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Table of Contents

CONNECTICUT REPORTS

CONNECTICUT APPELLATE REPORTS

(continued on next page)

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CONNECTICUT REPORTS

Vol. 351

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ADAM P.*
(SC 20849)

McDonald, D'Auria, Mullins, Ecker and Dannehy, Js.**

Syllabus

Convicted of multiple counts of sexual assault in the first degree and risk of injury to a child in connection with the sexual abuse of the minor victims, D and T, the defendant appealed to this court. He claimed, inter alia, that the trial court had violated his due process right to a fair trial by instructing the jury, in accordance with this court's directive in *State* v. *Daniel W. E.* (322 Conn. 593), that it was not to consider the victims' approximately nine year delay in officially reporting the abuse at issue in assessing their credibility. *Held*:

This court overruled that portion of *Daniel W. E.* that modified the constancy of accusation doctrine, as set forth in *State* v. *Troupe* (237 Conn. 284), and returned to the standard previously articulated in *Troupe*, which provides that a person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint, that constancy evidence is admissible only to corroborate the victim's testimony and not for substantive purposes, and that a defendant is entitled to an instruction that a victim's delay in reporting is a factor that the jury can consider in evaluating the victim's credibility.

This court concluded that *Troupe*, along with other avenues available to negate juror biases, such as expert testimony and the application of the rules of evidence, sufficiently balanced the defendant's interest in being free from the undue prejudice that may result from the presentation of multiple constancy witnesses with the state's interest in overcoming potential jury bias against sexual assault victims who delay in reporting.

The defendant was not entitled to a new trial because any error with respect to the trial court's instructing the jury in accordance with *Daniel W. E.* was harmless, as any such error was not constitutional in nature and it was not reasonably probable that the instruction misled the jury in arriving at its verdict.

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

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

The jury charge, as a whole, directed the jury to consider the victims' general credibility on the basis of factors other than their delay in reporting and emphasized that it was the state's burden to prove the requisite elements of the charged offenses, it was not reasonably probable that the jury believed that the challenged instruction precluded it from considering the victims' credibility more generally, neither the jury's verdict nor the primary theory of defense turned on the victims' delayed reporting, and the state's case was strong.

The trial court did not abuse its discretion in permitting D to testify that the defendant told her that he had played the same sex "games" with his daughter that he played with D and T, as D's testimony was probative of the defendant's attempts to groom or pressure her to engage in sexual intercourse with him, and the trial court took measures to mitigate any prejudicial effect of D's testimony.

(*One justice concurring in part and dissenting in part*)

Argued September 26, 2024—officially released February 11, 2025

Procedural History

Substitute information charging the defendant with seven counts of the crime of sexual assault in the first degree and eight counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Dayton*, *J.*; verdict and judgment of guilty of five counts of sexual assault in the first degree and eight counts of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Edward L. Miller*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The defendant, Adam P., appeals directly to this court from his conviction of five counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), four counts of risk of injury to a

child in violation of General Statutes § 53-21 (a) (1), and four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). He first claims that the trial court violated his due process rights when, based on our decision in *State* v. *Daniel W. E.*, 322 Conn. 593, 629, 142 A.3d 265 (2016), it instructed the jury not to consider the delay of the twin minor victims, D and T, in reporting the defendant's sexual abuse when assessing their credibility because that credibility was central to the outcome of the case, therefore misleading the jury. He then claims that the trial court abused its discretion by permitting D to testify that the defendant told her that he previously had played the same sexual "games" with his daughter, A, that he was playing at the time with the victims.

We conclude that we must overrule *Daniel W. E.*, to the extent that it modified our constancy of accusation doctrine set forth in *State* v. *Troupe*, 237 Conn. 284, 304–305, 677 A.2d 917 (1996), so that jurors understand more precisely the parameters for when and how they may consider a victim's delayed reporting when assessing the victim's credibility. Further, we hold that the alleged instructional error was nonconstitutional in nature and that, based on the charges against the defendant and the record in its entirety, it was not reasonably probable that the trial court's *Daniel W. E.* instruction misled the jury in arriving at its verdict. Finally, we reject the defendant's second claim and conclude that the trial court did not abuse its discretion by permitting D to testify that the defendant had told her that he played the same sexual "games" with A that he had with the victims. We therefore affirm the trial court's judgment.

We summarize the facts that the jury could have reasonably found, and the relevant procedural history, as follows. From 2005 to 2013, the defendant was in a romantic relationship with the victims' mother, Q. During most of that time, the defendant lived with Q, D

and T, first in Bridgeport, and then in Stratford. He did not live with them during summers, when the victims stayed with extended family in South Carolina, or for ten months in 2010, when Q was evicted from her Stratford apartment.

When the defendant lived with the victims, Q was rarely home because she often worked twelve hour shifts, seven days a week, as a nursing assistant. While Q was at work, the defendant, who was unemployed, looked after the victims. There were other adults in the home intermittently during this period, with one adult living with Q and the victims for three years.

The defendant sexually abused the victims, beginning when they were five years old. At trial, the victims described graphic incidents in which the defendant engaged in cunnilingus, fellatio, vaginal-penile intercourse, and other sexual contact with the victims, individually or simultaneously, as well as showed them pornography. The defendant described the sexual abuse as "a game" to the victims.

The defendant continued to sexually abuse the victims until he moved to North Carolina after he and Q had ended their relationship. The victims were eleven years old when the abuse ended. They never told anyone about it while it was happening. After the breakup, Q moved to a different location in North Carolina than the defendant and sent the victims to live with extended family in South Carolina. Approximately two years later, the victims joined Q in North Carolina. Q and the defendant kept in touch during this period, and, in 2017, Q asked the victims, then almost fourteen years old, how they would feel about the defendant's coming to live with them again. It was then that the victims disclosed to Q that the defendant had sexually abused them. Q did not report the victims' disclosure to the police but cut off contact with the defendant.

The victims' behavior changed in the months following their disclosure to Q. D struggled at school, engaged in self-harm, ran away from home, and researched sex trafficking. T became withdrawn. D was hospitalized for a mental health crisis, at which point she told a hospital worker that the defendant had sexually abused her. The hospital worker reported this disclosure to the North Carolina authorities, who investigated the claims and, because the incidents had taken place in Connecticut, shared the relevant forensic interviews and medical evaluations with Connecticut law enforcement. The defendant was then arrested in North Carolina and brought back to Connecticut to stand trial.

The defendant was charged with seven counts of sexual assault in the first degree and eight counts of risk of injury to a child. More specifically, the defendant was charged with two counts of sexual assault in the first degree based on an incident involving sexual intercourse with the victims in the apartment where they lived in Bridgeport. The additional five counts of sexual assault in the first degree involved incidents in the apartment where they lived in Stratford. Four of the eight risk of injury to a child charges were based on the events in Bridgeport; the other four were based on the Stratford incidents.

The defendant's defense at trial was that he had never abused the victims and that they fabricated their accusations to maintain Q's attention once it became apparent to the victims that the defendant might return to live with them. He advanced this defense on cross-examination by demonstrating his lack of opportunity to assault the victims, the victims' motive to fabricate to gain Q's attention, and the lack of physical evidence suggesting sexual abuse. Following the close of evidence and the parties' closing arguments, and consistent with our decision in *State* v. *Daniel W. E.*, supra, 322 Conn. 629, the trial court's charge to the jurors included an instruction that D and T's eight year delay in reporting

the sexual abuse "should not be considered by you in evaluating their credibility." The defendant previously had objected to this instruction outside the jury's presence, claiming that it unfairly undermined his primary defense at trial that the victims had fabricated their accusations.

The jury found the defendant guilty on five counts of sexual assault in the first degree and eight counts of risk of injury to a child. It found the defendant not guilty of two counts of sexual assault in the first degree, both involving incidents of sexual intercourse with T alone. The trial court rendered judgment of conviction based on the jury's verdict and sentenced the defendant to a total effective term of forty-eight years of incarceration, twenty-five years of which was a mandatory minimum, followed by thirty-five years of special parole and lifetime sex offender registration. This appeal followed.

I

The defendant first claims that the trial court violated his due process rights when, consistent with *Daniel W. E.*, it instructed the jury not to consider the victims' delay in reporting the abuse when evaluating their credibility. The contested instruction arose on the third day of trial, when the court, while discussing its draft final jury instructions with the parties outside the jury's presence, noted that it intended to deliver a delayed reporting instruction based on Connecticut Criminal Jury Instructions 7.2-1.[1] Defense counsel first objected

[1] Instruction 7.2-1 of the Connecticut model criminal jury instructions provides in relevant part: "If no constancy of accusation witness testified, but there was a delay in officially reporting the offense," the trial court should instruct the jury that "[t]here was evidence in this case that the complainant delayed in making an official report of the alleged sexual assault. There are many reasons why sexual assault victims may delay in officially reporting the offense, and to the extent the complainant delayed in reporting the alleged offense here, the delay should not be considered by you in evaluating (his or her) credibility." Connecticut Criminal Jury Instructions 7.2-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited February 4, 2025).

orally, arguing that the instruction would invade the jury's domain and bolster the testimony of the state's expert witness on the behavior of child victims of sexual assault, Danielle Williams, who testified later that day that sexual assault victims often delay reporting abuse. The court overruled the objection, stating that delay "is not one of the things that should be considered in evaluating credibility" and that, with respect to the impact of the instruction on the expert testimony, "[the jury is] told that . . . [expert] testimony is not binding [on] them and they can disregard it completely."

Defense counsel then submitted a written objection to the instruction, which the court overruled the following morning, again relying on *Daniel W. E.* After the court ruled that the instruction was appropriate, the jury heard counsels' closing arguments and the court's final instructions, including the instruction now at issue, which read in full: "There was evidence in this case that [D and T] delayed in making an official report of the alleged sexual assaults. There are many reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent [D and T] delayed in reporting the alleged offense here, the delay should not be considered by you in evaluating their credibility."

The defendant asks that we overrule the portion of our decision in *Daniel W. E.* that directed trial courts to give this instruction because requiring that jurors disregard any delay in reporting abuse when assessing the victims' credibility constitutes an invasion of the jury's fact-finding role. He contends further that the instruction improperly shifted the state's burden of proof to him by signaling to the jury that the victims' delay in reporting was a symptom of the defendant's sexual abuse, which, in turn, undermined his fabrication defense. He claims that the instruction necessarily harmed him because the victims' credibility was dispositive of the case's outcome, and the jury might have found him

not guilty on all counts if it could have considered the delayed reporting when assessing his fabrication defense.

In response, the state argues that the trial court did not provide the instruction in error because, read in the context of the entire jury charge, the instruction precluded the jury from considering only the *fact* of the victims' delay in reporting the sexual abuse, but not the *reasons* for that delay, when assessing their credibility. The state also asserts that, even if the instruction was erroneous, it was harmless because the jurors understood, based on the evidence and arguments presented at trial, that they could consider the victims' reasons for delay when assessing their credibility and that the instruction did not inescapably signal that D and T were, in fact, victims because they delayed reporting. Regardless of whether the instruction was deficient in the present case, however, the state joins the defendant in requesting that we reconsider our holding in *Daniel W. E.*, specifically asking that we "overrule *Daniel W. E.* in its entirety, scrap the apparently unique procedure adopted therein, and return to the constancy doctrine as it existed under *Troupe*."

We first address and reconsider the jury instruction in *Daniel W. E.* that we directed trial courts to provide when facing circumstances such as those the court confronted in the present case, and we further overrule the changes to the constancy of accusation doctrine contained in that opinion. Next, we consider the impact the instruction had on the defendant in the present case and hold that any impact was harmless.

A

As noted, the instruction at issue derives from our holding in *Daniel W. E.*, which built on our constancy of accusation doctrine. Any discussion of that doctrine requires some context.

Beginning in the early nineteenth century, Connecticut common law allowed the state in a sexual assault case to offer constancy evidence, which generally included proof that the victim had disclosed the sexual assault to third parties prior to making a formal complaint to authorities. See *State* v. *Troupe*, supra, 237 Conn. 294–99 (reciting history of constancy of accusation doctrine). The law permitted the court to admit this evidence to negate the inference a fact finder might draw, namely, that a complainant was fabricating her accusation if she failed to officially report the alleged sexual abuse promptly after the incident. Id., 296.

In *Troupe*, we rejected the defendant's request that we abandon our constancy of accusation doctrine altogether and held that the biases supporting that doctrine still existed in our society. Id., 303. But we narrowed the admissibility of constancy evidence to better serve "the interests of the defendant, the state and the victim," who, in that case, was thirty years old at the time of the crime. Id., 287, 303. Specifically, we held that a constancy witness "may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator. . . . Thus, such evidence is admissible only to corroborate the victim's testimony and not for substantive purposes." (Footnote omitted.) Id., 303; see also Conn. Code Evid. § 6-11 (c) (codifying *Troupe* rule). To further accommodate the interests of the defendant, we directed that "the defendant is entitled to an instruction that any delay by the victim in reporting the incident is a matter for the jury to consider in evaluating the weight of the victim's testimony." *State* v. *Troupe*, supra, 237 Conn. 305.

In *Daniel W. E.*, two decades after *Troupe*, we again were asked to either modify or abandon the constancy of accusation doctrine, particularly in child sexual abuse cases. The defendant in *Daniel W. E.* first asserted that the trial court's jury instruction on the correct use of constancy evidence misled the jury because it failed to adequately distinguish constancy evidence from substantive proof. *State* v. *Daniel W. E.*, supra, 322 Conn. 608. He next claimed that, based on increased public understanding of child sexual abuse along with other evidentiary rules permitting the introduction of probative evidence, he was unfairly prejudiced by the hypothetically unlimited number of constancy witnesses that the state could call under *Troupe*, even though only two constancy witnesses testified at his trial. Id., 617–18. We concluded that the instruction concerning the use of constancy evidence did not mislead the jury and that implicit juror biases against victims, including children, who delay in officially reporting sexual abuse remained, and, therefore, we declined to abolish the constancy of accusation doctrine entirely. Id., 616, 618. We nevertheless modified the doctrine to alleviate "the potential prejudice to defendants caused by the testimony of multiple constancy witnesses." Id., 618. To achieve "a proper balance between the interests of the state and the defendant"; id., 630; and after considering "the myriad ways in which other courts have attempted to balance these competing interests," we directed that "the victim in a sexual assault case should continue to be allowed to testify on direct examination regarding the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. . . . Thereafter, if defense counsel challenges the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting, the state will be permitted to call constancy of accusation witnesses subject to the limitations estab-

lished in *Troupe*, as modified in this opinion. If defense counsel does not challenge the victim's credibility in any fashion on these points, the trial court shall not permit the state to introduce constancy testimony but, rather, shall instruct the jury that there are many reasons why sexual assault victims may delay in officially reporting the offense, and, *to the extent the victim delayed in reporting the offense, the delay should not be considered by the jury in evaluating the victim's credibility.*" (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 629. The parties accurately observe that this procedure, now at issue in this appeal, is unique to this state.

