appointed the executor of R's estate. The plaintiff sent a claim to the defendant for compensation for his caregiving services, which the defendant rejected by filing a return of claims with the Probate Court and sending the return to the plaintiff in July, 2020. The plaintiff commenced this action in December, 2020, and the defendant raised several special defenses including, inter alia, that the plaintiff's claims were barred by the statute of limitations (§ 45a-363) because he did not commence this action within 120 days of receiving the return of claims. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly instructed the jury regarding the effect of the return of claims and the defendant's statute of limitations defense; this court concluded that, even if it assumed that the jury instruction should have been more detailed, any error arising from the jury instructions was harmless and did not affect the verdict, as the trial court instructed the jury to answer the interrogatories in the order in which they were presented on the jury form, and the jury found that the plaintiff had failed to prove an essential element of each of his claims prior to addressing the defendant's special defense.
2. The trial court did not abuse its discretion by admitting into evidence testimony regarding the fair rental value of R's real property and evidence of the emotional effect of the plaintiff's claims on the defendant and the plaintiff's mother: the plaintiff failed to demonstrate that the defendant's testimony regarding the fair rental value of the property constituted hearsay, as the defendant, in describing his efforts to determine the fair rental value, did not testify to any specific out-of-court statements made to him, and, in his capacity as executor, the defendant was reasonably qualified to talk about the fair rental value; moreover, the court reasonably could have determined that the testimony provided by the defendant and the plaintiff's mother regarding their reactions to the plaintiff's claim against R's estate was relevant because it was offered to assist the jury in determining whether it found credible the plaintiff's testimony that R promised to compensate him for his caregiving services.
3. The trial court did not abuse its discretion in allowing the defendant to present the testimony of two "surrebuttal" witnesses during his case-in-chief; regardless of the descriptor attached to the witnesses' testimony by the plaintiff, the court's findings that it would allow the evidence so as not to delay the trial and because it did not surprise the plaintiff reasonably justified its decision to allow the defendant to present this evidence during his case-in-chief.

Argued March 13—officially released June 25, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Budzik*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Thomas A. Amato, for the appellant (plaintiff).

Steven L. Katz, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Daniel A. Martin, appeals from the judgment of the trial court rendered after a jury verdict in favor of the defendant, Christopher R. Olson, executor of the estate of Robert K. Olson (decedent). On appeal, the plaintiff claims that the court improperly (1) instructed the jury regarding the defendant's statute of limitations defense, (2) admitted into evidence certain testimony, and (3) permitted the defendant to present the testimony of undisclosed witnesses during his case-in-chief.[1] We affirm the judgment of the trial court.

[1] We have consolidated certain of the plaintiff's issues on appeal for ease of discussion.

The plaintiff raises three additional claims on appeal, which warrant little discussion. The plaintiff first claims that the court improperly instructed the jury that the applicable burden of proof it was to apply to his claims was clear and convincing evidence rather than clear and satisfactory evidence. The court instructed the jury that clear and convincing evidence is a heightened burden of proof greater than a preponderance of the evidence and less than beyond a reasonable doubt. See footnote 6 of this opinion. Our jurisprudence provides that "[c]lear and satisfactory evidence is the equivalent to clear and convincing evidence." (Internal quotation marks omitted.) *Wallenta* v. *Moscowitz*, 81 Conn. App. 213, 220, 839 A.2d 641, cert. denied, 268 Conn. 909, 845 A.2d 414 (2004). We conclude that the court's instruction was proper and, therefore, we reject the plaintiff's claim.

The plaintiff also asserts, in his statement of issues, that the court improperly denied his motion to set aside the verdict. Aside from that statement, the only other mention of this claim is in the nature of a conclusion in the plaintiff's brief. "[When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015). We conclude that this claim is inadequately briefed and, accordingly, we decline to address it.

Finally, the plaintiff raises an evidentiary claim that the court improperly permitted the defendant to testify regarding the estate's financial transactions. In his appellate brief, the plaintiff devotes one sentence to his argument that the admission of this testimony was harmful. The plaintiff bears the burden of establishing not only the existence of an erroneous evidentiary ruling but that the evidentiary ruling was harmful. See *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 628, 161 A.3d 562 (2017). "[W]e are not required to review issues that have been improperly

The following facts, as reasonably could have been found by the jury, and procedural history are relevant to this appeal. In October, 2007, the plaintiff moved into the home of the decedent, his grandfather, at 65 Andreis Trail, South Windsor (property). The plaintiff continued to reside at the property with the decedent until the decedent's death in March, 2020. During this thirteen year period, the plaintiff provided certain caregiving services to the decedent in the form of (1) assisting the decedent with completing errands, (2) completing general household chores and cooking, (3) providing the decedent with his medications, (4) driving the decedent to doctor's appointments, (5) providing care to the decedent when he was ill, and (6) serving as a daily presence at the property in the event of an emergency. The decedent's children, including the defendant, also frequently provided care for their father.

After the decedent's death, the defendant was appointed executor of the decedent's estate. The decedent's last will and testament did not include the plaintiff as a beneficiary. On May 29, 2020, the plaintiff sent a claim to the defendant requesting $741,048 for the caregiving services the plaintiff provided to the decedent. On June 5, 2020, the plaintiff sent a supplemental claim to the defendant requesting an increased amount of $1,106,175 for the services he provided to the decedent. On July 10, 2020, the defendant filed with the Probate Court a form titled "Return of Claims and List of Notified Creditors" (return of claims), wherein the defendant rejected the plaintiff's claim by identifying the "date of

presented to this court through an inadequate brief. . . . [W]ithout adequate briefing on the harmfulness of an alleged error, the [plaintiff] is not entitled to review of [the] claim on the merits." (Citation omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018). We conclude that the plaintiff has inadequately briefed whether the claimed error was harmful and, accordingly, we decline to address it. See id., 749 (defendant's harm analysis consisted of only cursory statements and therefore was inadequately briefed).

written disallowance" as July 10, 2020, and stating that the "amount allowed" to the plaintiff was zero dollars. The defendant sent via certified mail the return of claims to the plaintiff. On July 13, 2020, the postal return receipt card was signed. The defendant subsequently received the signed return receipt card.[2]

On October 19, 2020, the plaintiff sent a letter to the defendant by certified mail stating in relevant part: "I understand that you are the executor of [the decedent's estate]. On May 29, 2020 I presented a claim, and on June 6, 2020 an amended claim, to you in your capacity as such executor. You thus far have failed to give notice under [General Statutes §] 45a-360 (a)[3] of your action on said claim. Since at least ninety days have elapsed since May 29, 2020 please consider this correspondence my request under [§] 45a-360 (c)[4] that you take action on said claims." (Footnotes added.)

The defendant received the plaintiff's letter on October 24, 2020. On November 23, 2020, the defendant's counsel sent an email to the plaintiff's counsel stating in relevant part: "I have received a letter from your client to the [defendant] requesting action on his claim for caretake[r] services. The claim was denied by virtue

[2] The plaintiff testified that he did not receive the return of claims. The return receipt card that was signed and returned to the defendant had an illegible signature on the "signature" line and did not contain a printed name of the signatory.

[3] General Statutes § 45a-360 (a) provides: "The fiduciary shall: (1) Give notice to a person presenting a claim of the rejection of all or any part of his claim, (2) give notice to any such claimant of the allowance of his claim, or (3) pay the claim."

[4] General Statutes § 45a-360 (c) provides: "If the fiduciary fails to reject, allow or pay the claim within ninety days from the date that it was presented to the fiduciary as provided by section 45a-358, the claimant may give notice to the fiduciary to act upon the claim as provided by subsection (a) of this section. If the fiduciary fails to reject, allow or pay the claim within thirty days from the date of such notice, the claim shall be deemed to have been rejected on the expiration of such thirty-day period."

of the [return of claims] filed on July 9, 2020.[5] On that form, the claim was denied in its entirety. At this time, we consider the claim to be dismissed as no legal action was commenced within 120 days per Connecticut law." (Footnote added.)

In December, 2020, the plaintiff commenced this action against the defendant. In the plaintiff's operative amended complaint, he alleged five causes of action, captioned breach of express oral contract, breach of implied-in-fact contract, quantum meruit, unjust enrichment, and "breach of promise to nominate as beneficiary." The defendant filed an answer to the plaintiff's amended complaint and raised several special defenses. Relevant to this appeal, the defendant asserted, inter alia, that the plaintiff's causes of action were barred by the statute of limitations set forth in General Statutes § 45a-363[6] because the plaintiff did not commence this action within 120 days of receiving the return of claims.

A jury trial was held over several days in September, 2022. In addition to his own testimony, the plaintiff presented the testimony of Gabrielle Duah, an expert in the rates for caregiving services; Jami Somero, his friend; and Jeffrey J. Martin, his father. The plaintiff testified, inter alia, that he had several conversations with the decedent wherein the decedent offered to pay the plaintiff for his caregiving services, offered him the

[5] We note that, although the return of claims was dated July 9, 2020, records from the Probate Court reflect that the return of claims was filed with the court on July 10, 2020.