We agree with both parties that we should reconsider the balance we struck in *State* v. *Daniel W. E.*, supra, 322 Conn. 617–30, in our attempt to mitigate the potential prejudice to the defendant of multiple constancy of accusation witnesses. We recognize that doing so necessarily implicates stare decisis, which "counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). Appropriate reasons and logic include "[w]hen a previous decision clearly creates injustice . . . ." (Internal quotation marks omitted.) Id., 520. Then, "[t]he court must weigh [the] benefits of [stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust"; (internal quotation marks omitted) id.; understanding that stare decisis is "not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." (Internal quotation marks omitted.) *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970); see also *State* v. *Moulton*,

310 Conn. 337, 362 n.23, 78 A.3d 55 (2013). We "should be especially wary of overturning a decision that involves the construction of a statute"; (internal quotation marks omitted) *State* v. *Bischoff*, 337 Conn. 739, 762, 258 A.3d 14 (2021); or claims "expressly . . . raised and rejected by this court"; *State* v. *Ray*, 290 Conn. 602, 614, 966 A.2d 148 (2009); however, our decision in *Daniel W. E.*, involved an issue of judicial policy, specifically, how to instruct the jury on a sexual assault victim's delayed reporting, and when constancy of accusation evidence may be introduced at trial. Although we do not suggest that we should ever treat the stare decisis doctrine cavalierly, we are less reluctant under these circumstances to correct what we conclude to be an error of judicial policy that might mislead the jury at trial. See *Payne* v. *Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ("[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights . . . [and] the opposite is true in cases . . . involving procedural and evidentiary rules" (citations omitted)).

Although we reject the defendant's argument that the instruction we directed trial courts to deliver in *Daniel W. E.* violates due process, as we will discuss in greater detail in part I B of this opinion, we conclude that our modification of the constancy of accusation doctrine in *Daniel W. E.*, although well-intentioned, unduly confuses what a jury may and may not consider when assessing a victim's credibility in a sexual assault case, and conflicts with aspects of *Troupe* that we left untouched. In light of these conclusions, we have determined that we will not allow principles of stare decisis to prevent our reconsideration and reformulation of an area of the law so important to the fairness of a sexual assault trial.

The instruction at issue refers to evidence "that [D and T] delayed in making an official report" of the

assaults and explains in the same sentence that there are "many reasons why sexual assault victims may delay," all the while admonishing that any delay "should not be considered by [the jury] in evaluating their credibility." Considering the instruction closely, as the defendant requests, we understand how the sentence may create confusion. The state argues that, because the court's instructions as a whole emphasized the jury's role in assessing general credibility and the state's burden of proof, the jury understood that it could consider the victims' reasons for delay, but not the fact of the delay itself, when assessing their credibility. Although our cases consistently direct that we must read a trial court's charge as a whole, and not myopically, we do not believe that the jury would understand that the reasons why a victim might delay reporting sexual assault are necessarily separate from the delay itself based on the instructions provided, given that we have trouble discerning or articulating this distinction convincingly ourselves.

Rather than only enjoining trial courts from providing this portion of the instruction, which we had directed courts to provide in *Daniel W. E.*, we choose to overrule the entirety of our modification of the constancy doctrine in that case because we are convinced that incompatibilities remain between *Daniel W. E.* and *Troupe*. For example, *Daniel W. E.* instructs that, if the state is permitted to call constancy of accusation witnesses, the testimony of those witnesses should be governed by the limitations established in *Troupe*. See *State* v. *Daniel W. E.*, supra, 322 Conn. 629. But *Troupe* provides that the defendant is entitled to an instruction that "any delay by the victim in reporting the incident is a matter for the jury to consider" when evaluating witness credibility. *State* v. *Troupe*, supra, 237 Conn. 305. Reading *Troupe* and *Daniel W. E.* together thus means that, if a defendant challenges the victim's credibility based on

a delay in reporting and the state then calls constancy witnesses, the jury must be instructed to consider any delay; but, if a defendant does not challenge the victim's credibility and the state therefore does not call constancy witnesses, the jury will be instructed to disregard any delay. We cannot reconcile this disparate outcome considering the otherwise parallel nature of these cases. See E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) §§ 6.33.4 and 6.33.5, pp. 420–21. Moreover, if we were to abandon only the *Daniel W. E.* instruction but leave in place the rest of our holding, all that would remain of *Daniel W. E.* is the requirement that a defendant must attack a victim's credibility for the state to introduce constancy testimony. This requirement does little in practice, as a defendant will almost invariably attack a victim's credibility in sexual assault cases, whether through cross-examination, as part of the defendant's own presentation of evidence or in argument.

We therefore return our constancy of accusation doctrine to its earlier status under *Troupe*. We believe that *Troupe*, along with the other avenues available to negate juror biases, such as expert testimony, sufficiently balance the defendant's interest in not being unreasonably burdened by constancy testimony with the state's interest in overcoming potential jury bias against victims of sexual abuse who delay in reporting. As illustrated by the testimony of Williams, we specifically allow expert testimony about the general behavioral characteristics of sexual abuse victims, including delayed reporting. This testimony, if credited by the jury, combats any skepticism the jury might harbor toward sexual assault victims who delay in reporting, without requiring the jury to take delay entirely off the table when assessing the victims' credibility or risking that the jury will so construe the court's instructions. See *State* v. *Favoccia*, 306 Conn. 770, 780, 51 A.3d 1002 (2012).

It is also important to point out that *Troupe* already directs that trial courts substantively provide the reformed jury instruction the defendant in the present case requests, namely, one that instructs that delay is a factor jurors may consider when evaluating witness credibility. See *State* v. *Troupe*, supra, 237 Conn. 305 ("the defendant is entitled to an instruction that any delay by the victim in reporting the incident is a matter for the jury to consider in evaluating the weight of the victim's testimony"). Thus, the defendant's argument against a return to *Troupe* and, in turn, for maintaining part of the constancy of accusation doctrine we articulated in *Daniel W. E.*, relies on the possibility of undue prejudice to the defendant from the state's presentation of multiple constancy witnesses. But, in *Troupe*, we expressly addressed this concern, concluding that a trial court's responsibility to carefully consider and limit the detail that constancy witnesses may provide sufficed to offset the prejudice a defendant might suffer from multiple constancy witnesses. See id., 302–303.

We further observe that ordinary rules of evidence already safeguard defendants against this prejudice. Section 4-3 of the Connecticut Code of Evidence provides, for example, that relevant evidence may be excluded if it wastes time or needlessly presents cumulative evidence. Thus, if constancy testimony is unnecessarily duplicative, trial courts already have the tools to vigilantly protect the defendant from undue prejudice. We must, however, distinguish between what the defendant in *Daniel W. E.* described as the state's " 'piling on' " of multiple constancy witnesses; *State* v. *Daniel W. E.*, supra, 322 Conn. 618; and the state's presentation of a strong case involving several constancy witnesses who testify in a limited manner, consistent with *Troupe*. The former requires that trial courts not admit needlessly cumulative[2] evidence,

[2] We highlight that our Code of Evidence specifies that evidence may not be *needlessly* cumulative. See Conn. Code Evid. § 4-3. Two constancy

whereas the latter strongly negates any inference that a sexual assault victim's delayed reporting is evidence of fabrication.

Troupe also already contains other limitations meant to protect defendants from undue prejudice. For example, under *Troupe*, constancy witnesses "may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to [the details] necessary to associate the victim's complaint with the pending change . . . ." *State* v. *Troupe*, supra, 237 Conn. 304. Additionally, trial courts must

witnesses who testify about a victim disclosing an assault to them on separate occasions, as in *Daniel W. E.*, does not necessarily result in needlessly cumulative testimony. See *State* v. *Parris*, 219 Conn. 283, 293–94, 592 A.2d 943 (1991) ("[E]ach item of the state's constancy evidence . . . pertained to a different statement that the victim had made to a different person at a different point in time. . . . [T]herefore, the evidence covered new matter by demonstrating . . . that the victim previously had reported the incident . . . in a constant and consistent fashion."); see also *State* v. *Kelly*, 256 Conn. 23, 38–40, 770 A.2d 908 (2001) (overlapping constancy testimony still was not necessarily unfairly duplicative following *Troupe*). Rather, such testimony serves the purpose *Troupe* contemplated: it undercuts any notion that a victim must be lying if she delayed making an official report. See *State* v. *Kelly*, supra, 38; *State* v. *Parris*, supra, 293–94. This is not to say that constancy testimony can never be needlessly duplicative. For example, if a victim told a group of individuals about a sexual assault at a sleepover party, it might be needlessly cumulative for each individual to testify because each report would only reiterate the same disclosure, given in the same set of circumstances. However, if, at the same sleepover party, a victim told multiple individuals about different sexual assaults, or told one individual about a sexual assault and then told another person about the same sexual assault at a later date, that testimony would not be needlessly cumulative because each report would present "new matter . . . ." (Internal quotation marks omitted.) *State* v. *Parris*, supra, 293. But see R. Block, Note, "The New Face of Connecticut's Constancy of Accusation Doctrine: *State* v. *Troupe*," 29 Conn. L. Rev. 1713, 1738–39 (1997) ("[T]he court [in *Troupe*] admitted that cumulative testimony could be prejudicial [and addressed this concern by holding that] detail testimony would no longer be allowed . . . [but] the change does not correspond to the concern. . . . There will still be the enhanced risk that the jury may be unduly swayed by the repeated iteration of the constancy of accusation testimony." (Footnotes omitted; internal quotation marks omitted.)).

provide a limiting instruction, stating that, because it is hearsay and the rules of evidence therefore consider it unreliable, any constancy testimony admitted pursuant to *Troupe* should not be considered substantively—that is, jurors are not permitted to use, and should not use, the testimony to help determine whether the accusation is true. Id., 305. By returning to *Troupe*, we affirm that trial courts, subject to appellate review, are in the best position to properly "balance the probative value of the evidence against any prejudice to the defendant," pursuant to the standards articulated in *Troupe* and the ordinary rules of evidence. Id.

Accordingly, we overrule the modification of the constancy of accusation doctrine established in *Daniel W. E.* and return to the standards we previously articulated in *Troupe*. Going forward, we encourage the Judicial Branch's Criminal Jury Instruction Committee to modify the constancy of accusation instruction to more closely follow the language used by the New Jersey courts in their 2013 revision of the charge. See New Jersey Model Criminal Jury Charges, Fresh Complaint: Silence or Failure to Explain (revised April 15, 2013), available at https://www.njcourts.gov/sites/default/files/charges/non2c029.pdf (last visited February 4, 2025);[3] see also *State* v. *Daniel*

[3] The April 15, 2013 revision of the New Jersey model charge provides: "The law recognizes that stereotypes about sexual assault complainants may lead some of you to question [complaining witness's] credibility based solely on the fact that [he or she] did not complain about the alleged abuse sooner. You may or may not conclude that [complaining witness's] testimony is untruthful based only on [his or her] silence/delayed disclosure. You may consider the silence/delayed disclosure along with all of the other evidence including [complaining witness's] explanation for his/her silence/delayed disclosure when you decide how much weight to afford to [complaining witness's] testimony." (Footnote omitted.) New Jersey Model Criminal Charges, supra, Fresh Complaint: Silence or Failure to Explain.

We note that the New Jersey model instruction includes a footnote that states that this instruction should not be used when there is testimony about "child sexual abuse accommodation syndrome," akin to expert testimony about behaviors common to child sexual abuse victims, because New Jersey provides a separate, special instruction for such testimony. See id., n.1. Because our model jury instructions do not presently contain a special

W. E., supra, 322 Conn. 615–16 and n.11 (rejecting defendant's claim that *Troupe* instruction on limited purpose of constancy evidence misled jury and encouraging trial courts, going forward, to provide jury instructions in line with more detailed New Jersey model instruction, as revised to February 5, 2007, to inform jurors about limited purpose of constancy evidence).

B

Having concluded that we should abandon the approach to constancy evidence that we adopted under *Daniel W. E.*, we must next address whether the instruction we directed trial courts to provide in that case was harmful, consequently entitling the defendant to a new trial. We exercise plenary review over a challenge to jury instructions because it presents a question of law. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 529, 180 A.3d 882 (2018).

To determine whether the defendant is entitled to a new trial because of an erroneous jury instruction, "we review the entire charge to determine if, taken as a whole, the charge adequately guided the jury to a correct verdict. . . . In appeals not involving a constitutional question [we] must determine whether it is reasonably probable that the jury [was] misled . . . . [I]n appeals involving a constitutional question, [however, the standard is] whether it is reasonably *possible* that the jury [was] misled." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 594, 275 A.3d 578 (2022); see *State* v. *Tatum*, 219 Conn. 721, 734, 595 A.2d 322 (1991) (" '[t]he ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present

instruction for that type of expert witness, but only a standard instruction for expert testimony generally, we encourage trial courts to rely on the body of the New Jersey model charge without paying heed to the exception in the footnote.

the case to a jury in such a way that injustice is not done to either party under the established rules of law' "). If the instruction involves a constitutional violation, the state bears the burden of demonstrating harmlessness, whereas, if the instruction does not, the defendant bears the burden of demonstrating harm. See *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015) (" '[i]f an improper jury instruction is of constitutional magnitude, the burden is on the state to prove harmlessness beyond a reasonable doubt' "). Instructional errors violate due process—and, therefore, are of constitutional dimension—when they confuse the burden of proof, the presumption of innocence, or one of the essential elements of the crime. See *State* v. *LaBrec*, 270 Conn. 548, 557, 854 A.2d 1 (2004) ("[w]e previously have considered an instructional impropriety to be of constitutional dimension only when it has gone to the elements of the charged offense, the burden of proof or the presumption of innocence, concepts that undeniably are fundamental to the notion of a fair and impartial jury trial"); see also *State* v. *Dash*, 242 Conn. 143, 152, 698 A.2d 297 (1997); *State* v. *Tillman*, 220 Conn. 487, 503, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 112 S. Ct. 3000, 120 L. Ed. 2d 876 (1992).

The defendant argues that the instructional error in the present case is of constitutional dimension, requiring the state to show that the error was harmless beyond a reasonable doubt. We are not persuaded. We have repeatedly held that, when a claim "does not involve the violation of a constitutional right, the burden rests upon [the defendant] to demonstrate the harmfulness of the court's error." *State* v. *Cooper*, 182 Conn. 207, 212, 438 A.2d 418 (1980); see also *State* v. *Patterson*, 276 Conn. 452, 471–72, 886 A.2d 777 (2005). More particularly, we have expressed that general credibility instructions regarding constancy of accusation testimony are nonconstitutional in nature because they do

not, on their own, confuse the elements of a crime, shift the state's burden of proof to the defendant, or undermine the defendant's presumption of innocence. See, e.g., *State* v. *Jones*, 337 Conn. 486, 509, 254 A.3d 239 (2020); *State* v. *Daniel W. E.*, supra, 322 Conn. 610; see also *State* v. *Roberto Q.*, 170 Conn. App. 733, 743, 155 A.3d 756 (citing Appellate Court cases), cert. denied, 325 Conn. 910, 158 A.3d 320 (2017).

Credibility is often particularly important in sexual assault cases, and victims' delayed reporting may be relevant to their credibility. In fact, what to make of delay is often a point of dispute between the parties in sexual abuse cases, with one side positing that delay is a symptom of a victim's trauma, and the other claiming that it is consistent with a motivation to fabricate accusations. Even so, neither delay nor credibility is an element of the charged offenses; nor do they shift the state's burden of proof to the defendant. Cf. *State* v. *Devalda*, 306 Conn. 494, 507–508, 50 A.3d 882 (2012) (instructional error was of constitutional dimension when jury was told it could find restraint element, which is essential to kidnapping, proven if it found that victim had " 'acquiesced,' " but court failed to define "restraint by acquiescence" as limited to when victim is younger than sixteen or incompetent). And, although we have held that instructions mandating that jurors draw particular inferences might violate due process, we have done so when those instructions "[relieve] the state of the burden of proving an *essential element of the offense* . . . ." (Citation omitted; emphasis added.) *State* v. *Williams*, 199 Conn. 30, 36, 505 A.2d 699 (1986); see also *State* v. *Bunkley*, 202 Conn. 629, 657–58, 522 A.2d 795 (1987) (instruction on mandatory legal effect of police officers' conduct as to defendant's liability did not violate due process because "the challenged statement was not given as part of the court's instruction on an element of the crimes charged"). Because the instructional error

we have found in the present case neither shifted the burden of proof to the defendant, implicated the defendant's presumption of innocence, nor dealt with an element of the charged crimes, we reject the defendant's argument that the error is of constitutional dimension.

We must now consider whether the defendant has demonstrated that it is not just reasonably possible, but reasonably probable—meaning more probable than not—that the instructional error misled the jury in arriving at its verdict, therefore requiring reversal. See *State* v. *Chapman*, 229 Conn. 529, 544, 643 A.2d 1213 (1994) ("[u]nder the circumstances . . . we cannot conclude that it is more probable than not that the court's instructional impropriety affected the result"). This determination is necessarily fact intensive, requiring that we look to the instructions provided, the parties' theories of the case, and the larger record, all in their entireties, to ensure that "injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Gomes*, 337 Conn. 826, 849, 256 A.3d 131 (2021). "We evaluate the harmfulness of a nonconstitutional error on the record as a whole. . . . An improper instruction is not automatically harmful merely because it adversely affects a defense." (Citations omitted.) *State* v. *Ross*, 230 Conn. 183, 215, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). The defendant's claim of harm requires that we conclude that the jury's verdict turned on its misunderstanding, based on the *Daniel W. E.* instruction, that it could not consider the victims' delayed reporting of the sexual abuse when assessing their credibility. See *State* v. *Patterson*, supra, 276 Conn. 473 ("in the absence of [an instruction on the jailhouse informant's credibility] the jury reasonably could not have found the defendant guilty . . . [b]ecause [the informant's] testimony was so critical to the state's case, and because the other evidence on which the state

relied was so weak, we cannot say that the trial court's failure to charge the jury specially regarding [the informant's] credibility was harmless" (citation omitted)). Considering the record as a whole, including the jury instructions, the theory of defense, and the strength of the evidence presented, we conclude that it is not reasonably probable that the erroneous instruction misled the jury because it had sufficient tools with which to judge the victims' credibility, and neither the verdict nor the defendant's theory of the case turned on delay.

Beginning with the jury instructions, notwithstanding our rejection of the *Daniel W. E.* instruction that the victims' delay "should not be considered . . . in evaluating their credibility," we cannot conclude that it is reasonably probable that the jury believed that it was precluded, based on this portion of the charge, from considering the victims' credibility more generally, and therefore, we are not convinced based on the instructions alone that the jury was misled in arriving at its verdict. The instructions as a whole directed the jury to consider the victims' credibility based on factors other than delay and emphasized that the state's burden of proof does not shift to the defendant. There is no reason to believe that the jury, based purely on the *Daniel W. E.* instruction, would disregard the credibility factors the court provided as examples in its final charge or its instruction on the state's burden of proof. See, e.g., *State* v. *Beavers*, 290 Conn. 386, 408, 963 A.2d 956 (2009) (in absence of contrary evidence, reviewing court presumes jurors followed trial court's jury instructions).

Specifically, the trial court, immediately before providing the instruction at issue, stated that, to obtain a guilty verdict, the state must prove the requisite elements beyond a reasonable doubt for each charge, and that that burden cannot shift to the defendant during trial. It then instructed that the jury was the sole judge

of credibility and that it alone should determine "which testimony to believe, and which testimony not to believe." It proceeded to describe the factors a jury might look to when considering a witness' credibility, including whether "the witness [was] able to see, hear, or know the things about which the witness was testifying, how well was the witness able to recall and testify to these things . . . the witness' manner while testifying, [whether] the witness [had] an interest in the outcome of the case, or any bias or prejudice concerning any party or any matter involved in the case, how reasonable was the witness' testimony when viewed in light of all the evidence in the case, and [whether] the witness' testimony [was] contradicted by what that witness [had] said or done at another time, or by the testimony of other witnesses, or by other evidence."

After the trial court provided the instruction that we have today disavowed,[4] it instructed the jury on how to assess the credibility of expert witnesses, noting that, "[i]t is for you to consider the testimony with the other circumstances in the case and, using your best judgment, to determine whether you will give it any weight, and, if so, what weight you will give it." Finally, the trial court again discussed with the jurors the elements of each charged offense, reminding them that, to find the defendant guilty of any charge, they must find that the state has proven every element of the charge beyond a reasonable doubt.

[4] We emphasize that the trial court in the present case laudably undertook its best efforts to faithfully implement the direction that this court provided in *Daniel W. E.* and that the model criminal jury instruction for constancy of accusation testimony sought to implement. See Connecticut Criminal Jury Instructions 7.2-1, supra. For this reason, at least, we cannot conclude that the trial court committed plain error, as the defendant asks us to conclude in the alternative. See, e.g., *State* v. *Turner*, 334 Conn. 660, 684, 224 A.3d 129 (2020) (" '[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine' ").

Our conclusion that it is not reasonably probable that the jury was misled by the erroneous instruction is supported further by the fact that the defendant's principal defense—that no sexual abuse had occurred and that the victims had fabricated such accusations—centered on his insufficient opportunity to sexually abuse the victims and the absence of physical evidence, categories wholly separate from any delayed reporting. The defendant's reliance on delay in support of his fabrication theory was minimal, and the jury was able to appreciate his defense even if it arguably believed it was constrained to disregard delay in assessing the victims' credibility. See *State* v. *Quintana*, 209 Conn. 34, 47, 547 A.2d 534 (1988) (erroneous jury instruction was harmless when jury's verdict hinged on factual determinations that were " 'not classically dependent' " on subtleties of legal issue); see also *State* v. *Helmedach*, 306 Conn. 61, 80, 48 A.3d 664 (2012) (instructional error was harmless when instruction could not have changed jury's verdict).

Specifically, while cross-examining the various witnesses, defense counsel repeatedly stressed the lack of physical evidence, highlighting, for example, that T claimed that the defendant had bitten her ear during a sexual abuse incident but did not leave a mark and that, although Q regularly took her and D to a doctor as children, T's doctor had never asked about sexual or physical abuse. Counsel also questioned the validity of the police investigation, as neither Connecticut nor North Carolina detectives had made any effort to obtain the victims' medical records from the time during which the alleged abuse occurred to corroborate their accusations.

Defense counsel, again on cross-examination, also highlighted the defendant's lack of opportunity to assault the victims because other adults lived in the home during the time the abuse occurred, with at least one adult

living with them for three years. Defense counsel also pointed to the lengthy periods of time during which the victims and the defendant did not live in the same household, with D stating that they spent summers in South Carolina with extended family, away from both Q and the defendant. This focus on the other adults present in the home during the time the abuse occurred, and the distance between the victims and the defendant, necessarily encouraged the jury to question whether he would have had the opportunity to abuse the victims at all.

Defense counsel's closing argument further illustrates that the primary theory of defense did not center on delay but, rather, on the defendant's lack of opportunity to assault the victims and the lack of physical evidence. It also demonstrates that the jury was well equipped to assess the victims' credibility using other factors, despite the erroneous instruction. Defense counsel suggested that it would not be possible for the victims to be assaulted in such a violent manner without the other adults living in the home knowing about it, considering the small size of the apartments in which the abuse occurred. She laid out the many inconsistencies between the victims' testimony that did not involve delay in reporting and explicitly asked the jury to consider those inconsistencies when assessing their credibility. For example, she noted that the victims' testimony did not match up as to where the first incident had occurred, whether the defendant had threatened them, and whether the victims had talked to each other about the abuse. Defense counsel further highlighted the complete lack of physical evidence and the results of the victims' medical examinations, emphasizing that there were no findings consistent with sexual abuse and going so far as to posit, "[w]e're talking about . . . very rough sex on small children. . . . [The defendant is] not a small man. . . . Does this make sense?"

Thus, notwithstanding the defendant's efforts on appeal to portray the delay as the centerpiece of his defense, our comprehensive review of the testimony elicited and arguments made at trial reveals that the victims' delay in reporting the defendant's abuse played a relatively unimportant role in the defendant's theory of the case. Even if we assume that the jury did not credit either of the victims' testimony, which offered some alternative reasons for their disclosure that could be considered separately from delay,[5] or the testimony of the state's expert, who explained why many victims do not more promptly disclose the abuse they have endured at a very young age, the victims' delay in reporting the defendant's abuse was arguably relevant to their motive to fabricate their accusations. Yet, evidence of delay was only one piece of the defendant's fabrication theory. On cross-examination, and again during closing, defense counsel questioned *why* the victims would not disclose the abuse earlier, once they were not living with the defendant during the summers and it was therefore physically safe to do so. In closing argument, counsel suggested to the jury that the victims' accusations were merely a recent bid for attention from Q. In other words, the defendant argued that the victims' motivation to fabricate was based on their relationship with Q, a credibility factor that the jury might consider as separate from delay.

The record supports this distinction. On cross-examination, defense counsel elicited that Q was absent for much of the victims' childhoods because of her work schedule, that D believed that Q did not care that the defendant was sexually abusive, that nothing happened as a result of D's disclosure until she was hospitalized, and that Q did not immediately come to see D in the hospital, despite having been notified. Defense counsel highlighted this testimony during closing argument, ask-

[5] One such reason was the victims' fear of pregnancy.

ing the jury to consider that the victims made up their accusations because they did not want to give up their long sought-after attention from Q and blamed Q for their deteriorated emotional state leading up to and after their disclosure based on her absence from their lives. Defense counsel also stressed the damage that constantly moving between homes, starting at a new school, and not having a stable mother figure would have on the victims, and how that damage might manifest itself in the victims' fabricating accusations to get attention from Q. Thus, the jurors were able to assess the defendant's fabrication theory, even without considering delay, by relying on the victims' relationship with Q to inform their motivation to fabricate, as well as on general credibility factors provided by the defendant and the court.

The only explicit mention during closing arguments of delayed disclosure as related to credibility was brief. Defense counsel recounted Williams' expert testimony that victims might delay disclosure because of their love for the abuser and that they do not want to hurt the abuser, or because the victim lives with the abuser and fears retaliation. She contended that the victims' proffered reasons for their delayed disclosure were inconsistent with those Williams described because the victims felt no loyalty toward the defendant and were not in close proximity to him for extended periods of time. Therefore, as we previously discussed, even if defense counsel did not highlight delay during closing argument because of the *Daniel W. E.* instruction, the jury was able to assess the victims' credibility by considering other factors, such as their consistency while testifying, that both the trial court and defense counsel had emphasized.

Lastly, we consider the strength of the evidence presented at trial. The defendant contends that the state's case was weak and, therefore, that the instruction we

now reject was more likely to be harmful because "[t]here was no forensic evidence, no physical evidence, and no witnesses other than the [victims]." Upon our review of the record, however, we conclude to the contrary. The strength of the state's case buoys our determination that it is not reasonably probable that the erroneous instruction misled the jury. See *State* v. *Patterson*, supra, 276 Conn. 472 (instructional error was exacerbated by, and therefore harmful because of, lack of corroborative evidence); *State* v. *Ruth*, 181 Conn. 187, 197, 435 A.2d 3 (1980) (harmlessness of instructional error was supported principally by "the overwhelming nature of the evidence").

The state's case, even without physical or forensic evidence, was strong. See *State* v. *Felix R.*, 319 Conn. 1, 18–19, 124 A.3d 871 (2015) ("a [sexual abuse] case is not automatically weak just because . . . [of] the lack of conclusive physical evidence corroborating sexual assault, especially given the corroborating evidence introduced at trial"). The victims testified extensively, and largely consistently about the defendant's actions, at least as to the type of idiosyncratic details that Williams noted were indicative of children truthfully recalling sexual abuse.[6] The state also presented multiple

[6] The victims testified that the first incident of sexual abuse began with the defendant's asking if they would like to play a game that T described as "licking cups." D then testified that the defendant orally, vaginally, and anally assaulted them in the dining room, and T testified that the defendant orally and vaginally assaulted them after forcing them to watch a pornographic film. D testified to another incident when the defendant forced her to watch a pornographic film while he vaginally assaulted T and, following the film, orally and vaginally assaulted D. T also testified that the defendant vaginally assaulted her twice without D present.

The victims further testified about an incident that started with the defendant's asking if they wanted to play the game and ended with Q's returning from work. D said that she saw the defendant take T into Q's bedroom and, worried for her sister, went inside to ask what they were doing. After D entered the room, the defendant forced her to digitally penetrate him while he orally assaulted T. D then described the defendant's ordering her to leave the room because she had digitally penetrated him "so badly," at which point she sat outside Q's bedroom door. T's account of this incident was

witnesses who bolstered the victims' credibility, including three detectives and Williams. The detectives corroborated the victims' timeline of events, noted that, in their experience, the lack of physical evidence was common in cases involving late disclosures by children of sexual assault, and detailed how they investigated and assessed the reliability of the victims' allegations. With respect to reliability, Detective Thomas Russell Varnadoe, the lead investigator into the victims' claims in North Carolina, testified that the victims underwent separate forensic and physical examinations conducted by a multidisciplinary team of prosecutors, police officers, social workers, and others who have worked on sexual assault investigations. Varnadoe stated that he observed the interviews of the victims, transcripts of which were admitted into evidence at the time of trial, and that the interviews informed his investigation. Following those examinations, law enforcement was able to establish a reliable timeline of when and where the incidents occurred, in part by corroborating certain details with Q, such as the color or makeup of the house in Stratford, and by confirming where the victims lived and for what period of time through the use of a police database that provided information that was largely consistent with the information provided by Q and the victims. Williams also bolstered the victims' credibility by testifying at length about the general behavior of child sexual abuse victims, including changes in behavior and delayed reporting. She explained the common

largely consistent with D's account. T testified that the defendant put on a pornographic film and proceeded to orally assault D while T watched and, in short order, attempted to force T to engage in oral sex with D. T further testified that the defendant, after D said she did not like it and did not want to continue, told D to leave the room and stand as a lookout for when Q returned from work. Once D left the room, T testified, the defendant vaginally and orally assaulted her.

Although the victims testified only as to the details of the previously mentioned incidents, D further stated that, at least at the Stratford apartment, the abuse happened "every day . . . ."

triggers for reporting abuse and factors that might make a disclosure more or less credible, including a recounting of "important idiosyncratic details, contextual details, peripheral details . . . [that] wouldn't be there if something didn't happen to them because they're not typically details [someone would have] if . . . it didn't happen . . . ."

Additionally, although there are limits to what inferences we may properly draw from a jury's verdict, the jury's split verdict in the present case increases our confidence that the erroneous instruction was harmless because *what* the jury split its verdict on indicates that it assessed the victims' credibility. See, e.g., *State* v. *Angel T.*, 292 Conn. 262, 294, 973 A.2d 1207 (2009) ("the split verdict suggests that the jury had doubts concerning [the complainant's] credibility as a general matter, as it failed to credit [some of] her testimony"). Specifically, the jury found the defendant not guilty of two counts of sexual assault in the first degree as to incidents involving only T. The state alleged that both incidents took place in Stratford. The jury found the defendant guilty of one count of sexual assault in the first degree in connection with an incident in which D was the sole complainant that the state also alleged took place in Stratford. The jury came to different conclusions about the veracity of the victims' claims, despite their other similarities: both sexual assault incidents allegedly took place in Stratford and involved one victim without the other present. Therefore, we are comfortable inferring, based on the present record, that the jury must have made a credibility determination based on something besides delay to find the defendant not guilty of those two counts involving only T.

Given our careful review of the trial record, including the victims' extensive testimony and corroborating testimony by other witnesses, we are confident that the jury had sufficient grounding on which to make a credi-

bility determination and that the jury's verdict turned on that general credibility determination rather than specifically on the victims' delayed reporting. Because the trial court's jury instructions were adequate as a whole, and the strength of the state's case corroborated the victims' credibility, we conclude that it is not reasonably probable that the instructional error we identify today misled the jury in arriving at its verdict.