[6] General Statutes § 45a-363 provides in relevant part: "(a) No person who has presented a claim shall be entitled to commence suit unless and until such claim has been rejected, in whole or in part, as provided in section 45a-360.

"(b) Unless a person whose claim has been rejected (1) commences suit within one hundred twenty days from the date of the rejection of his claim, in whole or in part . . . he shall be barred from asserting or recovering on such claim from the fiduciary, the estate of the decedent or any creditor or beneficiary of the estate, except for such part as has not been rejected. . . ."

property as compensation for his services, and stated that he would name the plaintiff as a beneficiary in his will.

In addition to his own testimony, the defendant presented the testimony of his siblings. The defendant also presented the testimony of Audrey Carson, a caregiver hired by the defendant and his siblings to provide assistance to the decedent. Finally, the defendant presented, during his case-in-chief, the testimony of Debra Olson, the defendant's wife, and Mark Longo, the plaintiff's stepfather. The plaintiff objected to the defendant presenting this testimonial evidence during his case-in-chief, arguing that it was impermissible "surrebuttal" evidence. The court overruled the plaintiff's objection and permitted the defendant's wife to testify so as not to delay the trial and found that the plaintiff was not unfairly surprised by the testimony of his stepfather.

After the close of evidence, the court instructed the jury as to each of the plaintiff's causes of action.[7] The

[7] Before charging the jury on the elements of the plaintiff's causes of action, the court instructed the jury that, "[i]n this particular case, in order to meet his burden of proof, [the plaintiff] must prove each of his claims by a standard of proof known as clear and convincing evidence. Under Connecticut law, a claim that a decedent, here [the plaintiff's] grandfather, [the decedent], promised—promised to compensate a family member for caregiving services, and that is a serious claim. That's [the plaintiff's] allegation I should say. Therefore, the law applies a higher standard of proof to such a claim than is ordinarily applied in other civil cases. This, in this case, [the plaintiff] has the burden of proving each of his claims by clear and convincing evidence. This standard of proof also applies to any amount of damages [the plaintiff] may seek to prove. [The plaintiff] cannot meet the burden of proof of his claims by simply producing evidence which is slightly more persuasive than the evidence that is opposed to his claims. That amount of proof would meet the burden of proof under the preponderance of the evidence standards which is typical in most civil cases. Instead, in this case, [the plaintiff] must prove—must produce clear and convincing evidence to prove his claims. Clear and convincing evidence is evidence that is substantial and that unequivocally established each of the elements of [the plaintiff's] claims. Stated another way, clear and convincing evidence is evidence that establishes for you a very high probability that the facts asserted are true or—or that they exist. Not simply that the facts at issue are more probable

court then instructed the jury on the defendant's special defenses. Finally, the court instructed the jury on how to complete the jury interrogatories. Specifically, the court instructed the jury to make a finding as to each count of the plaintiff's operative complaint and then, if necessary, to make findings on the defendant's special defenses.

On September 19, 2022, the jury returned a verdict in favor of the defendant on each count of the plaintiff's operative complaint. The jury also determined that the defendant's statute of limitations defense applied. The plaintiff filed a timely motion to set aside the verdict pursuant to Practice Book § 16-35. The defendant filed an objection, and, on April 24, 2023, the court denied the plaintiff's motion and rendered judgment in accordance with the verdict. This appeal followed. Additional procedural history will be set forth as necessary.

I

The plaintiff first claims that the court improperly instructed the jury regarding the effect of the return of claims. Specifically, the plaintiff asserts, inter alia, that the court's instruction as to the defendant's statute of limitations defense caused the jury to find against the plaintiff on his five causes of action. The defendant responds that, because the jury returned a verdict in favor of the defendant on all five causes of action, the jury was not required to make any findings as to the defendant's special defenses and any purported error in the court's instruction was harmless. We agree with the defendant.

The following procedural history is relevant to our resolution of this claim. After the close of evidence, the

than not. Finally, you may have heard in criminal cases that proof must be beyond a reasonable doubt. I must emphasize to you that this is not a criminal case, and you are not deciding criminal guilt or innocence. Therefore, the standard of beyond a reasonable doubt has no application in this case."

court held a charging conference. The plaintiff's counsel objected to the court's draft instruction on the defendant's statute of limitations defense and argued, inter alia, that his "position is that the return of claims that seems to be the significant document by which the defendant is claiming that it notif[ied] the plaintiff of the rejection, our position is that that document in and of itself is invalid because it violates § 45a-360 (b)."[8] The court overruled the objection, stating that it understood the plaintiff's objection to be that the return of claims did not provide a reason for denying the plaintiff's claim. The court relied on *International Tool & Gauge Co.* v. *Borg*, 145 Conn. 644, 646, 145 A.2d 750 (1958), for the proposition that notice must be sufficiently unequivocal to place a claimant on notice that their claim has been denied.

The court, after instructing the jury on the plaintiff's causes of action, charged the jury on the defendant's statute of limitations defense as follows: "[The defendant] has raised defenses to [the plaintiff's] claims asserting that [the plaintiff] cannot prevail on his various claims because he did not bring suit on those claims within the time that is allowed by law. There are state statutes that specify how much time a person—how much time a person has to bring certain kinds of claims. These are called statutes of limitation. A person cannot recover on a claim that is brought after the time period that applies to a particular claim even if it is one day late. The defendant claims that the [statute] of limitations provided for under . . . § 45a-363 bars recovery under all of [the plaintiff's] claims since the action was not commenced within 120 days from the date of the rejection of [the plaintiff's] claim against [the decedent's] estate. [The defendant] contends that [the plaintiff's]

[8] General Statutes § 45a-360 (b) provides: "A notice rejecting a claim in whole or in part shall state the reasons therefor, but such statement shall not bar the raising of additional defenses to such claim subsequently."

claim for alleged caregiver services was denied on July 9, 2020,[9] and that [the plaintiff] received a copy of that denial on July 13, 2020. [The plaintiff] denies that he ever received a copy of the denial of his claim. It is undisputed that this action was filed with the court on December 24, 2020. If you find that [the defendant] has proven that [the plaintiff] did not file his claim within 120 days of being notified of his claim's denial by [the decedent's] estate, then you must find in favor of [the defendant] as to all of [the plaintiff's] claims." (Footnote added.)

Thereafter, the court instructed the jury on how to complete the jury verdict form and interrogatories. The court informed the jury that it "will have to answer, perhaps, nineteen questions in—in serial form," and then instructed the jury to begin with the first interrogatory, and then, depending on its answer, proceed pursuant to the instructions on the jury verdict form. By way of example, the court instructed: "Count one which is . . . the breach of expressed contract. If you find that there was—that there was a contract, then you have to answer some questions with respect to whether or not you think it was breached and whether or not there was any damage. If you find it was not—there was no breach, then you simply skip to the interrogatories dealing with the next count which is count two. I've set that all out in the instructions that are on your form, but it depends on how you answer that first question whether or not you answer the next four or five, we're only going to have you skip to what is interrogatory number five. Okay?" The court repeated similar instructions with respect to counts two through five of the plaintiff's operative complaint. The court then instructed in relevant part: "At interrogatory number sixteen, then you will consider the special defenses which are, again, the statute of limitations. You have to decide whether

[9] See footnote 5 of this opinion.

or not [the defendant] has met his burden there. You have to answer the first few questions before you get there . . . .''

The jury returned a verdict in favor of the defendant, finding that (1) the plaintiff and the decedent did not enter into an express oral contract for the decedent to compensate the plaintiff for providing caregiver services, (2) the plaintiff and the decedent did not enter into an implied-in-fact contract for the decedent to compensate the plaintiff for providing caregiver services, (3) the decedent did not promise to nominate the plaintiff as a beneficiary in his will, (4) the plaintiff is not entitled to recover under quantum meruit, and (5) the decedent was not unjustly enriched by the caregiver services the plaintiff provided him. With respect to the defendant's special defenses, interrogatory sixteen stated: ''Do you find that [the plaintiff] did not file his complaint in this action within 120 days of the denial of [the plaintiff's claim against [the decedent's] estate by [the defendant],'' to which the jury answered, ''Yes.'' The jury did not make any findings on the additional special defenses raised by the defendant.

We now turn to our standard of review and relevant legal principles. ''A jury instruction must be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled. . . . Furthermore, [n]ot every error is harmful.

. . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Citation omitted; internal quotation marks omitted.) *Allen* v. *Shoppes at Buckland Hills, LLC*, 206 Conn. App. 284, 288–89, 259 A.3d 1227 (2021).

"The power of the trial court to submit proper interrogatories to the jury, to be answered when returning [its] verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment, it is within the reasonable discretion of the presiding judge to require or to refuse to require the jury to answer pertinent interrogatories, as the proper administration of justice may require. . . . The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content. . . . Moreover, [i]n order to establish reversible error, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . .

"We further note that jury interrogatories must be consistent with the pleadings and the evidence adduced at trial, so as not to mislead the jury. . . . The function of jury interrogatories is to provide a guide for the jury's reasoning, and a written chronicle of that reasoning. . . . The purpose of jury interrogatories is to elicit a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 176 Conn. App. 420, 430–31, 171 A.3d 88 (2017).

On appeal, the plaintiff argues that the court improperly instructed the jury that, "[i]f you find that [the defendant] has proven that [the plaintiff] did not file

his claim within 120 days of being notified of his claim's denial by [the decedent's] estate, then you must find in favor of [the defendant] as to all of [the plaintiff's] claims." The plaintiff contends, inter alia, that "[t]he jury, relying on the erroneous instruction concerning the effect of the return of claims, probably felt compelled to find in favor of the defendant on the substantive claims of the plaintiff."

We need not decide whether the court should have provided a more detailed instruction on the defendant's statute of limitations defense because, even if we assume it was error, it was harmless. The court instructed the jury to answer the interrogatories in the order in which they were presented on the jury verdict form. "[W]hen a jury has received an instruction, it is presumed to have followed such instruction unless the contrary appears." (Internal quotation marks omitted.) *Stratek Plastic Ltd.* v. *Ibar*, 145 Conn. App. 414, 419, 74 A.3d 577, cert. denied, 310 Conn. 937, 79 A.3d 890 (2013). Because the jury found that the plaintiff had failed to prove an essential element of each of the five causes of action prior to addressing the defendant's special defenses, the court's instruction on the defendant's statute of limitations defense, assuming it was erroneous, could not have confused or misled the jury. See, e.g., *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 848, 225 A.3d 261 (2020) (instructional error was neither misleading nor harmful because error did not affect verdict, which was premised on different issue).[10] Accordingly, we conclude that any error arising from the court's jury instructions was harmless and did not affect the verdict.

[10] We decline the plaintiff's invitation to speculate as to how and why the jury arrived at its verdict. See *Tisdale* v. *Riverside Cemetery Assn.*, 78 Conn. App. 250, 263, 826 A.2d 232 (law is clear that reviewing court will not speculate about jury's intentions), cert. denied, 266 Conn. 909, 832 A.2d 74 (2003).

II

We next address the plaintiff's claims that the court improperly admitted into evidence testimony regarding the fair rental value of the property and the effect of the plaintiff's claims on the defendant and the plaintiff's mother.

"The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . Additionally, [b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 627–28, 161 A.3d 562 (2017).

A

The plaintiff's first evidentiary claim is that the defendant's testimony regarding the fair rental value of the

property "constituted inadmissible hearsay." We disagree.

The following additional procedural history is relevant. At trial, the following colloquy occurred:

"[The Defendant's Counsel]: All right. So . . . in the past what, if any, efforts did you undertake to ascertain rental values for [the property]?

"[The Defendant]: Well, in December of 2019, my brother did an evaluation of the foundation of the house and found out it had a failing foundation. So, we decided to get some rent values because we thought, you know, my father was not doing that well at that time. So, we thought, perhaps, we would need to maybe rent the house, since we couldn't sell it because of the foundation. So, I went online and also talked to a realtor friend of mine just to see what the value of the house would be, if we had rented it. And it turned out to be, somewhere between $1000–$2000 a month.

"[The Plaintiff's Counsel]: Objection. We move to strike (indiscernible) that's hearsay. And it's also beyond the scope, or beyond the province that the lay witness can testify about the value of somebody else's property.

"The Court: Overruled."

The Connecticut Code of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3). Subject to certain exceptions, hearsay is inadmissible. See Conn. Code Evid. § 8-2. A "statement" is defined as "an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion." Conn. Code Evid. § 8-1 (1). "There are certain circumstances when, although the witness did not repeat the statements of another person,

his or her testimony presented to the jury, by implication, the substance of another person's statements. . . . Under these circumstances, a witness has implied an out-of-court statement of another by testifying to the witness' own verbal or nonverbal response to an identifiable conversation." (Citation omitted; internal quotation marks omitted.) *Loiselle* v. *Browning & Browning Real Estate, LLC*, 147 Conn. App. 246, 257–58, 83 A.3d 608 (2013).

In the present case, the plaintiff has not demonstrated that the defendant's testimony that he "went online and also talked to a realtor friend" to ascertain the fair rental value of the property constituted hearsay. The defendant's counsel asked the defendant "what, if any efforts" the defendant undertook to determine the fair rental value of the property, and the defendant responded by describing his process for ascertaining the property's value and the conclusions he drew on the basis thereof. The plaintiff has not cited, nor has our review of the record revealed, any portion of the transcript where the defendant testified, in either substance or by implication, to any specific out-of-court statement made to him by his friend or that he discovered online. The court, therefore, properly concluded that the defendant's testimony regarding the fair rental value of the property was not hearsay.

The plaintiff contends that our Supreme Court's decision in *Urich* v. *Fish*, 261 Conn. 575, 804 A.2d 795 (2002), "applies squarely" to his case. We disagree. In *Urich*, the defendant offered during trial "a list that he had prepared of items that were missing from [a] boat upon delivery. The list was offered by the defendant both as an indicator of what items were missing and as evidence of their value. The plaintiff objected on the ground that the defendant had not provided a foundation for the value of the items, and the court sustained the objection, ruling that the list was admissible as a list of allegedly

missing items but not as evidence of their value. After a foundation had been laid, however, as to the replacement cost of some of the items, primarily in the form of the amount actually paid by the defendant to replace them, the trial court admitted the exhibit in its entirety but with the limitation that the court would rely only on the valuations for which a foundation had been laid." *Urich* v. *Fish*, supra, 578. Despite this ruling, the court relied, in its calculation of damages, on the price quotes provided by the defendant irrespective of whether the defendant had laid a proper foundation for the quote. Id., 579–80. Our Supreme Court determined that the price quotes offered by the defendant that lacked a proper foundation met "the definition of hearsay because they were statements made outside of court by the suppliers and were offered by the defendant to establish that the prices quoted represented the true replacement cost of the items." Id., 583–84.

In the present case, the defendant neither sought to introduce into evidence an exhibit reflecting, nor an out-of-court statement suggesting, the estimated rental value of the property for the truth of the matter asserted. Rather, the defendant testified as to the procedure he undertook to ascertain the property's rental value and the conclusions he drew therefrom. Moreover, the defendant, in his capacity as executor of the decedent's estate, was reasonably qualified to testify about the rental value of the property. See id., 581 ("[o]ur long settled rule is that a witness is permitted to testify about the value of goods with a proper foundation and when any reasonable qualifications of the witness to do so have been established"). Accordingly, the present case is factually distinguishable from *Urich*.[11]

[11] The plaintiff also maintains that the court improperly admitted the defendant's testimony regarding the fair rental value of the property because the testimony constituted inadmissible lay witness testimony. Typically, a witness cannot offer an opinion as to the value of a property unless they own the property to which their testimony relates. See Conn. Code Evid. § 7-1, commentary. Our courts, however, have allowed a witness to present

We, therefore, conclude that the court did not abuse its discretion in admitting the defendant's testimony on the rental value of the property.

B

The plaintiff's second evidentiary claim is that the court improperly admitted "evidence of the emotional effect" of the plaintiff's claim against the decedent's estate on his relatives. Specifically, the plaintiff contends that the testimony of the defendant and Margaret Longo, the plaintiff's mother, was irrelevant.[12] We are not persuaded.

The following procedural history is relevant to our resolution of this claim. At trial, the following colloquy occurred between the defendant's counsel and the defendant:

"[The Defendant's Counsel]: Okay. Now, as you heard from [the plaintiff's] testimony, he claims he's owed some figure. I don't know if we've heard an amount but it's a figure of maybe, in excess of a half a million dollars, for caregiver services that he's provided to your father. You understand that to be the claim. Right?

"[The Defendant]: Yes.

valuation testimony if the court finds the witness qualified to offer such testimony. See, e.g., *O'Connor* v. *Dory Corp.*, 174 Conn. 65, 70, 381 A.2d 559 (1977) (court admitted former property owner's testimony regarding property value because "[r]easonable qualifications were established for the admission of the witness' testimony as to value and the objection raised concerning his former ownership of the property went to its weight rather than its admissibility"). In the present case, because the defendant in his capacity of executor of the decedent's estate had experience with the oversight and management of the property prior to its sale, he was reasonably qualified to provide testimony on the rental value of the property.

[12] Although the other children of the decedent testified as to their reaction to the plaintiff's claim against the estate, the plaintiff's claim on appeal is limited to challenging the testimony of the defendant and the plaintiff's mother.

"[The Defendant's Counsel]: And when you heard [the plaintiff] was making this claim, what thoughts came into your mind?

"[The Defendant]: Nobody—

"[The Plaintiff's Counsel]: Objection. Relevance.

"The Court: Overruled.

"[The Defendant]: Nobody was really expecting it. So, I guess, you know, we were all kind of shocked because, you know, he certainly, did some things around the house. But he lived there, didn't pay rent so, we kind of thought that that's, you know, was payment for him staying there."