II

The defendant also claims that the trial court abused its discretion by permitting D to testify that he had told her that he previously played the same sexual games with his daughter, A, that he was "playing" with the victims. He contends that the prejudicial effect of D's testimony, admitted as a statement of a party opponent to show that the defendant was grooming D for sexual abuse, outweighed its probative value because it suggested to the jury that the defendant also had sexually abused A.[7] We disagree.

Prior to trial, the state provided written notice that it intended to offer evidence that the defendant had told D that the "game" he played with her and T was the same "game" he played with A, and that D was the only one who did not like the game. The defendant responded that the evidence was not probative of a charged offense and was unduly prejudicial because "the jury's knowledge of these unsupported allegations

[7] The defendant alternatively contends that D's testimony "would have been inadmissible as uncharged [sexual] misconduct." The defendant, however, concedes that the trial court admitted D's testimony as a statement by a party opponent, not as uncharged sexual misconduct, and that the trial court instructed the jury not to consider D's testimony as uncharged misconduct evidence. The trial court therefore never exercised its discretion as to whether to admit or exclude D's testimony as evidence of uncharged sexual misconduct, and we will not review a hypothetical ruling of the court. See, e.g., *State* v. *Juan J.*, 344 Conn. 1, 13–14, 276 A.3d 935 (2022) (reviewing court cannot determine whether trial court abused its discretion in admitting evidence for different purpose).

could clearly tip the balance in favor of the state and unfairly alter the outcome of the trial."

After hearing argument, the court orally ruled that the evidence was not overly prejudicial because D's testimony was not "blatantly sexual in nature" compared to the allegations in the case that "the defendant was having . . . oral, anal, and vaginal sex with two little girls . . . ." The court indicated that it would permit the state to introduce the evidence as a statement by a party opponent for the limited purpose of showing a "form of bizarre peer pressure" or "grooming activity" but that, to minimize any prejudice to the defendant, it would instruct the jury that it should not use the evidence for propensity purposes or as evidence of uncharged sexual misconduct and would restrict any attempt by the state to argue that the defendant in fact sexually abused A.

At trial, D testified on direct examination that the defendant had described the sexual abuse as a "game" to the victims. D testified that the defendant had asked her why she did not "like the game" and that, when she answered, "it feels uncomfortable," he said that "it's supposed to be." Consistent with the court's ruling, D further testified that the defendant had "told [her] that he did it before with another girl named A. And he was telling me that A had also enjoyed the game, that [D] was the only one that did not enjoy the game. So, he tried to make it seem—our conversation was trying to persuade me to enjoy the game more. So, I remember just seeming shocked that there was another girl out there that also was going through what me and T were going through. So, that was basically the concept of the conversation." D also testified that she knew that A was the defendant's daughter and that they had met before.

The next morning, the court instructed the jury that D's testimony regarding the "game" was not offered to

establish that the defendant had engaged in any type of uncharged misconduct but, rather, for the limited purpose of describing the nature of the discussions or communications between the defendant and D. Later that day, A testified, stating that the defendant never acted inappropriately toward her. In its final charge, the court again directed the jury to use D's testimony for the limited purpose for which it was offered.

"It is well established that [s]tatements made out of court by a [party opponent] are universally deemed admissible when offered against him . . . so long as they are relevant and material to issues in the case." (Internal quotation marks omitted.) *State* v. *Tomlinson*, 340 Conn. 533, 576, 264 A.3d 950 (2021). "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4-3.

"Evidence is probative if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 195–96, 177 A.3d 1128 (2018); see also Conn. Code Evid. § 4-1. "To be unfairly prejudicial, evidence must be likely to cause a disproportionate emotional response in the jury, thereby threatening to overwhelm its neutrality and rationality to the detriment of the opposing party. . . . All evidence adverse to an opposing party is inherently prejudicial because it is damaging to that party's case. . . . For exclusion, however, the prejudice must be unfair in the sense that it unduly arouse[s] the [jurors'] emotions of prejudice, hostility or sympathy . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *James K.*, 347 Conn. 648, 672–73, 299

A.3d 243 (2023). We review the trial court's balancing of the potential prejudicial effect against its probative value for an abuse of discretion. See *State* v. *Patterson*, 344 Conn. 281, 298, 278 A.3d 1044 (2022).

We conclude that the court did not abuse its discretion by permitting D to testify that the defendant had told her that he played the same sexual games with A. The testimony was probative of the defendant's attempts to groom or pressure D to engage in sexual intercourse with him. The testimony was especially probative when paired with Williams' expert testimony that child sex abusers often use grooming as a mechanism to coerce children to engage sexually with them and that referencing the sexual abuse of another child in the same manner could be a form of grooming. The trial court mitigated any prejudicial effect of D's testimony by admitting the testimony only for the limited purpose of establishing grooming and by repeatedly instructing the jury to use it only for that purpose. In the absence of evidence to the contrary, we presume that the jury properly followed the court's instructions and used D's testimony for that limited purpose. See, e.g., *State* v. *Beavers*, supra, 290 Conn. 408. Both of these mitigating measures militate against a conclusion that the trial court abused its discretion. See, e.g., *State* v. *Patterson*, supra, 344 Conn. 301 (limiting instructions minimize prejudicial effect evidence might have); *State* v. *Bermudez*, 195 Conn. App. 780, 793, 228 A.3d 96 (2020) (limiting purpose of admitted evidence quells potential for unfair prejudice), aff'd, 341 Conn. 233, 267 A.3d 44 (2021).

In light of these mitigating measures, we cannot say that the trial court unreasonably balanced the probative value of D's testimony with any remaining unfair prejudice. We agree with the trial court that D's testimony did not likely cause a disproportionate emotional response in the jurors or unduly arouse their emotions because the substance of D's challenged testimony was not bla-

tantly sexual in nature compared to the bulk of the evidence in the case bearing on the state's allegations of the defendant's sexual contact with the victims. D did not explain the graphic details of the defendant's physical contact with A, only that he had told her that A enjoyed playing the same game. See, e.g., *State* v. *Jacobson*, 283 Conn. 618, 639–40, 930 A.2d 628 (2007) (testimony that defendant had slept in same bed with another child to establish grooming behavior was not inflammatory or otherwise unfairly prejudicial because jury already had heard graphic testimony of abuse of sexual victims). Consequently, indulging every reasonable presumption in favor of the trial court's ruling, we conclude that it was not a manifest abuse of discretion for the court to permit D to testify that the defendant had told her that he played the same sexual games with his daughter.

The judgment is affirmed.

In this opinion McDONALD, MULLINS and DANNEHY, Js., concurred.

ECKER, J., concurring in part and dissenting in part. I agree with the majority that *State* v. *Daniel W. E.*, 322 Conn. 593, 142 A.3d 265 (2016), must be overruled because the jury instruction that we adopted and approved in that case incorrectly informs the jury that "there are many reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent the victim delayed in reporting the offense, the delay should not be considered by the jury in evaluating the victim's credibility."[1] Id., 629; see part I A of the

[1] Consistent with our holding in *Daniel W. E.*, this instruction subsequently was incorporated into our model criminal jury instructions. See Connecticut Criminal Jury Instructions 7.2-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited February 4, 2025) ("If no constancy of accusation witness testified, but there was a delay in officially reporting the offense," then the following instruction should be given: "There was evidence in this case that the complainant delayed in making an official report of the alleged sexual assault. There are many reasons why sexual assault victims may

majority opinion. This instruction was misleading because it prohibited the jury from considering a complainant's delay in reporting sexual abuse allegations to assess the complainant's credibility, while simultaneously instructing the jury that delayed reporting is consistent with credible allegations of sexual abuse in that "there are many reasons why *sexual assault victims* may delay in officially reporting the offense . . . ." (Emphasis added.) *State* v. *Daniel W. E.*, supra, 629. The majority rightly rejects the state's argument that the jury instructions as a whole cured the defect by permitting the jury to consider the reasons for the delay, if not the fact of the delay itself, cogently reasoning that "the jury would [not] understand that the reasons why a victim might delay reporting sexual assault are necessarily separate from the delay itself based on the instructions provided, given that we have trouble discerning or articulating this distinction convincingly ourselves." Part I A of the majority opinion.

Unlike the majority, however, I cannot conclude that the erroneous jury instruction was harmless. See part I B of the majority opinion. The credibility of the complainants, T and D, was the central issue in the case, and the jury's assessment of the truthfulness of their testimony was critical to the theory of the defendant, Adam P., that they had fabricated the sexual abuse allegations. There was no corroborative evidence of the sexual abuse; the jury's verdict hinged entirely on the credibility of the complainants' testimony. By forbidding the jury from drawing a negative inference about the complainants' credibility from their nine year delay in reporting the abuse, the tainted instruction necessarily deprived the jury of a legitimate basis on which to form a reasonable doubt about the veracity of the

delay in officially reporting the offense, and to the extent the complainant delayed in reporting the alleged offense here, the delay should not be considered by you in evaluating (his or her) credibility.").

complainants' allegations. The erroneous instruction deprived the jury of information relevant and material to its resolution of the critical factual issue in the case—the credibility of the complainants' sexual abuse allegations—and, on this record, I have no trouble concluding that it likely impacted the jury's verdict. I would reverse the judgment of conviction and remand for a new trial before a properly instructed jury.[2]

The test for assessing harm depends on whether the instructional error was of constitutional magnitude. If the instructional error was "of a constitutional magnitude, the state bears the burden of establishing that there is no reasonable possibility that the error affected the verdict. If, on the other hand, the error does not rise to the level of a constitutional violation, then a new trial is required only if the accused can demonstrate that the error probably affected the verdict." *State* v. *Breton*, 235 Conn. 206, 243, 663 A.2d 1026 (1995). Under either standard, we have observed that child sexual abuse cases that boil down to a "credibility contest characterized by equivocal evidence . . . is a category of cases . . . far more prone to harmful error." (Internal quotation marks omitted.) *State* v. *Favoccia*, 306 Conn. 770, 816–17, 51 A.3d 1002 (2012).

The majority concludes that the instructional error in this case was not of constitutional magnitude because it did not "confuse the elements of [the] crime, shift the state's burden of proof to the defendant, or undermine the defendant's presumption of innocence." Part I B of the majority opinion. But these are not the only circumstances in which we have recognized that an erroneous jury instruction implicates a defendant's con-

[2] To the extent that the issue is likely to arise on remand, I agree with the majority that the trial court did not abuse its discretion in admitting D's testimony regarding the defendant's out-of-court statement that he previously had played sexual games with his daughter. See part II of the majority opinion.

stitutional rights. In particular, we have held that "[a]n improper instruction on a defense, like an improper instruction on an element of an offense, is of constitutional dimension." (Internal quotation marks omitted.) *State* v. *Prioleau*, 235 Conn. 274, 284, 664 A.2d 743 (1995); see also *State* v. *Gomes*, 337 Conn. 826, 845-56, 256 A.3d 131 (2021) (erroneous jury instruction on defense of inadequate police investigation was of constitutional magnitude); *State* v. *Heinemann*, 282 Conn. 281, 298, 920 A.2d 278 (2007) (fundamental constitutional right to present defense of duress "includes proper jury instructions" (internal quotation marks omitted)). The erroneous instruction at issue in this case struck at the very heart of the defendant's defense, which was that the complainants' allegations of sexual abuse were not credible.

The discussion of the New Jersey Supreme Court's analysis of a substantially similar jury instruction is instructive. In *State* v. *P.H.*, 178 N.J. 378, 840 A.2d 808 (2004), the jury was instructed in relevant part that "a child may not complain or tell anyone of sexual abuse for a myriad of reasons including fear, ignorance or confusion. *You therefore may not consider the child's failure to complain as evidence weighing against the credibility of the child because silence is one of the many ways a child may respond to sexual abuse if it has occurred. . . .*" (Emphasis in original; internal quotation marks omitted.) Id., 387. The court held that this instruction deprived the defendant in that case, P.H., of his constitutional right to present a complete defense because it "effectively barred the jury from considering [the complainant's] delayed disclosure when assessing her credibility." Id., 399. Because the issue of the complainant's credibility was central and material both to P.H.'s defense and the outcome of the case, the court held that the erroneous jury instruction deprived P.H. of his constitutional right to a fair trial. Id., 400.

To arrive at its conclusion to the contrary, the majority cites to *State* v. *Jones*, 337 Conn. 486, 509, 254 A.3d 239 (2020), *State* v. *Daniel W. E.*, supra, 322 Conn. 610, and *State* v. *Roberto Q.*, 170 Conn. App. 733, 743, 155 A.3d 756, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017), to support the proposition that "we have expressed that general credibility instructions regarding constancy of accusation testimony are nonconstitutional in nature because they do not, on their own, confuse the elements of a crime, shift the state's burden of proof to the defendant, or undermine the defendant's presumption of innocence." Part I B of the majority opinion. I believe that these cases are distinguishable, however, because none of them involved jury instructions that expressly and affirmatively *prohibited* the jury from considering evidence relevant to the witnesses' credibility. In *Jones*, we held that it was erroneous to reject a request for a jury instruction on the special considerations pertinent to assessing the credibility of a jailhouse informant, but the omission of this instruction did not bar the jury from taking those considerations into account when evaluating the informant's credibility. See *State* v. *Jones*, supra, 491–92 and n.3, 494–95. Likewise, in *Daniel W. E.* and *Roberto Q.*, the jury was instructed on the constancy of accusation doctrine, pursuant to which a complainant who is impeached on the ground of a delayed report of sexual assault may have his or her credibility rehabilitated through the introduction of evidence indicating that a timely informal allegation of sexual assault had been made. See *State* v. *Daniel. W. E.*, supra, 605–607; *State* v. *Roberto Q.*, supra, 740–41. The juries in those cases, however, were not instructed that the delay in reporting the sexual assault could not be considered by them at all in assessing the credibility of the complainants' testimony.

Ultimately, I need not decide whether the erroneous jury instruction in this case was of constitutional dimen-

sion because, even under the nonconstitutional standard, it is clear to me that the error likely affected the jury's verdict. The credibility of the complainants, who were children when the sexual abuse occurred, was the central and outcome determinative issue in this case. The complainants were nineteen years old at the time of trial, and they testified in graphic detail about sexual abuse that took place many years earlier, when they were between the ages of five and eleven. The complainants' testimony was not corroborated by any physical, forensic, or contemporaneous evidence; nor was the jury presented with any constancy of accusation testimony or evidence of any uncharged sexual misconduct attributed to the defendant. The only evidence of the crimes committed by the defendant came from the complainants themselves.[3]

A child sexual abuse case that lacks physical evidence is not automatically weak, but neither is it automatically strong merely because the complainants testified that the abuse happened, especially if the prosecution rested exclusively on the uncorroborated testimony of complainants who were young children when the sexual abuse occurred years earlier. On the basis of my careful review of the evidentiary record in this case, I cannot agree with the majority that "[t]he state's case, even

[3] Aside from the complainants and the state's expert witness, Danielle Williams, only four other witnesses testified for the state: (1) Heineman Gonzalez, a former detective with the Stratford Police Department who did not participate in the forensic interviews of the complainants in North Carolina but applied for a warrant for the defendant's arrest in Connecticut; (2) Jonathan Policano, a detective with the Stratford Police Department who transported the defendant from North Carolina to Connecticut; (3) Thomas Russell Varnadoe, a detective with the Raleigh Police Department in North Carolina who investigated the complainants' allegations of sexual assault, ascertained where the alleged sexual assaults had occurred, and notified the pertinent Connecticut authorities; and (4) the complainants' mother, Q, who confirmed the locations where the complainants lived during the relevant time periods and testified that the complainants had disclosed the sexual abuse to her around the time of their fourteenth birthdays, approximately five months before an official complaint was reported.

without physical or forensic evidence, was strong." Part I B of the majority opinion. I recognize that an absence of physical evidence is not uncommon in child sexual abuse cases, but the problem in this case is not just an absence of physical or forensic evidence, but an absence of any corroborative evidence to support the credibility of the complainants' testimony. Compare *State* v. *Felix R.*, 319 Conn. 1, 19, 124 A.3d 871 (2015) ("the state's case was not weak due" in part to corroborative evidence, such as "the defendant's purchase of a pregnancy test and morning after pills" for complainant), with *State* v. *Freddy T.*, 200 Conn. App. 577, 599, 241 A.3d 173 (2020) (state's case was weakened by lack of corroborative evidence). The state's witnesses corroborated the locations where the complainants lived when the alleged sexual assaults occurred, but those locations were not in dispute at trial. See footnote 3 of this opinion. The disputed factual issue was not *where* the alleged sexual assaults had occurred but *whether they had occurred at all.*

The majority contends that the complainants themselves provide corroboration, because there are two of them rather than just one. See part I B of the majority opinion. This logic might have some force except for the fact that, contrary to the assertion of the majority, the complainants' respective versions of events cannot be characterized as "largely" consistent. Id. To the contrary, my review of the record persuades me that the complainants' testimony was largely inconsistent as to key factual issues, such as the location in the home where the abuse occurred, the sex acts that were performed, and the participants involved.[4] These inconsis-

[4] For example, with respect to the first instance of sexual abuse that occurred in Bridgeport when the complainants were five years old, T testified that the sexual assaults occurred in her mother's bedroom, where the defendant took T and D to watch a pornographic movie. According to T, the defendant put his penis in the complainants' mouths and then told D "to get up and put her clothes on, and walk out." After D left the room, the defendant proceeded to rape T vaginally. D's description of the sexual

tencies undermine the claim of corroboration and simultaneously strengthen the defendant's argument that the complainants' testimony was not credible.[5]

In addition to the complainants' testimony, the jury heard expert testimony from Danielle Williams, a forensic interviewer with extensive experience working with child victims of sexual abuse. Williams testified about child sexual abuse accommodation syndrome, informing the jury that delayed reporting is not uncommon. In fact, according to Williams, "60 to 80 percent of the time, we're going to expect a delay of a child coming forward." Children delay reporting sexual abuse for a variety of reasons—because they love or fear their abuser, the abuser is the primary breadwinner in the family, or they do not understand that they are being abused. Williams acknowledged, however, that there are times when a child discloses sexual abuse immediately. Williams also explained that she had not met the complainants in this case or watched their forensic interviews.

T and D did not disclose the sexual abuse until around the time of their fourteenth birthday, approximately nine

assaults differed. According to D, the first instance of sexual abuse did not take place in her mother's bedroom but on a mattress in the dining room. D did not mention the viewing of a pornographic movie and testified that, in addition to performing oral sex on and vaginally raping T, the defendant performed oral sex on D, penetrated D's vagina digitally, and raped D anally. Both versions describe horrific criminal conduct, of course, but that is not the point. The point is that the testimony of T and D contains substantial differences that cannot be characterized as corroborating in nature. There are additional illustrations of nontrivial inconsistencies between the complainants' descriptions of their abuse, but I have attempted to minimize the need for graphic detail.

[5] I wish to emphasize that my observations in this concurring and dissenting opinion regarding the nature and quality of the evidence should not be understood to reflect my own personal views about the credibility of the complainants. It is not my role in this case to make credibility determinations; that role is reserved exclusively for the jury. See, e.g., *State* v. *Favoccia*, supra, 306 Conn. 786 ("[t]he determination of the credibility of a witness is solely the function of the jury" (internal quotation marks omitted)).

years after the abuse began and three years after it had stopped. The disclosure occurred a couple days after the complainants' mother, Q, informed them that she had rekindled her romantic relationship with the defendant and was considering asking him to come live with them. T explained that she did not tell anyone about the sexual abuse earlier because the defendant had told her not to tell anyone about it, she did not want to upset Q when she was happy in her relationship with the defendant, and she feared backlash from the defendant. D testified that she did not tell anyone about the sexual abuse earlier because the defendant "was always there" and had told her that, if she disclosed the abuse, she would "go to jail, and bad things happen to people in jail."

During closing argument, counsel for both parties relied on the complainants' delayed disclosure of the sexual abuse to support their respective theories of the case. The prosecutor posited that the complainants' delayed disclosure was consistent with their testimony regarding the sexual abuse, citing the expert testimony of Williams. The prosecutor argued: "And what percentage of child sexual abuse cases did . . . Williams say involved late disclosure? I believe she said 60 to 80 percent. Now, you may have been asking yourself, if this had been going on as long as it did, why didn't the girls tell someone sooner? And to that, I would tell you to go back to the testimony of our expert. According to . . . Williams, there could be a litany of reasons why a child might not disclose to others right away. She mentioned secrecy. The girls testified that the defendant told them to keep it a secret, otherwise they would get in trouble, jail[ed] even, and that, if they kept it a secret, they would be rewarded. Also, the relationship between [them] and the defendant—up until that point, the defendant had been the one watching the girls while their mother was working. There

could have also been some confusion. According to the testimony of the girls, the defendant asked them if they wanted to participate in a game. According to . . . Williams, at their age, the concept of sexual intercourse is limited, and I would argue it's nonexistent. And, without a point of reference, they would have no reason to believe that what they were engaging in was not play, especially since it was with someone [who] was supposed to be looking after them, someone they had no reason not to trust up until that point."

Defense counsel urged the jury to find that the complainants' delay in reporting was not due to sexual abuse accommodation syndrome but, instead, resulted from their recent fabrication of the sexual assault allegations to gain their mother's undivided attention. Defense counsel argued: "And I want to pause and consider the testimony of the state's expert . . . Williams. She talked a lot about the delay of disclosure. She talked about how it's very common. She gave several reasons for it. She suggested that . . . the child knows and loves [the] abuser and does not want to hurt them. She also indicated that it could be because the child lived with the abuser and is in fear of retaliation. . . . [C]lose proximity can be a reason that the child is fearful. However, when we consider this timeline, T and D were away from [the defendant] for long periods of time, and they weren't in close proximity. They were far away. They were states apart. And we also heard from them that both girls felt no loyalty to him. They indicated they did not love him. They did not consider him a father figure. They just wanted their mother, and Q said what they would say about him is, 'why don't you have more time for us? Why is he always here? We want to be with you.' D also indicated that they spent most summers in South Carolina. So that's plenty of time away. There was the ten month period while they were in South Carolina, and then the two year period [when]

they did not see Q at all. On top of that, Q testified that there were multiple breakups [during which the defendant] had moved out for periods of time. So, after this two year period of being moved back and forth between houses, Q . . . swoops in and brings the girls back to North Carolina. They're finally back with their mother. They finally have her attention." Defense counsel argued that Q "sacrificed everything in her life for this relationship [with the defendant], including her daughters," and that the jury should consider "[w]hat . . . the girls possibly [could] say to their mother to keep [the defendant's return] from happening."

During rebuttal argument, the prosecutor urged the jury to consider the complainants' explanation as to why they did not disclose the abuse earlier, after they no longer lived with the defendant: "Now, I know there was discussion at some point [that] they were far apart from the defendant, and I don't know if the point was being made, you know, why didn't they disclose and say we're no longer in proximity to him, but do you remember T's testimony? She said that, despite the abuse . . . [the defendant] was now out of their life. [The defendant] was out of their life. They had no fear of abuse, and T specifically mentioned that she was concerned [about] what would happen to her mother if she told her. Her mental health. She also said that, while this was going on, she had concern[s] about telling her mom because she had never seen her mom that happy with someone. She was in love with him. I don't think there's any denying that."

In its charge to the jury, the trial court instructed the jury on the general credibility considerations applicable to all witnesses. Then it gave the erroneous instruction specifically relating to the issue of delayed reporting in this case: "There was evidence in this case that the complainants delayed in making an official report of the alleged sexual assaults. There are *many reasons*

why sexual assault victims may delay in officially reporting the offense, and, to the extent the complainants delayed in reporting the alleged offense here, *the delay should not be considered by you in evaluating their credibility.*" (Emphasis added.) Immediately thereafter, the trial court instructed the jury on the credibility considerations applicable to the testimony of Williams, the state's expert witness on sexual abuse accommodation syndrome.

During its deliberations, the jury submitted multiple notes asking to rehear the testimony of T and D describing the alleged sexual assaults. The jury's careful consideration of the complainants' testimony indicates that this evidence, and specifically the credibility of this evidence, was of vital importance to the jury's deliberations. See, e.g., *State* v. *Devalda*, 306 Conn. 494, 510, 50 A.3d 882 (2012) ("[w]e have recognized that a request by a jury may be a significant indicator of [its] concern about evidence and issues important to [its] resolution of the case" (internal quotation marks omitted)); *State* v. *Miguel C.*, 305 Conn. 562, 577, 46 A.3d 126 (2012) ("the jury's note to the court during deliberations provides insight into the facts that the jury considered when it was reaching its verdict"); *State* v. *Moody*, 214 Conn. 616, 629, 573 A.2d 716 (1990) (jury's note requesting to rehear evidence was "a clear indication that [the jury] deemed the evidence . . . as being important"). The importance of the credibility of the complainants' testimony also is reflected by the jury's split verdict finding the defendant not guilty on two counts of sexual assault in the first degree involving T alone but guilty of the remainder of the charged crimes. "[T]he split verdict suggests that the jury had doubts concerning the [complainant's] credibility as a general matter, as it failed to credit [some of] her testimony . . . ." *State* v. *Angel T.*, 292 Conn. 262, 294, 973 A.2d 1207 (2009). Given the importance of the complainants' credibility to the jury's

verdict, it is likely that the improper instruction on credibility "might have tipped the balance." *State* v. *Favoccia*, supra, 306 Conn. 813.[6]

In light of the evidence before the jury, the central role the complainants' credibility played in the outcome of the case, and the parties' focus on the reasons for the complainants' delay in reporting the sexual abuse either to strengthen or undermine the complainants' credibility, I cannot conclude that the erroneous jury instruction was harmless. The reason the jury instruction is erroneous, in short, is precisely the same reason that it was harmful on the present factual record. As explained by the majority, "the jury would [not] understand that the reasons why a victim might delay reporting sexual assault are necessarily separate from the delay itself based on the instructions provided . . . ." Part I A of the majority opinion. Stated another way, the complainants' delay in reporting the sexual abuse and their reasons for the delay in reporting the sexual abuse were so inextricably intertwined, or at least so conceptually indistinct, that, by instructing the jury to disregard one (the delay), it is likely that the jury was misled to believe that it must also disregard the other (the reasons for the delay). The assistant state's attorney candidly acknowledged during oral argument before this court that the reasons for the

[6] I agree with the majority that we should exercise caution when drawing inferences regarding what a split verdict tells us about a jury's thought process. See part I B of the majority opinion. But I disagree that the split verdict in the present case plausibly could increase our confidence that the erroneous jury instruction was harmless. The majority reasons that the split verdict demonstrates that the jury did, in fact, make credibility assessments notwithstanding the erroneous instruction. My point, however, is not that the erroneous instruction deprived the jury of *any* ability to make credibility assessments, or that the jury did not, in fact, make credibility assessments in reaching its verdict. Rather, the problem is that the erroneous instruction deprived the jury of the ability to include, *as part of its credibility assessment*, one potentially important consideration, namely, the complainants' delay in reporting the assaults.

complainants' delay were "the centerpiece of the evidence . . . [and] both parties' arguments" at trial, and that it would be "hard" to say that a misleading jury instruction regarding those reasons "didn't make any difference" to the jury's verdict on this record. I take this to be a significant concession with respect to the harmless error analysis.

The instruction was harmful because it likely misled the jury regarding its consideration of the reasons for the complainants' delayed reporting, and it did so in a manner that favored the state's theory of the case. Revisiting the precise language of the challenged instruction, I observe that it informed the jury that "[t]here are many reasons why sexual assault victims may delay in officially reporting the offense, and, to the extent the complainants delayed in reporting the alleged offense here, the delay should not be considered by you in evaluating their credibility." This instruction, which explicitly refers to "sexual assault victims," informs the jury that the reason it is prohibited from considering the complainants' delay in reporting the sexual abuse is because the delay may be indicative of credible allegations of sexual assault pursuant to the testimony of the state's expert witness. In this way, the erroneous instruction impermissibly bolstered the credibility of the state's witnesses in two ways: by suggesting, first, that the complainants' delayed reporting was consistent with that of "sexual assault victims," and, second, that Williams' expert testimony as to the "many reasons why sexual assault victims may delay in officially reporting the offense" must be believed. The error was particularly harmful in this case because the identity of the perpetrator was not at issue and the sole question for the jury was not *who* had committed the sexual assaults, but whether the sexual assaults *had occurred at all* (i.e. whether they had been fabricated). The faulty instruction permitted the state to use the complainants' delayed

reporting as a sword to prove that the sexual assaults had occurred but did not permit the defendant to use it as a shield to defend against the crimes charged.

This court has observed that, when a child sexual abuse case presents the jury with a "credibility contest characterized by equivocal evidence . . . [it] is far more prone to harmful error." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 306 Conn. 816–17. Additionally, we have cautioned that "[i]t cannot be harmless error to remove from the fact finder the very tools by which to make a credibility determination . . . . [When] credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a [witness'] credibility is not harmless error." (Citations omitted; internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 223–24, 202 A.3d 350 (2019); see also *State* v. *Ritrovato*, 280 Conn. 36, 57–58, 905 A.2d 1079 (2006) (improper exclusion of complainant's prior sexual conduct to impeach her testimony that she was virgin at time of sexual assault was not harmless error because "there was no independent physical evidence of the assault and no other witnesses to corroborate [the complainant's] testimony, [and] her credibility was crucial to successful prosecution of the case"); *State* v. *Iban C.*, 275 Conn. 624, 641–42, 881 A.2d 1005 (2005) (improper admission of expert testimony that five year old complainant had been diagnosed with child sexual abuse was not harmless error because complainant's "credibility was central to the state's case," and there was lack of corroborative evidence). This case hinged entirely on the credibility of the complainants' allegations of sexual assault, and the erroneous jury instruction deprived the jury of the tools that it needed to evaluate the truthfulness of their testimony. On this factual record, the erroneous jury instruction cannot be deemed harmless, and, therefore, I dissent from part I B of the majority opinion.

L. L. ET AL. *v.* NEWELL BRANDS, INC., ET AL. (SC 21005)

McDonald, D'Auria, Ecker, Alexander and Dannehy, Js.

Syllabus

The plaintiffs sought to recover from the defendants in federal court for, inter alia, the defendants' alleged violations of the Connecticut Product Liability Act (§ 52-572m et seq.). The United States District Court for the District of Connecticut certified to this court, pursuant to statute (§ 51-199b (d)), a question of law concerning whether Connecticut law recognizes a parent's claim for loss of filial consortium of a minor child who was severely injured as result of a defendant's allegedly tortious conduct. *Held*:

This court concluded that Connecticut law does not recognize a cause of action for loss of filial consortium.

Although this court has recognized causes of action for loss of spousal consortium and loss of parental consortium, the justifications for imposing liability for third-party emotional injuries in those circumstances, namely, the mutual dependence and reliance between spouses and a child's dependence on his or her parents, did not support the recognition of a cause of action for loss of filial consortium, as the relational interests at issue were sufficiently distinguishable.