Additionally, the following colloquy occurred between the defendant's counsel and the plaintiff's mother:

"[The Defendant's Counsel]: When you heard that your son was making this claim, what thoughts did you have?

"[The Plaintiff's Counsel]: Objection. Relevance.

"The Court: Overruled.

"[The Witness]: I was appalled. I did not agree with it at all.

"[The Defendant's Counsel]: And what did you not agree with?

"[The Witness]: The fact that he was bringing suit against me, and my siblings. And I always thought he had a roof over his head, a very nice room, a bathroom, a garage of his own and he helped my dad with things that any good grandson would help with and my dad, in turn, gave him free rent. And I didn't . . . I didn't think the suit was warranted at all."

The following legal principles guide our resolution of this claim. "Section 4-1 of the Connecticut Code of

Evidence defines relevant evidence as evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. To determine whether a fact is material or consequential, it is necessary to examine the issues in the case, as defined by the underlying substantive law, the pleadings, applicable pretrial orders, and events that develop during the trial. Thus, the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial. The connection to an element need not be direct, so long as it exists." (Internal quotation marks omitted.) *McCrea* v. *Cumberland Farms, Inc.*, 204 Conn. App. 796, 804, 255 A.3d 871, cert. denied, 338 Conn. 901, 258 A.3d 676 (2021). "Once a witness has testified to certain facts . . . his credibility is a fact that is of consequence to [or material to] the determination of the action, and evidence relating to his credibility is therefore relevant . . . ." (Internal quotation marks omitted.) Id., 805.

We are not persuaded that the court improperly allowed the testimony of the defendant and the plaintiff's mother regarding their reactions to learning about the plaintiff's claim against the decedent's estate. The plaintiff brought causes of action sounding in breach of express oral contract, breach of implied-in-fact contract, unjust enrichment, quantum meruit, and "breach of promise to nominate as beneficiary." In support of these claims, the plaintiff testified at trial that he would have yearly discussions with the decedent during which the decedent promised to compensate the plaintiff for providing him with caregiving services. The court reasonably could have determined that the testimony provided by the defendant and the plaintiff's mother regarding their reactions to the plaintiff's claim against the decedent's estate was relevant because it was offered

to assist the jury in determining whether it found credible the plaintiff's testimony that the decedent promised to compensate the plaintiff for providing caregiver services.

Accordingly, the court did not abuse its discretion by allowing the defendant and the plaintiff's mother to testify to their reactions to the plaintiff's claim against the decedent's estate.

III

The plaintiff's final claim on appeal is that the trial court improperly allowed the defendant to present the testimony of two surrebuttal witnesses during his case-in-chief. The plaintiff argues that the court erred because there was no good cause for allowing the defendant's surrebuttal witnesses to testify out of order. We disagree.

The following additional procedural history is relevant to our resolution of this claim. During trial, the defendant sought to call as witnesses during his case-in-chief the defendant's wife and the plaintiff's stepfather. The plaintiff's counsel objected to the defendant's wife testifying because (1) she was not listed as a witness on the joint trial management report, (2) the plaintiff did not have questions prepared for her, and (3) allowing her to testify during the defendant's case-in-chief would prejudice the plaintiff. The court overruled counsel's objection and stated: "I'm going to allow [the defendant's counsel] to take her out of order, because she would be, obviously, an appropriate rebuttal witness. And I don't see any reason why to—to delay her testimony."[13]

[13] The following colloquy occurred prior to the testimony of the defendant's wife:

"[The Plaintiff's Counsel]: Your Honor, we would object, because I don't think [the defendant's wife is] listed on the joint trial management report.

"The Court: Ah. . . .

"[The Plaintiff's Counsel]: We have a specific list of witnesses. And I don't recall seeing her.

The plaintiff's counsel also objected to the plaintiff's stepfather testifying during the defendant's case-in-chief on the basis that it was premature surrebuttal evidence. The following colloquy occurred between the court and the plaintiff's counsel:

"The Court: If I—how are you prejudiced by this? I mean, I think you agree that he can present this witness on surrebuttal because he's contradicting testimony that [the plaintiff] has provided. So other than the procedural issue and timing, what is your prejudice? Testimony is coming in either way, right?

"[The Plaintiff's Counsel]: I don't think that's correct, Judge, no.

"The Court: I—my copy of the report is in the—in chambers, but that should be an objective yes or no. Is [the defendant's wife] listed or not?

"[The Defendant's Counsel]: She was not. This is a rebuttal [witness] in connection with the testimony of [the plaintiff] regarding what, if anything, a few family members did, with respect to helping [the decedent]. The [plaintiff's] testimony was no assistance. The testimony was the—whatever little things that [the defendant's wife] did and she has direct knowledge concerning what she did, as well. So, it—it wasn't intended to be a witness.

"The Court: Attorney Amato.

"[The Plaintiff's Counsel]: Well, I don't think that now is an appropriate time to be doing rebuttal for the defendant. Typically, the plaintiff does rebuttal and the defendant would do surrebuttal and that would only come after the plaintiff does rebuttal. So, in other words, under my interpretation—

"The Court: All right. Wait.

"[The Plaintiff's Counsel]:—it's all—

"The Court: And it—I understand the procedural issue. Is there any substantive issue, which is to say why shouldn't we just skip the formalities and let [the defendant's wife] testify, because she would be able to testify in rebuttal because, if—she's clearly rebutting what the plaintiff was saying with respect to what may or may not have been done—

"[The Plaintiff's Counsel]: I—

"The Court: —by the plaintiff and the children.

"[The Plaintiff's Counsel]: Apart from the—

"The Court: So why shouldn't we just skip to what we know—all know she's going to—her—her ability to testify?

"[The Plaintiff's Counsel]: Well, apart from the fact that we haven't had a chance to prepare anything for her, I think that's kind of—

"The Court: All right.

"[The Plaintiff's Counsel]:—prejudicial.

"The Court: I'm going to allow [the defendant's counsel] to take her out of order . . . ."

"The Court: Why is that not correct?

"[The Plaintiff's Counsel]: Because if he brings him in in the normal order—let's say, the defendant finishes his case-in-chief. Now the plaintiff goes on and does his rebuttal, then if he wants to bring in a witness on surrebuttal to rebut what the plaintiff brought in on rebuttal, that's fine. But we don't know that this person—this other witness, this undisclosed witness is going to rebut the rebuttal evidence. We don't know that. What he's trying to do is get an extra crack at trying to defend or contradict or challenge what the plaintiff said on direct examination. An undisclosed surrebuttal witness is not the way to do it."

The court overruled the plaintiff's objection and stated: "Okay. Well, I mean, I'm going to allow the witness. I think he's—it's not unfair surprise. There's clearly been a lot of testimony about this. It's a family dispute. The idea that family members on either side of this dispute might be testifying about relevant facts. It shouldn't come as a surprise to anyone. I'm going to allow him to present that testimony out of order."

We now turn to our standard of review and relevant legal principles. Practice Book § 15-5 (a) provides in relevant part: "Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial and argument in the following order: (1) The plaintiff shall present a case-in-chief. (2) The defendant may present a case-in-chief. (3) The plaintiff and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit a party to present evidence not of a rebuttal nature, and if the plaintiff is permitted to present further evidence in chief, the defendant may respond with further evidence in chief. . . ." "[W]hen considering whether there was cause for a court to [deviate from the procedures] prescribed in . . . § 15-5 (a), we

review the decision of the court under the abuse of discretion standard." (Internal quotation marks omitted.) *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 625–26, 216 A.3d 667, cert. denied, 333 Conn. 928, 218 A.3d 68 (2019).

"It is well settled that the admission of rebuttal evidence lies within the sound discretion of the trial court. . . . Our standard of review of the [plaintiff's] claim is that of whether the court abused its discretion in allowing this . . . testimony. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . It goes without saying that the term abuse of discretion . . . means that the ruling appears to have been made on untenable grounds. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Citation omitted; internal quotation marks omitted.) *O & G Industries, Inc.* v. *American Home Assurance Co.*, 204 Conn. App. 614, 642–43, 254 A.3d 955 (2021).

As an initial matter, it is unclear to us why the testimony at issue would be considered surrebuttal evidence. It was offered to directly refute the plaintiff's testimony in his case-in-chief. It is typical for a defendant to offer in his case-in-chief evidence directly refuting evidence offered by the plaintiff, including the testimony of witnesses who directly contradict the plaintiff's testimony. See id., 645 ("[R]ebuttal evidence is that which refutes the evidence [already] presented . . . rather than that which merely bolsters one's case. . . . [A] general contradiction of the testimony given by [a party] is considered permissible rebuttal testimony." (Citation omitted; internal quotation marks omitted.)). Nevertheless, the plaintiff contends, inter alia, that "the trial court failed to expressly solicit and find good

cause" for allowing the defendant to present what the plaintiff calls "surrebuttal evidence" during his case-in-chief.