The injury that is experienced by a parent whose child sustains a severe and potentially disabling injury is a form of emotional distress, rather than the type of relational loss or loss of society for which the tort of loss of consortium affords a remedy.

Although a substantial minority of other jurisdictions allow the parent of an injured child to recover for loss of filial consortium under certain circumstances, this court found more persuasive the reasoning of those jurisdictions that have recognized a clear conceptual and practical distinction between parental consortium and filial consortium, which militated against this court's recognition of a common-law cause of action for loss of filial consortium.

(*One justice concurring separately*; *one justice dissenting*)

Argued September 19, 2024—officially released February 11, 2025

Procedural History

Action to recover damages for, inter alia, the defendants' alleged violation of the Connecticut Product Liability Act, and for other relief, brought to the United States District Court for the District of Connecticut,

where the court, *Shea*, *J.*, certified a question of law to this court concerning whether Connecticut recognizes a parent's claim for loss of filial consortium when the minor child suffered severe injuries as a result of the defendants' allegedly tortious conduct.

James J. Healy, with whom were *Allison D. White*, *Kenneth J. Krayeske* and, on the brief, *Peter C. Bowman*, for the appellants (plaintiff Justin Lapointe et al.).

Rachel M. Bradford, with whom were *Christopher M. Vossler* and *Katharine L. Walker*, for the appellees (named defendant et al.).

Linda L. Morkan, with whom were *Sabrina M. Galli* and, on the brief, *Jeffrey J. White*, for the appellee (defendant Haier US Appliance Solutions, Inc.).

Carey B. Reilly filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Edward W. Mayer, *Jr.*, *Hannah L. Lauer*, *Glenn B. Coffin*, *Jr.*, and *Kelcie B. Reid* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

ALEXANDER, J. Over the past one-half century, this court has twice recognized a cause of action for loss of consortium. In *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 408 A.2d 260 (1979), this court recognized a claim for the loss of the consortium of an injured spouse; id., 496; defined to encompass both the tangible elements of consortium, such as a spouse's household services and financial support, and the intangible elements, including a spouse's "affection, society, [and] companionship . . . ." (Internal quotation marks omitted.) Id., 487. Thirty-six years later, in *Campos* v. *Coleman*, 319 Conn. 36, 123 A.3d 854 (2015), this court further extended a tortfeasor's liability to a minor

child's loss of the consortium of an injured parent. Id., 57. The sole issue in this case, which comes to us on certification from the United States District Court for the District of Connecticut, is whether we should further expand the scope of liability by recognizing a parent's claim for the loss of the consortium of an injured minor child. We decline to do so.

The following relevant facts and procedural history are drawn largely from the District Court's certification order. Where appropriate, we have supplemented that summary with additional allegations from the underlying complaint; see, e.g., *Gerrity* v. *R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 123, 818 A.2d 769 (2003); which we must accept as true for purposes of addressing the certified question. See, e.g., *Francis* v. *Kings Park Manor, Inc.*, 992 F.3d 67, 71 (2d Cir. 2021).

On June 23, 2020, the plaintiff Mary Lapointe (Mary) strapped her infant daughter, the plaintiff L. L.,[1] into a Graco car seat, placed the car seat on the kitchen counter of her Colchester home, next to an electric range stove, and left the room. While Mary was away from the kitchen, the car seat caught fire, as a result of the faulty design or production of both the car seat and the stove. L. L.'s aunt, the plaintiff Kayleigh Lapointe (Kayleigh), discovered the fire and rescued L. L. by removing her from the burning car seat. L. L. suffered severe burns and injuries to her entire body.

Mary, Kayleigh, L. L.'s father, the plaintiff Justin Lapointe (Justin), and L. L., through Justin as her next friend, brought the underlying action in the District Court against the defendants, Newell Brands Inc. (Newell), the manufacturer of the car seat; Target Stores, Inc. (Target), the retail seller of the car seat; Haier US Appliance Solutions, Inc. (Haier), which placed the

[1] In accordance with the District Court's certification order, we refer to the minor plaintiff by the initials L. L.

electric range into the stream of commerce; and General Electric Company.[2] They claimed violations of the Connecticut Product Liability Act (CPLA), General Statutes § 52-572m et seq., sounding in defective product design, manufacturing defect, breach of warranty, failure to warn, and recklessness. They also brought claims alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., which the District Court subsequently dismissed. In addition, Mary and Justin brought claims for the loss of L. L.'s consortium, alleging that, due to L. L.'s injuries, they "lost the consortium, society, care and companionship of [their] daughter, and will continue to suffer such a loss in the future."

The defendants moved to dismiss, inter alia, the loss of consortium claims, contending that Connecticut law does not recognize claims for loss of filial consortium. The District Court denied, without prejudice, the defendants' motions as to the loss of consortium claims and, pursuant to General Statutes § 51-199b (d), certified the following question of law to this court: "Does Connecticut law recognize a parent's claim for loss of filial consortium in his or her child, who allegedly suffered severe, but nonfatal, injuries because of the defendants' tortious conduct?"[3]

The plaintiffs[4] acknowledge that neither this court nor the Appellate Court has recognized a cause of action for loss of filial consortium. They contend, however,

[2] The District Court dismissed the claims against General Electric Company. See *L. L.* v. *Newell Brands, Inc.*, Docket No. 3:23-cv-00803-MPS, 2024 WL 245023, *2 (D. Conn. January 23, 2024). For convenience, we hereinafter refer to Newell, Target, and Haier, collectively, as the defendants.

[3] In addition to the briefs filed by the parties, the Connecticut Trial Lawyers Association has filed a brief in support of the plaintiffs as amicus curiae, whereas the Connecticut Defense Lawyers Association has filed a brief in support of the defendants as amicus curiae.

[4] Because only the loss of consortium claims are at issue, hereinafter, all references to the plaintiffs are to Mary and Justin.

that recognition of such a cause of action is compelled by our decision in *Campos*. They argue that, once this court recognized claims for loss of parental consortium in *Campos*, loss of filial consortium is "a natural complement" and "[t]he logical next step . . . ." (Internal quotation marks omitted.) Although the injuries suffered by L. L. in the present case are tragic, we are not persuaded to recognize a cause of action for loss of filial consortium. Although the principles articulated in *Campos* continue to control this area of the law, the relational interests at issue in the present case are sufficiently distinguishable from those at issue in *Campos* as to not require the imposition of liability for third-party emotional injuries under a loss of consortium theory.

Implicit in *Campos* is the recognition that minor children are dependent on their parents for the provision of all their basic needs. See *Campos* v. *Coleman*, supra, 319 Conn. 48 (parent's failure to provide "love, care, companionship and guidance to minor children" is "uniquely harmful" (internal quotation marks omitted)). In *Campos*, we indicated that a child's recovery for loss of parental consortium would hinge on the extent to which the parent helps to meet the child's basic needs; id., 49 n.8; and, relying on that principle, we left open the possibility that a loss of parental consortium claim could lie for a plaintiff who, for reasons of disability, remains "dependent on parental care" past the age of majority. Id., 58 n.18.

Similarly, although spouses are legally independent adults, we observed in *Hopson* that mutual dependence and reliance traditionally have been among the defining features of "the variety of intangible relations [that] exist between spouses living together in marriage." *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 487; see also *Mueller* v. *Tepler*, 312 Conn. 631, 647, 95 A.3d 1011 (2014). Once again, this concept of dependence

is important both because it provides a clear dividing line between those relationships for which we do and do not recognize a cause of action for loss of consortium, and because it encapsulates the nature of the loss and the rationale for recovery. It is precisely because minor children are fully reliant on their parents, and spouses allow themselves to become mutually reliant in so many ways, that the benefits of holding a tortfeasor liable for loss of spousal and parental consortium are justified.

In arguing that this court should now recognize a cause of action for loss of filial consortium, the plaintiffs focus on the importance of the parent-child relationship and the seriousness of an injury to that bond. They contend that the factors that counseled in favor of compensating a loss of parental consortium in *Campos* necessarily weigh in favor for compensating a loss of filial consortium. The two causes of action, they submit, are flip sides of the same coin.

Regardless of whether the plaintiffs' claim in the present case is in fact the proverbial "flip side," which is itself debatable, we do not find the analogy apt. Although the ideal marriage might be one that is equal and reciprocal in all important respects, that is not true of the parent-child relationship. The parent does not obey the child; nor does the child supervise the parent. See, e.g., *Roberts* v. *Williamson*, 111 S.W.3d 113, 119 (Tex. 2003).

The fact that the present matter involves the extreme case, in which the parental and filial roles are most dissimilar, brings into sharp relief why few, if any, of the considerations that formed the basis of this court's decision in *Campos* support the recognition of a cause of action for loss of filial consortium. See *Campos* v. *Coleman*, supra, 319 Conn. 43. Parents are not dependent on their child—certainly not an infant child—for

their financial support, household assistance, or emotional solace.

In this respect, we are persuaded by the reasoning of the Texas Supreme Court in *Roberts* v. *Williamson*, supra, 111 S.W.3d 113. In that case, the court concluded that, although the parent-child relationship deserves special protection, as reflected in that court's recognition of a cause of action for loss of parental consortium, "the parent-child relationship is not reciprocal like husband and wife and that the child is the party to the relationship who needs special protection." Id., 118. The court explained: "Although parents customarily enjoy the consortium of their children, in the ordinary course of events a parent does not depend on a child's companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent. Of course, it is true that such dependency may exist in a particular situation, but it is not intrinsic to the parent-child relationship as is a minor child's dependency on his or her parents and as is each spouse's dependency on the other spouse." (Emphasis omitted; internal quotation marks omitted.) Id., 117. "In our society the minor child requires his or her parent's nurturing, guidance, and supervision. The child is uniquely dependent [on] the parent for his or her socialization, that maturation process [that] turns a helpless infant into an independent, productive, responsible human being who has an opportunity to be a valuable, contributing member of our society. Without question, the child's relational interest with the parent is characterized by dependence. In contrast, the parent's relational interest with the child is not. In a real sense, the child is becoming, and the parent has become. Thus, the parent's loss of an injured child's consortium is different in kind from the child's loss of an injured parent's con-

sortium." (Internal quotation marks omitted.) Id., 117–18. We agree with this reasoning and conclude that the justifications we relied on in *Hopson* and *Campos* do not warrant recognizing a cause of action for loss of filial consortium.

The emotional pain that is experienced by a parent whose child sustains a severe and potentially disabling injury is unimaginably devastating. However, the suffering for which the plaintiffs seek compensation is a form of emotional distress, rather than the type of relational loss or loss of society for which the tort of loss of consortium affords a remedy. This court has made clear that the two types of injuries are separate and distinct.[5] See, e.g., *Campos* v. *Coleman*, supra, 319 Conn. 60 n.20; see also *Pierce* v. *Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162 (1989). This distinction informs our decision not to recognize a common-law cause of action for loss of filial consortium.

The plaintiffs argue that persuasive authority from other states supports recognition of loss of filial consortium claims by the common law. They contend that, of the twenty-six states that have considered the issue, a clear majority—sixteen—have recognized such claims.

It is true that a substantial minority of other states allow the parent of an injured child to recover for loss of filial consortium under at least some circumstances. Of those states, however, only seven have recognized

[5] We acknowledge that this court has at times repeated language from a New York decision that appears to blur the lines between emotional distress and loss of consortium. See *Millington* v. *Southeastern Elevator Co.*, 22 N.Y.2d 498, 503, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968) (describing "the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person"); see also, e.g., *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 493 (referencing relevant language in *Millington*). We take this opportunity to clarify that, as other courts have recognized, however painful it may be to witness the suffering of a disabled child, that child's disability does not impair the *relational* value of parenting. See, e.g., *Dralle* v. *Ruder*, 124 Ill. 2d 61, 70–71, 529 N.E.2d 209 (1988).

the cause of action solely pursuant to their common-law authority.[6] In eleven other states, the cause of action was either enacted expressly by the legislature[7] (in some instances after the state high court had held that there was no common-law cause of action) or recognized judicially as arising by necessary implication from a wrongful death or related statute.[8] At the same time, the courts of thirteen additional states and the District of Columbia have expressly declined to adopt any common-law cause of action for loss of filial consortium,[9]

[6] See *Pierce* v. *Casas Adobes Baptist Church*, supra, 162 Ariz. 272–73; *United States* v. *Dempsey*, 635 So. 2d 961, 962–65 (Fla. 1994); *Fernandez* v. *Walgreen Hastings Co.*, 126 N.M. 263, 271–73, 968 P.2d 774 (1998); *First Trust Co. of North Dakota* v. *Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 9–11 (N.D. 1988); *Gallimore* v. *Children's Hospital Medical Center*, 67 Ohio St. 3d 244, 251, 617 N.E.2d 1052 (1993); *Benda* v. *Roman Catholic Bishop of Salt Lake City*, 384 P.3d 207, 209, 212–13 (Utah 2016); *Shockley* v. *Prier*, 66 Wis. 2d 394, 401–404, 225 N.W.2d 495 (1975).

[7] See Iowa Code Ann. § 613.15A (West 2018); Mass. Ann. Laws c. 231, § 85X (LexisNexis 2009); Okla. Stat. Ann. tit. 12, § 1055 (West 2015); R.I. Gen. Laws § 9-1-41 (c) (2012); Vt. Stat. Ann. tit. 14, § 1492 (b) (Cum. Supp. 2024); Wn. Rev. Code Ann. § 4.24.010 (West Cum. Supp. 2025); see also *Gillispie* v. *Beta Construction Co.*, 842 P.2d 1272, 1273–74 (Alaska 1992) (construing § 09.15.010 of Alaska Statutes); *Hayward* v. *Yost*, 72 Idaho 415, 425, 242 P.2d 971 (1952) (construing §§ 5-310 and 5-311 of Idaho Code).

We have included in this category states that have recognized a cause of action for loss of filial consortium arising from the wrongful death of a child but have not resolved the question of whether there is a cause of action for parents of an injured child.

[8] See *Masaki* v. *General Motors Corp.*, 71 Haw. 1, 19, 780 P.2d 566 (1989) (construing § 663-3 of Hawaii Revised Statutes); *Worsham* v. *Walker*, 498 So. 2d 260, 266 (La. App.1986) (construing article 2315 (B) of Louisiana Civil Code), writ denied, 500 So. 2d 423 (La. 1987), and writ denied, 500 So. 2d 424 (La. 1987); *Dawson* v. *Hill & Hill Truck Lines*, 206 Mont. 325, 333, 671 P.2d 589 (1983) (construing § 27-1-512 of Montana Code Annotated).

We disagree with the dissent that the courts of these three states are best understood as having imposed liability for loss of filial consortium pursuant to their common-law authority.

[9] See *Cardinale* v. *La Petite Academy, Inc.*, 207 F. Supp. 2d 1158, 1161 (D. Nev. 2002); *Baxter* v. *Superior Court*, 19 Cal. 3d 461, 466, 563 P.2d 871, 138 Cal. Rptr. 315 (1977); *Elgin* v. *Bartlett*, 994 P.2d 411, 420 (Colo. 1999), overruled in part on other grounds by *Rudnicki* v. *Bianco*, 501 P.3d 776 (Colo. 2021); *Wheeler ex rel. Neidlinger* v. *Drummond*, Docket No. 88C-OC-13, 1990 WL 58253, *2 (Del. Super. April 17, 1990); *Parker* v. *Martin*,

and eighteen others continue to follow the traditional common-law approach, allowing recovery for the documented value of a child's earnings and domestic services and the costs of any medical expenses, but not for the intangible elements of the parent-child relationship.[10]

The parties largely agree on the classifications of these other jurisdictions, but they draw very different lessons from them. The plaintiffs note that more than

905 A.2d 756, 765 (D.C. App. 2006); *Bayless* v. *Boyer*, 180 S.W.3d 439, 449 (Ky. 2005); *Dralle* v. *Ruder*, 124 Ill. 2d 61, 68–69, 529 N.E.2d 209 (1988); *Sizemore* v. *Smock*, 430 Mich. 283, 299, 422 N.W.2d 666 (1988); *Butler* v. *Chrestman*, 264 So. 2d 812, 816–17 (Miss. 1972); *Powell* v. *American Motors Corp.*, 834 S.W.2d 184, 191 (Mo. 1992); *Doe* v. *Greenville County School District*, 375 S.C. 63, 69, 651 S.E.2d 305 (2007); *Rains* v. *Bend of the River*, 124 S.W.3d 580, 598 (Tenn. App. 2003); *Roberts* v. *Williamson*, supra, 111 S.W.3d 119-20; *Gates ex rel. Gates* v. *Richardson*, 719 P.2d 193, 201 (Wyo. 1986).

We note that, in several of these states, state law allows recovery for loss of filial consortium arising from the wrongful death, but not injury, of a minor child.

[10] See *J.V. ex rel. Valdez* v. *Macy's, Inc.*, Docket No. 13-5957 (KSH) (CLW), 2014 WL 4896423, *4 (D.N.J. September 30, 2014); *Ms. K ex rel. S.B.* v. *South Portland*, 407 F. Supp. 2d 290, 299 (D. Me. 2006); *Santoro ex rel. Santoro* v. *Donnelly*, 340 F. Supp. 2d 464, 492–93 (S.D.N.Y. 2004); *Smith* v. *Richardson*, 277 Ala. 389, 394, 171 So. 2d 96 (1965); *Earl* v. *Mosler Safe Co.*, 291 Ark. 276, 279, 724 S.W.2d 174 (1987); *Cotton States Mutual Ins. Co.* v. *Crosby*, 149 Ga. App. 450, 452, 254 S.E.2d 485, rev'd in part on other grounds, 244 Ga. 456, 260 S.E.2d 860 (1979); *Forte* v. *Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 802–803 (Ind. 2001); *Schmeck* v. *Shawnee*, 231 Kan. 588, 594, 647 P.2d 1263 (1982); *Michaels* v. *Nemethvargo*, 82 Md. App. 294, 300, 571 A.2d 850 (1990); *Father A* v. *Moran*, 469 N.W.2d 503, 506 (Minn. App. 1991); *Connelly* v. *Omaha*, 284 Neb. 131, 150, 816 N.W.2d 742 (2012); *Siciliano* v. *Capitol City Shows, Inc.*, 124 N.H. 719, 724, 475 A.2d 19 (1984); *Bolkhir* v. *North Carolina State University*, 321 N.C. 706, 713, 365 S.E.2d 898 (1988); *Beerbower* v. *State ex rel. Oregon Health Sciences University*, 85 Or. App. 330, 332–35, 736 P.2d 596, review denied, 303 Or. 699, 740 P.2d 1212 (1987); *Brower ex rel. Brower* v. *Philadelphia*, 557 A.2d 48, 50–51 (Pa. Commw. 1989), appeal denied, 525 Pa. 604, 575 A.2d 569 (1990); *In re Certification of Questions of Law from the United States Court of Appeals for the Eighth Circuit*, 544 N.W.2d 183, 192–93 (S.D. 1996); *Virginia Farm Bureau Mutual Ins. Co.* v. *Frazier*, 247 Va. 172, 174 n.*, 440 S.E.2d 898 (1994); *State ex rel. Packard* v. *Perry*, 221 W. Va. 526, 539, 655 S.E.2d 548 (2007).

thirty states recognize some form of a loss of filial consortium claim (whether for any type of losses or only for loss of a child's services and income) on some basis (statutory or common law). The defendants counter that only a handful of states have done what the plaintiffs are inviting this court to do in the present case, namely, to recognize a common-law cause of action for loss of filial consortium, under which a parent can recover for solely intangible losses.

There is merit to both positions. Certainly, the fact that so many states allow recovery, on whatever basis, indicates that loss of filial consortium claims are neither well outside the national mainstream nor prohibitively costly to litigate. The plaintiffs also note that, of the approximately twenty other states that, like Connecticut, recognize a cause of action for loss of parental consortium, most have also adopted a cause of action for loss of filial consortium. Nevertheless, we find more persuasive the reasoning of those states that have recognized a clear conceptual and practical distinction between parental consortium and filial consortium that militates against recognizing a common-law cause of action for loss of the latter. Indeed, most of the states that recognize claims limited to the loss of a child's services and income do so under a different label and continue to purport not to recognize loss of filial consortium claims.[11]

Finally, the dissent contends that the time is ripe to recognize a cause of action for loss of filial consortium because "[t]he trend is toward recognition of such

[11] See, e.g., *Santoro ex rel. Santoro* v. *Donnelly*, 340 F. Supp. 2d 464, 492–93 (S.D.N.Y. 2004); *Smith* v. *Richardson*, 277 Ala. 389, 394, 171 So. 2d 96 (1965); *Cotton States Mutual Ins. Co.* v. *Crosby*, 149 Ga. App. 450, 452, 254 S.E.2d 485, rev'd in part on other grounds, 244 Ga. 456, 260 S.E.2d 860 (1979); *Father A* v. *Moran*, 469 N.W.2d 503, 506 (Minn. App. 1991); *Siciliano* v. *Capitol City Shows, Inc.*, 124 N.H. 719, 724, 475 A.2d 19 (1984); *Brower ex rel. Brower* v. *Philadelphia*, 557 A.2d 48, 50–51 (Pa. Commw. 1989), appeal denied, 525 Pa. 604, 575 A.2d 569 (1990).

claims, with the vast majority occurring after 1987." (Internal quotation marks omitted.) As authority for this proposition, the dissent relies on Tentative Draft No. 1 of the Restatement (Third) of Torts, Concluding Provisions § 48 B, comment (b), in which the drafters recommended changing course and recognizing a cause of action for loss of filial consortium.[12] We are not persuaded.

Although it is true that a handful of state courts recognized the cause of action in the 1980s and 1990s, that trend, such as it was, has largely run its course. In the past one-quarter century, only one more state court has embraced the plaintiffs' position. See *Benda* v. *Roman Catholic Bishop of Salt Lake City*, 384 P.3d 207, 209, 212–13 (Utah 2016).[13] During that same time period, the courts of at least ten other states have declined the opportunity to do so. The drafters of the proposed new rule acknowledge that their approach remains a minority position; see Restatement (Third), supra, § 48 B, comment (b), p. 297; and they fail to offer any rationale that persuades us of a need to adopt the rule at the present time.[14]

[12] Section 703 of the Restatement (Second) of Torts permits claims by parents for injuries to their unemancipated children but limits parents' recovery to the lost earning capacity of the child and any medical expenses that the parents incurred. 3 Restatement (Second), Torts § 703, p. 510 (1977). The proposed new rule would permit parents of an injured child to also recover for the loss of the child's society, defined to include "loss of affection, comfort, companionship, love, and support, and loss of services." Restatement (Third), Torts, Concluding Provisions § 48 B, p. 297 (Tentative Draft No. 1, 2022).

[13] Although Montana had previously recognized a cause of action for loss of filial consortium arising from wrongful death, in *Hern* v. *Safeco Ins. Co. of Illinois*, 329 Mont. 347, 125 P.3d 597 (2005), the Montana Supreme Court extended the cause of action to injuries to *adult* children on whom the parents are extraordinarily dependent. See id., 362–63.

[14] We recognize that, given the comprehensive review process of the American Law Institute, and the numerous entities within that body that participate in the production of the Restatements of the law, a tentative draft of a Restatement may well have significant persuasive value in our assessment of a particular point of law. Indeed, the American Law Institute states

The certified question is answered in the negative.

No costs shall be taxed in this court to any party.

In this opinion D'AURIA, ECKER and DANNEHY, Js., concurred.

ECKER, J., concurring. This is a hard case. The majority and dissenting opinions both make valid points and reflect reasonable perspectives on the law governing loss of consortium. At the end of the day, I agree with and join the majority opinion. I write separately to underscore that we have not been requested to determine whether Connecticut law recognizes a cause of action other than loss of consortium to compensate parents for their emotional distress resulting from serious and life-changing injuries sustained by their minor child as a result of the tortious conduct of another.

The question of tort compensation naturally arises because, first, the allegations of tortious conduct by the defendants are presumed to be true at the pleading stage, and, second, the parents' emotional harm is so palpable under these circumstances. With respect to the nature and degree of harm, I agree with the majority that the emotional pain experienced by parents whose child sustains a serious, life-changing injury ordinarily will be "unimaginably devastating." It seems indisputable that the parents' anguish will be enormous, long-lasting, and distinctive. The anguish comes not only

that the tentative draft "represent[s] [its] position until the official text is published." (Internal quotation marks omitted.) *HELG Administrative Services, LLC* v. *Dept. of Health*, 154 Haw. 228, 236 n.8, 549 P.3d 313 (2024); see *Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 180 (3d Cir. 1977) (concluding that Virgin Islands statute referring to Restatements "as an expression of 'the rules of common law' " does not "[contemplate] strict adherence to old Restatements which no longer accurately summarize the common law" because "the weight of authority now lies behind the position in the [t]entative [d]raft of the [s]econd Restatement, rather than that contained in the [f]irst Restatement, which dates from 1939" (emphasis omitted)).

from the pain of seeing one's child suffer, but also from the parents' knowledge that the serious nature of the injuries has changed their child's life forever, and will require their child to face an unending series of challenges and struggles that were inconceivable prior to the accident. This distress is as real and severe as any noneconomic harm that the law of torts deems compensable. It is also a harm to parents that would be readily foreseeable to defendants when they manufacture or sell a product designed for use by children. Nonetheless, I also agree with the majority that this particular type of emotional distress is not within the scope of damages recoverable for "relational loss or loss of society" traditionally compensated in connection with a claim for loss of consortium.

In my view, it remains an open question whether parents may obtain compensation for their emotional distress based on a different legal theory, such as bystander emotional distress or negligent infliction of emotional distress, resulting from serious injuries to their minor child.

McDONALD, J., dissenting. "It is a [well settled] principle of law that a tortfeasor takes his victim as he finds him. Should the victim be married, it follows that the spouse may suffer personal and compensable . . . injuries" and that those "injuries should not go uncompensated." *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 493, 408 A.2d 260 (1979). Should the victim have a minor child, that child may suffer personal, compensable injuries and may recover with a parental consortium cause of action. See *Campos* v. *Coleman*, 319 Conn. 36, 37–38, 44–47, 57, 123 A.3d 854 (2015). Now, faced with a certified question that asks whether this court should recognize a common-law loss of consortium cause of action for parents when their child is injured, the majority dispenses with this court's well settled reasoning by concluding that a loss of filial consortium claim

implicates a relational interest not deserving of legal protection. But this court has never relied on distinctions between the relational interests of spouses, parents, and children when determining whether to recognize a loss of consortium cause of action. See, e.g., id., 43–58; *Hopson* v. *St. Mary's Hospital*, supra, 492–96. Instead, we have ordinarily engaged in a policy analysis; see, e.g., *Campos* v. *Coleman*, supra, 40 n.5; which the majority declines to do without explanation. Because I believe that the balance of factors from this court's well settled policy framework supports the recognition of a loss of filial consortium cause of action, I respectfully dissent.

This case comes to us as a certified question from the United States District Court for the District of Connecticut. The plaintiffs Justin Lapointe and Mary Lapointe are seeking to recover damages for the loss of filial consortium of their infant daughter, the plaintiff L. L.[1] They allege that Mary placed L. L. into a car seat, temporarily set L. L. on the kitchen countertop, and inadvertently turned on the electric range, causing L. L.'s car seat to catch fire. L. L. allegedly suffered severe injuries, including burns to her entire body, which resulted in the amputation of fingers on her right hand.

The plaintiffs brought a product liability action in the District Court against the defendants—car seat manufacturer Newell Brands, Inc., car seat retailer Target Stores, Inc., stovetop manufacturer Haier US Appliance Solutions, Inc., and stovetop designer General Electric

[1] Justin, Mary, L. L.'s aunt, the plaintiff Kayleigh Lapointe, and L. L., through Justin as her next friend, brought this product liability action in the District Court. They brought various claims, including claims alleging violations of the Connecticut Product Liability Act, General Statutes § 52-572m et seq., and claims alleging violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. Because the loss of consortium claims are the only claims at issue before this court, for simplicity, all references to the plaintiffs are to Justin and Mary.

Company.[2] The plaintiffs alleged that Newell and Target "knew or should have known" that the car seat contained defective components that did not satisfy federal fire safety standards, and that they failed to warn customers about the risk of injury. The plaintiffs also alleged that Haier "knew or should have known" that the stovetop was defective because it lacked safety mechanisms to prevent customers from accidently turning it on, and that Haier had failed to warn customers of that risk. The defendants moved to dismiss, among other things, the plaintiffs' loss of filial consortium claims. The District Court denied, without prejudice, the defendants' motions to dismiss as to those claims and issued an order certifying the following question to this court: "Does Connecticut law recognize a parent's claim for loss of filial consortium in his or her child, who allegedly suffered severe, but nonfatal, injuries because of the defendants' tortious conduct?"

Before this court, the plaintiffs argue that our reasoning in *Campos* v. *Coleman*, supra, 319 Conn. 36, supports adopting a loss of filial consortium cause of action because *Campos* rooted the loss of parental consortium cause of action in the reciprocal and unique parent-child relationship, not in the loss of parental services. See id., 46–47. The plaintiffs highlight that, although, in *Campos*, this court concluded that "parental consortium consists of both a parent's *services* to his or her children . . . [and] such *intangibles* as the parent's love, care, companionship and guidance"; (emphasis added; internal quotation marks omitted) id., 50; it is "the impairment of [the parent-child] relationship"—not the loss of the parent's services—that is the critical element giving rise to a loss of parental consortium

[2] The claims brought against General Electric Company were all dismissed with prejudice. See *L. L.* v. *Newell Brands, Inc.*, Docket No. 3:23-cv-00803-MPS, 2024 WL 245023, *2 (D. Conn. January 23, 2024). For simplicity, we hereinafter refer to Newell, Target, and Haier, collectively, as the defendants.

claim. Id., 47. Consequently, the plaintiffs argue, because a parent can also suffer an impaired relationship with their child when a tortfeasor injures their child, this court should recognize a loss of filial consortium claim as the necessary extension of a loss of parental consortium claim. Following *Campos*, the plaintiffs reason, a loss of services should not be necessary to recover under a filial consortium claim. Instead, they argue, a loss of filial consortium claim should compensate parents for " 'purely emotional injuries' " stemming from the tortfeasor's impairment of the parent-child relationship.

The defendants contend that the parent-child relationship is not reciprocal because, although parents are legally obligated to provide services to their minor children, the reverse is not true. Instead, children are uniquely dependent on their parents. Accordingly, the defendants argue that this court should not recognize a loss of filial consortium cause of action because it is not the logical complement to a loss of parental consortium claim. Haier further contends that, if this court were to recognize a filial consortium claim, it would allow for the recovery of intangible losses alone and would depart from consortium's " 'conceptualistic unity' " of tangible and intangible losses.

I

It is well settled that this court has the "inherent authority, pursuant to the state constitution, to create new causes of action. . . . Moreover, it is beyond dispute that we have the power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law." (Internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540, 554, 175 A.3d 1 (2018). This court has exercised this authority when, among other instances, it adopted a common-

law loss of spousal consortium cause of action; *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 496; and a common-law loss of parental consortium cause of action. *Campos* v. *Coleman*, supra, 319 Conn. 57. Accordingly, there can be no question that, in the present case, this court has the authority to recognize a common-law cause of action for the loss of filial consortium.