Regardless of the descriptor attached to the evidence, we conclude that the court did not abuse its discretion by allowing the defendant to present the testimony of the defendant's wife and the plaintiff's stepfather during his case-in-chief. The court stated that it was allowing the evidence, first, because the testimony did not unfairly surprise the plaintiff and, second, so as not to delay the trial. Considering that the court's decision is to be afforded every reasonable presumption of correctness, we conclude that the court's findings reasonably justified its decision to allow the defendant to present the evidence during his case-in-chief. See, e.g., *de Repentigny* v. *de Repentigny*, 121 Conn. App. 451, 456, 995 A.2d 117 (2010) (trial court's decision denying plaintiff's request to present oral closing argument on basis that it would prolong trial justified deviating from Practice Book § 15-5 and did not constitute abuse of discretion).[14] Accordingly, the plaintiff has not demonstrated that the court abused its discretion in allowing the defendant to present rebuttal evidence during his case-in-chief.

The judgment is affirmed.

In this opinion the other judges concurred.

SHERI SPEER *v.* DONNA SKAATS
(AC 46047)

Elgo, Suarez and Bear, Js.

Syllabus

The plaintiff sought injunctive relief and to recover damages from the defendant attorney for abuse of process. The defendant represented a third

[14] The plaintiff's claim, if accepted, also would lead to the bizarre circumstance that the defendant would be precluded from presenting evidence that contradicted the testimony the plaintiff already gave if the plaintiff

party, S Co., in a foreclosure action that related to the plaintiff's personal residence. In the present case, the plaintiff alleged that, inter alia, five years after S Co. was defaulted in the foreclosure action for failure to appear, the defendant filed an appearance in the foreclosure action on S Co.'s behalf and then proceeded to file numerous motions, notices, and objections for, inter alia, the purpose of causing annoyance and distress to the plaintiff. The trial court granted the defendant's motion to dismiss, finding that it lacked subject matter jurisdiction because the plaintiff had failed to establish that she was aggrieved, and, therefore, she did not have standing to bring the action. On the plaintiff's appeal to this court, *held* that the trial court erred in granting the defendant's motion to dismiss because it improperly determined that it lacked subject matter jurisdiction over the plaintiff's action: the plaintiff plainly alleged that the defendant had made use of a legal process, that she did so primarily to accomplish purposes for which the process was not designed, and that those purposes were detrimental to the plaintiff; moreover, the factual allegations in the plaintiff's complaint, when viewed in the light most favorable to her as the pleader and construed both broadly and realistically, sufficiently established classical aggrievement, as the allegations were sufficient to demonstrate both the possibility that the plaintiff had a specific, personal, and legal interest in the defendant's conduct in the foreclosure action and the possibility that such interest had been specially and injuriously affected by the defendant's conduct, and, consequently, the trial court incorrectly determined that the plaintiff lacked standing to bring the action; accordingly, this court reversed the judgment of the trial court and remanded the case for further proceedings.

Argued January 4—officially released June 25, 2024

Procedural History

Action to recover damages for abuse of process, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Goodrow*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Sheri Speer, self-represented, the appellant (plaintiff).

chose not to present a rebuttal case. That simply is not how the rules of evidence and trial procedure work.

Opinion

SUAREZ, J. The plaintiff, Sheri Speer, appeals from the judgment of the trial court, *Goodrow*, *J.*, dismissing the civil action brought by her against the defendant, Donna Skaats.[1] The plaintiff claims that, in dismissing the action, the court erred in concluding that it lacked subject matter jurisdiction because she was not aggrieved and, thus, lacked standing to bring the action. The plaintiff also claims that the court, *Spallone*, *J.*, erred in "denying [her motion for] summary judgment."[2] We agree with the plaintiff's first claim and, therefore, reverse the judgment of the trial court.

With respect to the claims raised in this appeal, the record reflects the following relevant procedural history. In August, 2019, the plaintiff commenced the underlying civil action against the defendant, a member of the Connecticut bar, in connection with the defendant's representation of a third party, Seaport Capital Partners, LLC (Seaport), in an action brought by Deutsche Bank National Trust Company to obtain a judgment of foreclosure with respect to the plaintiff's personal residence (foreclosure action). The plaintiff alleged that, in the foreclosure action, Seaport was "an alleged lienholder" who had recorded a property interest with respect to the real property. The plaintiff further alleged that, on November 17, 2018, five years after Seaport was defaulted for its failure to appear in the foreclosure action, the defendant entered an appearance on Seaport's behalf, however, "[t]he defendant

[1] The plaintiff also appeals from the court's denial of her motion to reconsider the judgment of dismissal. In this appeal, however, the plaintiff does not raise any claims of error that are specifically related to the court's denial of her motion to reconsider.

[2] The plaintiff appeared before both the trial court and this court as a self-represented litigant. The defendant did not file a brief in this appeal. Consistent with an order of this court, dated September 19, 2023, we consider the merits of this appeal on the basis of the plaintiff's brief and appendix, the record as defined by Practice Book § 60-4, and the arguments advanced by the plaintiff during oral argument before this court.

never entered into an attorney-client agreement for representation in the [foreclosure] action with Seaport." The plaintiff also alleged that "Seaport never authorized the defendant to appear or litigate on its behalf in the [foreclosure] action."

In the plaintiff's single count complaint, she alleged: "Between November 17, 2018, and July 1, 2019, the defendant filed numerous motions, notices, and objections on behalf of Seaport . . . [1] without its authorization, which constituted the employment of a legal process . . . [2] to cause annoyance, alarm, embarrassment, and distress on the part of the plaintiff, and promises to do so in the future to her irreparable harm, which is not the proper use of the legal processes and procedures employed by the defendant in the name of Seaport . . . [3] to increase the costs the plaintiff in the [foreclosure] action would charge or assess during the litigation, which would be charged to the [present] plaintiff, and promises to do so in the future to her irreparable harm, which is not the proper use of the legal processes and procedures employed by the defendant in the name of Seaport . . . [4] to obstruct, thwart, and otherwise impair any possibility that the plaintiff could enter into a modification agreement to save her home from foreclosure, and promises to do so in the future to her irreparable harm, which is not the proper use of the legal processes and procedures employed by the defendant in the name of Seaport . . . [and (5)] to prevent the plaintiff from taking any action to defend against the [foreclosure] action, with the objective of rendering the plaintiff homeless, and promises to do so in the future to her irreparable harm, which is not the proper use of the legal processes and procedures employed by the defendant in the name of Seaport. . . .

"None of the filings made by the defendant in the [foreclosure] action relate[s] at all in any way to the

claims of the plaintiff [in the foreclosure action] or the defenses alleged to the [foreclosure] action. . . .

"Seaport has alleged no defense to the [foreclosure] action, has no defense to the [foreclosure] action, and was defaulted for failure to plead. . . .

"Seaport has alleged no claim in the [foreclosure] action and has no practical relief to obtain, that could be obtained, or that it has or had authorized the defendant to attempt to obtain on its behalf in the [foreclosure] action."

By way of relief, the plaintiff sought "[t]emporary and permanent injunctive relief against the defendant from engaging in the abuse of process as complained of herein in the [foreclosure] action or any proceedings related thereto" as well as damages, costs, and all other relief the court deems "fit and proper."

On October 23, 2019, the defendant filed a motion to dismiss and a supporting memorandum of law. On October 28, 2019, the plaintiff filed a memorandum of law in opposition to the motion to dismiss. On February 3, 2022, following a hearing, the court, *Spallone*, *J.*, denied the motion to dismiss.

On June 20, 2022, the defendant filed a second motion to dismiss as well as a supporting memorandum of law. The ruling on the defendant's second motion to dismiss is at issue in the present appeal. In its motion, the defendant argued, inter alia, that "[t]he plaintiff does not have standing to bring an action against the attorney representing Seaport . . . ."[3] On June 22, 2022, the

[3] The defendant also argued that the court should dismiss the present action in light of an order issued by the court against the plaintiff in an unrelated action that barred the plaintiff from filing any pleadings in cases in which Seaport was a party. The court, in granting the defendant's second motion to dismiss in the present case, concluded that, because Seaport was not a party to the present action, the defendant's reliance on the order was misplaced.

plaintiff filed a memorandum of law in objection to the motion to dismiss.

By order of October 28, 2022, the court, *Goodrow*, *J.*, granted the defendant's second motion to dismiss. The court stated: "[T]his action is dismissed due to lack of subject matter jurisdiction. . . . The crux of the plaintiff's complaint is that the plaintiff allegedly suffered an injury when the defendant represented Seaport . . . in a . . . [foreclosure] action in which the plaintiff in this case . . . was the defendant . . . . The plaintiff . . . alleges, in essence, that the defendant . . . acted without authority in holding herself out as counsel for Seaport . . . in the earlier [foreclosure] action. [The defendant] was counsel of record for [Seaport] in the earlier [foreclosure] action. . . . [T]he instant case is required to be dismissed due to the lack of standing by the plaintiff to bring the action and, therefore, the court's lack of subject matter jurisdiction. This court does not have subject matter jurisdiction based on the plaintiff's lack of standing. . . . Consistent with the court's policy of leniency to self-represented litigants, the court has construed the plaintiff's complaint broadly and realistically rather than narrowly and technically. . . . The plaintiff lacks standing to bring this action because she is not aggrieved, either classically or statutorily. . . . The plaintiff alleges that the defendant . . . illegally or without authority represented Seaport . . . in the prior [foreclosure] action. The facts alleged by the plaintiff do not include conduct that has injured, or will likely injure a specific, personal, legal interest of the plaintiff. Because the plaintiff has established neither classical nor statutory aggrievement, she lacks standing to bring this action." (Citations omitted; internal quotation marks omitted.)

On November 7, 2022, the plaintiff filed a motion for reconsideration of the court's decision. On November 18, 2022, the defendant filed an objection to the motion

to reconsider. On November 21, 2022, the court summarily denied the motion to reconsider and sustained the defendant's objection thereto. This appeal followed. Additional procedural history will be discussed as necessary.

I

First, the plaintiff claims that, in dismissing the action, the court erred in concluding that it lacked subject matter jurisdiction because she was not aggrieved and, thus, lacked standing to bring the action. We agree.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . .

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citation omitted; internal quotation marks omitted.) *Derblom* v. *Archdiocese of Hartford*, 346 Conn. 333, 341–42, 289 A.3d 1187 (2023). "Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10-30] may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . [If] a trial court decides a jurisdictional question raised by a

pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 763, 286 A.3d 467 (2022).

"When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . . Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved. . . . [Statutory] [s]tanding concerns the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . .

"The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been

adversely affected." (Footnote omitted; internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 525–26, 119 A.3d 541 (2015).

"An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another primarily to accomplish a purpose for which it is not designed . . . . Comment b to § 682 explains that the addition of primarily is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Internal quotation marks omitted.) *Rogan* v. *Rungee*, 165 Conn. App. 209, 220, 140 A.3d 979 (2016). "[A]lthough the definition of process may be broad enough to cover a wide range of judicial procedures, to prevail on an abuse of process claim, the plaintiff must establish that the defendant used a judicial process for an improper purpose." (Emphasis omitted.) *Larobina* v. *McDonald*, 274 Conn. 394, 406–407, 876 A.2d 522 (2005). As our Supreme Court has observed, "the elements of abuse of process . . . are less stringent than the elements of vexatious litigation. Specifically, unlike the tort of vexatious litigation, a claim for abuse of process does not require termination of the underlying litigation in favor of the plaintiff." *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 633, 79 A.3d 60 (2013).

In the present case, the court resolved the issue of standing on the basis of the complaint alone, not in conjunction with undisputed facts in the record or the

court's resolution of disputed facts. Accordingly, our analysis of the issue of standing is limited to the facts alleged in the complaint. Beyond our duty to interpret the facts alleged in the complaint, as well as the facts implied by the allegations in the complaint, in the light most favorable to the plaintiff, we are mindful in our de novo review of the complaint that "[t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically . . . ." (Internal quotation marks omitted.) *M&T Bank* v. *Lewis*, 349 Conn. 9, 31 n.10, 312 A.3d 1040 (2024). "[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Hepburn* v. *Brill*, 348 Conn. 827, 848, 312 A.3d 1 (2024). This method of interpreting the complaint applies with greater force in light of the fact that the plaintiff appeared before the court as a self-represented party.[4] Finally, we observe the well established principle that, "in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Fountain of Youth Church, Inc.* v. *Fountain*, 225 Conn. App. 856, 867, A.3d (2024).

[4] Connecticut courts adhere to the modern trend of interpreting pleadings broadly and realistically in part "to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . ." (Internal quotation marks omitted.) *Donald G.* v. *Commissioner of Correction*, 224 Conn. App. 93, 104, 311 A.3d 187, cert. denied, 349 Conn. 902, 312 A.3d 585 (2024).

As set forth previously in this opinion, the plaintiff alleged in her complaint that, without any authorization by Seaport, the defendant filed an appearance on behalf of Seaport, who was an "alleged lienholder" and a party to the foreclosure action that had been brought against her in the Superior Court. The plaintiff also alleged that, between November 17, 2018, and July 1, 2019, the defendant "filed numerous motions, notices and objections on behalf of Seaport . . . ." In paragraph 10 of her complaint, the plaintiff alleged that the defendant engaged in this conduct "to cause annoyance, alarm, embarrassment, and distress on the part of the plaintiff . . . ." In paragraph 11 of her complaint, the plaintiff alleged that the defendant engaged in this conduct "to increase the costs the plaintiff in the [foreclosure] action would charge or assess during the litigation, which would be charged to the [present] plaintiff . . . ." In paragraph 12 of her complaint, the plaintiff alleged that the defendant engaged in this conduct "to obstruct, thwart, and otherwise impair any possibility that the plaintiff could enter into a modification agreement to save her home from foreclosure . . . ." In paragraph 13 of her complaint, the plaintiff alleged that the defendant engaged in this conduct "to prevent the plaintiff from taking any action to defend against the [foreclosure] action, with the objective of rendering the plaintiff homeless . . . ." The plaintiff also alleged that none of the defendant's filings "relate[d] at all in any way to the claims of the plaintiff [in the foreclosure action] or the defenses alleged to the [foreclosure] action." Moreover, the plaintiff alleged that Seaport "alleged no claim in the [foreclosure] action and has no practical relief to obtain, that could be obtained, or that it has or had authorized the defendant to attempt to obtain on its behalf in the [foreclosure] action." Finally, in her prayer for relief, the plaintiff sought damages and relief against the defendant from "engaging

in the *abuse of process* as complained of herein . . . .'' (Emphasis added.)

We disagree with the trial court's conclusion that the plaintiff's complaint was merely based on the allegation that the defendant illegally or without authority represented Seaport in the foreclosure action and that the plaintiff had failed to allege conduct on the part of the defendant that has injured, or will likely injure, a specific, personal, and legal interest of the plaintiff. The factual allegations in the plaintiff's complaint, when viewed in the light most favorable to her as the pleader, and construed both broadly and realistically, were sufficient to demonstrate the possibility that the plaintiff had a specific, personal, and legal interest in the defendant's conduct in the foreclosure action. The allegations were also sufficient to demonstrate the possibility that her specific, personal, and legal interest had been specially and injuriously affected by the defendant's conduct. The plaintiff plainly alleged that the defendant had made use of a legal process and that she did so primarily to accomplish purposes for which it was not designed and for purposes that were detrimental to the plaintiff. Specifically, the plaintiff alleged that the defendant's motions, notices, and objections were not related to a proper purpose in connection with the practical relief that Seaport could obtain by operation of law in the foreclosure action but that the defendant had used those procedural devices for the improper purposes that the plaintiff alleged in paragraphs 10 through 13 of her complaint. Setting aside the plaintiff's allegation that, in the foreclosure action, the defendant represented Seaport without its authorization, the plaintiff alleged that the defendant had caused her various types of harm. Although it is not dispositive of our analysis, the plaintiff characterized the conduct of which she complained as ''abuse of process . . . .'' Thus, the

plaintiff's factual allegations in her complaint sufficiently established classical aggrievement. Accordingly, the court improperly determined that it lacked subject matter jurisdiction because the plaintiff lacked standing to bring the action.

II

We next address the plaintiff's claim that the court erred in "denying [her motion for] summary judgment." We decline to review this claim.

The following additional procedural history is relevant to this claim. On November 12, 2019, the plaintiff filed a motion for summary judgment as to liability only and a supporting memorandum of law. On June 13, 2020, the court, *S. Murphy, J.*, marked the motion off due to concerns and restrictions related to the COVID-19 pandemic. The court noted that the parties had the right to reclaim the motion "with affirmative language regarding their agreement to have the motion taken on the papers or at such time as the courts begin hearing arguable matters on short calendar."

On July 31, 2020, the plaintiff, relying on the fact that the defendant had not filed an opposition to the motion for summary judgment, filed a caseflow request seeking to have the motion for summary judgment taken on the papers. On August 4, 2020, the defendant filed what she characterized as an "initial procedural objection" to both the motion for summary judgment and the caseflow request related thereto. The defendant argued that the request to have the motion for summary judgment taken on the papers contravened her right to a hearing on the motion and that ruling on the motion for summary judgment was inappropriate in light of the fact that the court had not yet ruled on her pending motion to dismiss that she had filed in October, 2019. The defendant represented that, if the court denied her motion to dismiss, she was prepared to file a substantive objection to the motion for summary judgment within

thirty days. By orders of August 7, 2020, the court denied the plaintiff's caseflow request and sustained the defendant's objection thereto.[5]

After the court, *Spallone*, *J.*, denied the defendant's first motion to dismiss on February 3, 2022, the defendant filed a second motion to dismiss on June 20, 2022. The record reflects that, on June 9, 2022, Judge Spallone issued an order regarding the pending motion for summary judgment that stated: "The court is taking no action at this time on the plaintiff's motion for summary judgment . . . . This matter is currently stayed. Such stay is subject to a motion to reconsider, which will be scheduled for a hearing." The record does not reflect that the plaintiff brought a motion to reconsider this ruling. Thereafter, the court, *Goodrow*, *J.*, granted the defendant's second motion to dismiss on October 28, 2022. That ruling was the subject of the claim addressed in part I of this opinion.

It is important to identify the ruling, if any, that is being challenged by the plaintiff, for "[w]e cannot pass on the correctness of a trial court ruling that was never made." *Fischel* v. *TKPK, Ltd.*, 34 Conn. App. 22, 26, 640 A.2d 125 (1994). The plaintiff's brief is murky in this respect. The court did not consider, let alone deny, her motion for summary judgment. In this appeal, the plaintiff does not challenge the propriety of the court's denial of her caseflow request on August 7, 2020. Rather, in her appellate brief, the plaintiff specifically claims error on the part of Judge Spallone, for she states that "[t]he . . . trial court (*Spallone*, *J.*) found that subject matter jurisdiction existed and erred in denying summary judgment that remained unopposed for several years." She thereafter argues that Practice Book §§ 17-44, 17-45 and 17-49 "required" the court to grant her motion in light of the fact that she demonstrated her

[5] The court file reflects that the caseflow request and the objection thereto were denied "by the court."

entitlement to judgment in her favor as a matter of law and "there was no opposition whatsoever" within forty-five days of the filing of the motion.

To the extent that the plaintiff raises a claim of error related to Judge Spallone, the only ruling that was made by him that was tangentially related to her motion for summary judgment was his order of June 9, 2022, staying consideration of the motion.[6] In her brief, however, the plaintiff does not specifically identify this ruling, nor does she attempt to demonstrate that the court's ruling to defer consideration of her summary judgment motion at that time amounted to an abuse of its discretion. She does not address the myriad possible reasons on which the court may have relied in determining that the court's action was appropriate in June, 2022, but merely argues that summary judgment was a proper remedy. Even if we had an adequate record of the factual and legal basis underlying the court's imposition of a stay, the plaintiff has failed in her brief to adequately challenge the propriety of that specific ruling. "For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022); see also *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011) ("[i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately" (internal quotation marks omitted)).

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

In this opinion the other judges concurred.

[6] We note that, after she filed the present appeal, the plaintiff filed six motions for articulation. In one of those motions, she asked Judge Spallone to articulate with respect to his June 9, 2022 order. Judge Spallone denied the motion for articulation. The plaintiff did not thereafter file a motion for review in this court related to that ruling.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 226

MEMORANDUM DECISIONS

T. A. *v.* M. L.
(AC 46588)

Suarez, Clark and Vertefeuille, Js.

Argued May 13—officially released June 25, 2024

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Grossman*, *J.*

Per Curiam. The judgments are affirmed.

T. A. *v.* M. L.
(AC 46666)

Suarez, Clark and Vertefeuille, Js.

Argued May 13—officially released June 25, 2024

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Grossman*, *J.*; *Tindall*, *J.*; *Griffin*, *J.*; *Gould*, *J.*; *Hon. Jon M. Alander*, judge trial referee.

Per Curiam. The judgments are affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed 2024 Application for a Moratorium in the Town of New Canaan

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (6/18/2024) for a Certificate of Affordable Housing Project Completion (aka, a Moratorium) for the Town of New Canaan. As per Connecticut General Statutes Section 8-30g(1)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on June 25, 2024 and end on July 25, 2024. Under the statute, DOH has ninety (90) days (September 18, 2024) to review the completed application, along with any public comments submitted during the thirty (30) day comment period. DOH will accept electronic input/comment on the completed application at CT.HOUSING.PLANS@ct.gov. DOH will not act as intermediary but shall take into consideration all input and comments received. A copy of this completed application, along with all comments received will be available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please e-mail Laura Watson, Economic and Community Development Agent, at laura.watson@ct.gov

DEPARTMENT OF SOCIAL SERVICES

Notice of Intent to Amend and Renew the Acquired Brain Injury II (ABI II) Waiver and to Amend the Acquired Brain Injury (ABI I) Waiver

In accordance with the provisions of section 17b-8 of the Connecticut General Statutes, notice is hereby given that the Commissioner of the Department of Social Services (DSS) intends to submit applications to the Centers for Medicare and Medicaid Services to amend and renew the Acquired Brain Injury II (ABI II) waiver, and amend the Acquired Brain Injury (ABI I) waiver to align with the proposed amendments in the ABI II waiver renewal. The current ABI II waiver expires on November 30, 2024.

DSS is proposing the following changes to the ABI I and ABI II waivers:

- Modifying the educational requirements of case managers and shifting the licensure requirement to the agency level and off the individual case manager. These changes will improve the ability of the access agencies, which provide case management services on behalf of the Department, to hire and retain a sufficient number of case managers, without sacrificing client safety.

Current Language	Proposed Changes
The case manager is required to hold a Master's degree in social work, human services, counseling or rehabilitation counseling. If the degree is in social work, LCSW or LMSW licensure is required. The case manager may also be a nurse with a minimum of a bachelor's degree.	The case manager is required to hold a Master's degree in social work, human services, counseling or rehabilitation counseling. The agency will have at least one licensed clinician on staff available for case consultation and escalation. Acceptable licensures in social work, nursing, or counseling will meet this requirement.
The case manager must have the ability to serve multicultural, multilingual populations; and the skill set to lead and facilitate the Care Team	The case manager must have the ability to serve multicultural and multilingual populations, and the skill set to lead and facilitate the Care Team. The case manager will be required to hold a Brain Injury Specialist certification or be eligible to apply for such certification based on verifiable experience.

- Adding a certification requirement for case managers to be certified Brain Injury Specialists
- Updating the service definitions for the following services to reflect the 1-year agency experience requirement that already exists as a credentialing requirement for agencies to provide certain services:
    - Personal Care (agency provider)

Copies of the complete text of the two waiver applications are available, at no cost, upon request from: Christine Weston, Director of Community Options Unit, DSS Central Office, 55 Farmington Avenue, Hartford, CT, 06105, or via email at christine.weston@ct.gov. They are also available on the DSS website, www.ct.gov/dss, under ''News,'' as well as the following direct link: http://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-Waiver-Applications/Medicaid-Waiver-Applications.

All written comments regarding this application must be submitted by July 25, 2024 to: Christine Weston, Director of Community Options Unit, DSS Central Office, 55 Farmington Avenue, Hartford, CT, 06105, or via email at christine.weston@ct.gov.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-Q: July 2024 Quarterly HIPAA Compliant Update - Physician Office and Outpatient Fee Schedule/ Updates to the Reimbursement Rates of Select Manually Priced Procedure Codes

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after July 1, 2024, SPA 24-Q will amend Attachment 4.19-B of the Medicaid State Plan to incorporate the July 2024 Healthcare Common Procedure Coding System (HCPCS) changes (additions, deletions and description changes) to the physician office and outpatient fee schedule. DSS is making these changes to ensure the fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Secondly, several physician-administered drugs that are currently manually priced listed on the physician office and outpatient fee schedule will be updated to equal 100% of the revised April 2024 Medicare Average Sales Price (ASP) Drug Pricing file.

Procedure Code	Current Rate	*Maxfee Rate eff. 7/1/2024
A9574	MP	$5.13
J0283	MP	$2.55
J0612	MP	$0.05
J0874	MP	$0.07
J1961	MP	$22.01
J9029	MP	$63,505.40
J9314	MP	$9.96
J9333	MP	$22.85
J9334	MP	$33.17
Q4184	MP	$624.34
Q4188	MP	$637.63
Q4259	MP	$1,007.00
Q4283	MP	$1,297.54

Fee schedules are published at: http://www.ctdssmap.com. Select ''Provider'', then select ''Provider Fee Schedule Download''; after accepting the Terms and Conditions, proceed to the applicable fee schedule.

Fiscal Impact

The HIPAA updates to the physician office and outpatient fee schedule are not expected to have any fiscal impact, since there was not any utilization of these codes during CY 2023.

There was no utilization of the select manually priced physician-administered drugs listed on the physician office and outpatient fee; therefore, it is not expected to have any fiscal impact.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-Q: July 2024 Quarterly HIPAA Compliant Update - Physician Office and Outpatient Fee Schedule/ Updates to the Reimbursement Rates of Select Manually Priced Procedure Codes/''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **July 10, 2024**.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-U: Community First Choice - Reimbursement Updates to Implement Personal Care Attendant Collective Bargaining Agreement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is listed below.

Changes to Medicaid State Plan

Effective on or after July 1, 2024, this SPA will amend Attachment 4.19-B of the Medicaid State Plan in order to make the reimbursement increases described below for the Community First Choice (CFC) benefit pursuant to section 1915(k) of the Social Security Act.

The CFC self-directed personal care attendant (PCA) rates are being increased to comply with the Collective Bargaining Agreement (CBA) between the state's PCA Workforce Council and the union representing self-directed PCAs, which, after approval by the Connecticut General Assembly on March 25, 2024, was recently amended and extended through June 30, 2026. As required by the CBA, the state is to increase the payment rates for applicable CFC services, incorporating all of the relevant changes as detailed in the CBA, including, but not limited to: (1) wage increases, which comprise (A) specified hourly wage increases and (B) minimum

percent-based wage increases for individuals already receiving rates above the set minimum wages; (2) additional holidays added for holiday pay; (3) increase in the methodology for calculating the rate add-on to support individuals' health care expenses; and (4) increases in the methodology for calculating paid time off.

As detailed in the current approved Medicaid State Plan, the payment rates are calculated for each PCA to reflect all applicable components of the rate set forth in the Medicaid State Plan, including, but not limited to, applicable wage, employer taxes, and workers' compensation coverage (which are final components of the rate), plus the interim components of the rate, which include paid time off and rate add-on to support PCA's health care expenses. The calculation of the rate also incorporates all provisions required by applicable state and federal law, including minimum wage and other applicable labor law, which may result in adjustment of the overall analysis of the fiscal impact.

Fee schedules are published on the Connecticut Medical Assistance Program website: www.ctdssmap.com. From this web page go to 'Provider,' then to 'Provider Fee Schedule Download,' then select the applicable fee schedule.

The purpose of this SPA is to implement the CBA referenced above and to support ongoing access to quality CFC services for Medicaid members.

Fiscal Impact

Based on the information currently available, DSS estimates this SPA will increase annual aggregate expenditures by approximately $5,990,075 in State Fiscal Year (SFY) 2025 and $7,321,150 in State Fiscal Year (SFY) 2026.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''**SPA 24-U: Community First Choice - Reimbursement Updates to Implement Personal Care Attendant Collective Bargaining Agreement**''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **July 31, 2024**.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-W: Chronic Disease Hospitals – Supplemental Payment

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Proposed Changes to Medicaid State Plan

On or after July 1, 2024, this SPA will amend Attachment 4.19-A of the Medicaid State Plan to make a supplemental payment to free-standing licensed chronic disease hospitals, as defined in section 19a-550 of the Connecticut General Statutes, with Medicaid inpatient utilization exceeding 50% for State Fiscal Year (SFY) 2023. DSS anticipates that the funding will support continued access and quality for these services.

Estimated Fiscal Impact

DSS estimates that this will increase annual aggregate expenditures by $1,200,000 in State Fiscal Year (SFY) 2025.

Obtaining SPA Language and Submitting Comments

This proposed SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below). When feasible and relevant, the versions of the SPA pages posted to that webpage include track changes indicating this SPA's proposed changes to the current version of the Medicaid State Plan.

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-W: Chronic Disease Hospitals – Supplemental Payment''.

Anyone may send DSS written comments about the SPA. **Written comments must be received by DSS at the above contact information no later than July 24, 2024.**

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-X: Reimbursement Update for Private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID), Chemical Maintenance Clinics (Methadone Clinics), and Ambulance Services

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after July 1, 2024, SPA 24-X will amend Attachments 4.19-B and 4.19D of the Medicaid State Plan in order to do the following:

Private ICF/IID Reimbursement

Effective from July 1, 2024, through June 30, 2025, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to make the following changes to the reimbursement methodology for private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID).

For State Fiscal Year (SFY) 2025, this SPA implements a rebase of facility rates based upon 2023 cost report filings, adjusted to reflect rate increases provided after the cost report year ending June 30, 2023. A facility may receive a rate that is less than the rate in effect for the fiscal year ending June 30, 2024. There shall be no increase to rates based on any inflationary factor for the fiscal year ending June 30, 2025.

For SFY 2025, the minimum per diem, per bed rate for each private ICF/IID remains $501.

For SFY 2025, a facility may receive a rate increase for a capital improvement approved by the Department of Developmental Services, in consultation with DSS, for the health or safety of the residents during SFY 2025, only to the extent such rate increases are within available appropriations.

The purpose of this SPA is to comply with subsection (h) of section 17b-340 of the Connecticut General Statutes, as amended by section 274 of Public Act 23-204, An Act Concerning the State Budget for the Biennium Ending June 30, 2025, and Making Appropriations Therefor, and Provisions Related to Revenue and Other Items Implementing the State Budget.

DSS is currently analyzing the projected Upper Payment Limit (UPL) demonstration for SFY 2025. In general, the UPL is a federally required limit on Medicaid payment, which is a calculated amount using federally specified Medicare cost principles, above which Medicaid federal financial participation (FFP) is not available. Depending on the specific results of the UPL demonstration, one or more portions of this SPA may be modified or removed to the extent necessary to reflect that Medicaid payments to ICF/IIDs remain within the UPL.

Second, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to change the reimbursement for chemical maintenance clinics in accordance with recently adopted state legislation in section 73 of Public Act 24-81: subsection (b) of section 17b-280c of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage): ''(b) For the fiscal year beginning July 1, 2024, the commissioner shall amend the Medicaid state plan to increase rates, within available appropriations, for chemical maintenance providers who receive the lowest weekly reimbursement rate for such treatment, provided no provider receiving a higher rate for such treatment, shall have such rate reduced as a result of such rate increase. In accordance with statute, methadone clinics paid a rate of $94.74 or lower will see a 2.3% increase to the weekly rate, effective on or after July 1, 2024.''

Finally, this SPA will amend Attachment 4.19-B of the Medicaid State Plan to change the reimbursement for ambulance providers in accordance with recently adopted state legislation in section 74 of Public Act 24-81: ''For the fiscal year beginning July 1, 2024, the Commissioner of Social Services, within available appropriations, shall increase (1) the Medicaid ambulance mileage rate for all emergency and nonemergency transports by one dollar and eighteen cents, and (2) all other emergency and nonemergency ambulance services rates. The commissioner, within available appropriations, shall provide mileage reimbursement for in-town

trips for said fiscal year.'' Note that $5,000,000 state share was appropriated for this purpose in SFY 2025 (as part of the biennial budget adopted during the 2023 state legislative session), so in accordance with the language quoted above, one or both of these ambulance rate increases noted above may need to be adjusted downward to the extent necessary to remain within that state share appropriation.

Fee schedules are published at: http://www.ctdssmap.com. Select ''Provider'', then select ''Provider Fee Schedule Download''; after accepting the Terms and Conditions, proceed to the applicable fee schedule.

Fiscal Impact

Based on the information that is available at this time, DSS anticipates that this SPA will increase annual aggregate Medicaid expenditures by approximately $608,067 in SFY 2025.

DSS estimates that the changes to the reimbursement rate for chemical maintenance clinics will increase annual aggregate expenditures by approximately $663,015 in SFY 2025 and $682,905 in SFY 2026.

DSS estimates that the changes to the reimbursement for ambulance services will increase annual aggregate expenditures by approximately $13 million in SFY 2025.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''**SPA 24-X: Private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) Reimbursement Update and Chemical Maintenance Clinics (Methadone Clinics) Reimbursement.''**

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **July 25, 2024**.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-Y: Reimbursement Rate Increase for Select Behavioral Health Services for Children

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after July 1, 2024, SPA 24-Y will amend Attachment 4.19-B of the Medicaid State Plan in order to increase the reimbursement as described below for select behavior health services pursuant to Section 1 of Public Act 23-204, which appropriated the sum of seven million dollars to the Department of Social Services.

Effective for July 1, 2024 and forward, reimbursement rates of select behavioral health services for HUSKY Health members, ages 20 years old and under will be increased. Affected behavioral health services (inclusive of all family therapy services) are listed on the following fee schedules: behavioral health clinics, psychologists, physician office & outpatient; medical clinics (including school-based health clinics), and rehabilitation clinics.

Fee schedules are published at: http://www.ctdssmap.com. Select ''Provider'', then select ''Provider Fee Schedule Download''; after accepting the Terms and Conditions, proceed to the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $13,798,100 in SFY 2025 and $15,504,047 in SFY 2026.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-Y: **Reimbursement Rate Increase for Select Behavioral Health Services for Children**''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **July 10, 2024**.

NOTICES

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2024 - 2025 court year is as follows: September 16, 2024; October 28, 2024; December 2, 2024; January 27, 2025; March 3, 2025; April 7, 2025; and May 12, 2025.

Carl D. Cicchetti
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2024 - 2025 court year is as follows: September 3, 2024; October 7, 2024; November 12, 2024; January 6, 2025; February 3, 2025; March 10, 2025; April 14, 2025; and May 19, 2025.

Carl D. Cicchetti
Chief Clerk

Connecticut Bar Foundation

In accordance with Practice Book Rule 1.15(i)(4), notice is hereby given that the Connecticut Bar Foundation has published its 2023 Annual Report on its organizational website. The 2023 Annual Report details a report of IOLTA/IOTA, CFGIA, and JBGIA funds disbursed under the program and can be directly accessed here https://www.ctbarfdn.org/file_download/inline/8f95db46-6046-49ed-bf9d-0eab16d3bd5b