This court's reasoning in its consortium case law reflects society's evolved understanding of the nature of certain intimate relationships between spouses and between parents and their children. This case law strongly supports recognition of a filial consortium cause of action. See, e.g., *Craig* v. *Driscoll*, 262 Conn. 312, 339, 813 A.2d 1003 (2003) ("[t]he issue of whether to recognize a common-law cause of action . . . is a matter of policy for [this] court to determine based on the changing attitudes and needs of society"). A review of that case law is foundational to my evaluation of the plaintiffs' request that this court recognize a filial consortium cause of action.

In *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 496, this court first recognized a loss of spousal consortium cause of action after previously declining to do so in *Marri* v. *Stamford Street Railroad Co.*, 84 Conn. 9, 22–24, 78 A. 582 (1911). In *Marri*, this court declined to recognize a loss of spousal consortium cause of action after the legislature enacted chapter 114 of the 1877 Public Acts, commonly called the Married Women's Act, which permitted women to recover for injuries that impaired their capacity to serve their husbands. See id., 21–24. This court reasoned that, because of the Married Women's Act, a woman's right to recover for her lost services now "must be regarded as exclusive . . . ." Id., 23. As a result, if a husband were to recover for loss of spousal consortium, it would derive solely from a loss of his wife's companionship. See id. But this court reasoned that the loss of companionship

alone could not serve as the basis for a consortium cause of action. See id., 23–24. Specifically, this court concluded that the loss of a spouse's services constituted the "foundation[al]" element of consortium, without which recovery should not be available. Id. In short, the decision in *Marri* "rested primarily [on] distinctions then drawn between the sentimental and service aspects of claims for loss of consortium." *Hopson* v. *St. Mary's Hospital*, supra, 491.

Approximately seventy years later, in *Hopson*, this court overruled *Marri* and rejected *Marri*'s bifurcated understanding of consortium. See id., 487, 490–93, 496. We adopted the emerging view that consortium is a " 'conceptualistic unity' " and that its traditional elements—the loss of services and intangibles—are inseparable. Id., 492; see also id., 487 (defining intangible aspects of spousal relationship to include "companionship, dependence, reliance, affection, sharing and aid" (internal quotation marks omitted)). Citing *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, 813–14 (D.C. Cir.) (overruled in part on other grounds by *Smither & Co.* v. *Coles*, 242 F.2d 220 (D.C. Cir.), cert. denied, 354 U.S. 914, 77 S. Ct. 1299, 1 L. Ed. 2d 1429 (1957)), cert. denied, 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624 (1950), we emphasized that "*recovery for loss of consortium should* [*not*] *depend* [*on*] *whether there was a loss of services.*" (Emphasis added.) *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 492. Instead, we found persuasive the reasoning in *Hitaffer* that "what [is] significant [is] the injury to the unity of the marital relation." Id. Following *Hopson*, then, a spouse could recover for a loss of spousal consortium regardless of whether the injured spouse had previously provided any services to the consortium spouse. By adopting a unified view of consortium, this court moved beyond *Marri*'s archaic, service-based understanding of consortium that was rooted in the long

rejected idea that a husband possessed a *proprietary* interest in his wife's domestic labor. See id., 487–88.

To that end, *Hopson* recognized that consortium would compensate an injured spouse for the loss of specific *relational* interests. See id., 492–94; see also id., 494 (noting that consortium may compensate for "loss of companionship, society, affection, sexual relations [or] moral support"). Accordingly, this court rejected the notion that a loss of consortium is an indirect injury. See id., 493 ("[t]o describe such a loss as indirect is only to evade the issue" (internal quotation marks omitted)). Rather, this court concluded that a loss of consortium—now understood to include the intangible aspects of a relationship—was a "*personal* . . . though not physical" injury that is "a *direct* result of [a] defendant's negligence . . . ." (Emphasis added.) Id. To describe the consortium spouse's injury as indirect would fall back to the idea that a loss of consortium cause of action compensates that spouse only for a loss of services, rather than also for a loss of relational interests.

In *Campos* v. *Coleman*, supra, 319 Conn. 36, this court relied on the same notion that consortium is a " 'conceptualistic unity' " that compensates for the personal loss of a relational interest when it recognized a cause of action for a loss of parental consortium. Id., 50, 57; see also id., 50 (defining parental consortium to include not only "a parent's services to his or her children," but also "such intangibles as the parent's love, care, companionship and guidance" (internal quotation marks omitted)). Similar to the court's reasoning in *Hopson*, in *Campos*, this court concluded that "familial consortium claims" were compensable in "cases involving *the impairment of* [*the parent-child*] *relationship* . . . ." (Emphasis added.) Id., 47. To be sure, this court was aware of the lingering concern that services might provide a surer foundation for calculating damages in

a consortium cause of action than consortium's intangible, relational elements. Nevertheless, we quoted *Hopson* to reiterate that "*courts commit error when they attempt to distinguish between the different elements of* [*this*] *conceptualistic unity* . . . ." (Emphasis added; internal quotation marks omitted.) Id., 50, quoting *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 492. In sum, in both *Hopson* and *Campos*, this court reasoned that a loss of consortium cause of action allows the spouse or child of the injured party to recover when an injury to that spousal or parent-child relationship occurs.

It logically follows from this court's reasoning in *Hopson* and *Campos* that this court should recognize a loss of filial consortium cause of action. When a parent suffers an impaired relationship with their child because a tortfeasor negligently injured the child, the parent should be able to recover for any provable impairment to that relationship—just as a spouse can recover for a loss of spousal consortium, and just as a child can recover for the loss of parental consortium. Because "there is nothing in reason to differentiate the parent's loss of the joy and comfort of his [or her] child from that suffered by the child"; *Mendillo* v. *Board of Education*, 246 Conn. 456, 485 n.20, 717 A.2d 1177 (1998), overruled in part on other grounds by *Campos* v. *Coleman*, 319 Conn. 36, 123 A.3d 854 (2015); it is entirely arbitrary not to recognize a cause of action for a parent's personal loss of society, companionship, and comfort of their child.

This court has long affirmed that the parent-child relationship is a unique, protected legal relationship. See, e.g., *Campos* v. *Coleman*, supra, 319 Conn. 46–47. Parents have a constitutional "right to family integrity," which includes a parent's interests "in the companionship, care, custody and management of his or her children . . . ." (Citations omitted; internal quotation

marks omitted.) *Pamela B.* v. *Ment*, 244 Conn. 296, 310, 709 A.2d 1089 (1998); see also, e.g., *Hepburn* v. *Brill*, 348 Conn. 827, 839, 312 A.3d 1 (2024) ("[t]he essence of parenthood is the companionship of the child and the right to make decisions regarding [that child's welfare]" (internal quotation marks omitted)). We have underscored that parents and children share a "unique emotional attachment . . . ." *Campos* v. *Coleman*, supra, 43. Because "the parent-child relationship is essentially different from other familial relationships," we have recognized that injuries to that relationship are "uniquely harmful . . . ." (Emphasis omitted.) Id., 48. Indeed, it was that recognition that led this court to recognize a loss of parental consortium cause of action. See id., 43–47, 57.

A parent's interests in their child are also substantially the same as the interests protected by loss of spousal and parental consortium causes of action. In *Hopson*, we noted that a party bringing a loss of spousal consortium claim could seek recovery for a "loss of companionship, society, affection . . . and moral support," among other intangible elements of a spousal relationship. *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494. Similarly, in *Campos*, we defined parental consortium to include "the parent's love, care, companionship and guidance . . . ." (Internal quotation marks omitted.) *Campos* v. *Coleman*, supra, 319 Conn. 50. Certainly, a parent can also receive love, companionship, society, affection, and moral support from their child. Accordingly, because this court has already concluded that a child's interests in their parents' love, companionship, and society are protected, we must safeguard a parent's same interests by recognizing a filial consortium cause of action for parents whose minor child is negligently injured by a tortfeasor. See, e.g., *United States* v. *Dempsey*, 635 So. 2d 961, 965 (Fla. 1994) (loss of filial consortium includes "loss of

[a child's] companionship, society, love, affection, and solace"); *Gallimore* v. *Children's Hospital Medical Center*, 67 Ohio St. 3d 244, 251, 617 N.E.2d 1052 (1993) (" '[c]onsortium' includes services, society, companionship, comfort, love and solace"). A parent's interests in their child's love, companionship, and society are no less deserving of protection than a child's or spouse's interests in those same intangible aspects of a familial relationship. Cf. *Mendillo* v. *Board of Education*, supra, 246 Conn. 499–500 (*Berdon, J.*, concurring in part and dissenting in part).

The majority declines to recognize a filial consortium cause of action almost entirely on the ground that a child's relationship with their parents is different from a parent's relationship with their child. This reasoning is misguided. I recognize that, in *Campos*, this court identified particular aspects of a minor child's relationship with their parents that are significant—a unique emotional bond, the parents' distinct legal duties to their child, and a child's legal entitlement to their parents' care—but they do not all apply with equal force in a loss of filial consortium context. See *Campos* v. *Coleman*, supra, 319 Conn. 44–47. Although the unique emotional bond between a parent and child is reciprocal, it is true that a child has no legal duties to their parent, and a parent is not legally dependent on their child or legally entitled to their child's services.

In *Campos*, however, this court did not make legal dependency and reciprocal legal duties required elements of a loss of consortium claim. See id., 45 ("the relationship between a parent and a minor child is the only one of these [nonspousal, familial] relationships that gives rise to legally enforceable rights"). This court emphasized that it was a child's distinct legal relationship with their parents that defines the limits of who could bring a loss of parental consortium claim. See id. That is, this court reasoned that a child could bring a

claim for the loss of a parent's consortium, but not for the loss of an aunt's or uncle's consortium, because the parent-child relationship is "unique" in various ways. Id., 44–47. But this court did not make legal dependency a necessary element of a parental consortium cause of action. Notably, in *Campos*, this court never described the parent-child relationship in terms of legal or relational dependence. The majority recognizes this when it notes that the idea of dependence is merely "[i]mplicit . . . ." Making legal and relational dependence a necessary element to recover in connection with a loss of consortium claim—as the majority implies—would risk overruling this court's reasoning in *Campos* and *Hopson* and would fall back on the outdated notion of a parent's or spouse's respective proprietary interest in their child or spouse.

II

The public policy factors this court has previously identified in *Mendillo* v. *Board of Education*, supra, 246 Conn. 485, also strongly support my conclusion that this court should recognize a cause of action for loss of filial consortium. To determine whether to adopt a loss of parental consortium cause of action, this court in *Mendillo* inquired whether (1) recognizing "the cause of action would require [the imposition of] arbitrary limitations" on the class of potential plaintiffs, (2) "recognition would impose" an "additional economic burden . . . on the general public," (3) "recognition would yield significant social benefits," (4) recognizing the cause of action would create a "substantial risk of double recovery," and (5) "the weight of judicial authority" supported recognition. Id. In *Campos*, this court analyzed the same public policy considerations before it recognized a cause of action for loss of parental consortium. See *Campos* v. *Coleman*, supra, 319 Conn. 43–57; see also *Mueller* v. *Tepler*, 312 Conn. 631, 633, 656–58, 95 A.3d 1011 (2014) (analyzing public policy factors

identified in *Mendillo* when considering whether to extend loss of spousal consortium claim to unmarried same-sex partners).[3]

Without explanation, the majority almost entirely dispenses with this well settled policy analysis. In doing so, the majority principally relies on a single distinction drawn from an indirect implication from this court's previous holdings rather than on a policy analysis. Moreover, the majority explicitly addresses only one policy factor articulated in *Mendillo*—the weight of judicial authority. By focusing on only one policy factor, the majority has inordinately emphasized the policy decisions of other states, such as Texas, while declining to engage in a thorough policy analysis as it relates to Connecticut. Because I do not think that this is appropriate—at least not without an explanation as to why it is warranted to abandon this court's policy analysis and to rely on the reasoning of other state courts—I consider whether this court should recognize a loss of filial consortium cause of action using the well settled policy framework employed by this court in *Hopson*, *Mendillo*, and *Campos*. First, recognizing a loss of filial consortium cause of action would not create "a practically unlimited class of potential plaintiffs." *Mendillo* v. *Board of Education*, supra, 246 Conn. 485. Far from it. Although a child's sibling, grandparent, aunt, or uncle might suffer harm because of an injury to the child, such relationships between a child's relative and the

[3] In *Clohessy* v. *Bachelor*, 237 Conn. 31, 675 A.2d 852 (1996), this court reasoned that the first step in determining whether to recognize a common-law cause of action is to determine whether a reasonable person in the defendant's position could foresee the type of harm that would occur. See id., 45. There is no question that harm to a parent is foreseeable when a tortfeasor negligently injures the parent's child. See, e.g., *Campos* v. *Coleman*, supra, 319 Conn. 48 (concluding that loss of parental consortium is "eminently foreseeable" when tortfeasor negligently injures parent). Accordingly, I consider only whether the public policy factors identified in *Mendillo* weigh in favor of recognition.

child do not "present equally strong claims of loss of consortium as [claims] arising from the relationship between a minor child and a parent." (Internal quotation marks omitted.) *Campos* v. *Coleman*, supra, 319 Conn. 44. As we reasoned in *Campos*, the parent-child relationship is unique, and other familial relationships "[arise] *through* the parent-child relationship." (Emphasis in original.) Id. In general, then, a parent will suffer a "uniquely harmful" injury and can present a unique loss of consortium claim when their child is injured. Id., 48. This court's conclusion in *Campos* that a loss of parental consortium cause of action does not lead to limitless liability applies with equal force to a loss of filial consortium cause of action. The parent-child relationship represents a clear limit, as we have already concluded. See id., 44–48; see also *Mendillo* v. *Board of Education*, supra, 513 (*Berdon, J.*, concurring in part and dissenting in part) (reasoning that "[t]he distinction between the interests of children and those of other relatives is rational and easily applied" (internal quotation marks omitted)).

The majority argues that relying on the "concept of dependence" creates "a clear dividing line between those relationships for which we do and do not recognize a cause of action for loss of consortium . . . ." This argument implies that, if this court were to recognize a loss of filial consortium cause of action, it would open the door to expanding the loss of consortium cause of action to other family members, with no logical end point. And, if that is the case, at some point this court must say "no."

The fear of an ever-expanding loss of consortium cause of action is unfounded. This court has already concluded that the parent-child relationship clearly limits who can bring a loss of consortium cause of action. See *Campos* v. *Coleman*, supra, 319 Conn. 44–48. And the experience of other states shows that the majority's

concern is simply overstated. Of the numerous states that have recognized a loss of parental or filial consortium cause of action since Idaho first did in 1952; see *Hayward* v. *Yost*, 72 Idaho 415, 425, 242 P.2d 971 (1952); only New Mexico has allowed for nonparent family members to recover for a loss of consortium. See *Fernandez* v. *Walgreen Hastings Co.*, 126 N.M. 263, 273, 968 P.2d 774 (1998) (requiring child's grandmother to show that she acted as family caretaker and provided parental affection to child to recover for loss of consortium). In the twenty-six years since New Mexico first recognized the cause of action in *Fernandez*, no other state has extended nonspousal, familial consortium causes of action beyond the parent-child relationship. See, e.g., *HELG Administrative Services, LLC* v. *Dept. of Health*, 154 Haw. 228, 229, 234–35, 237, 549 P.3d 313 (2024); *Snearl* v. *Mercer*, 780 So. 2d 563, 591–92 (La. App.), writ denied, 794 So. 2d 800 (La. 2001), and writ denied, 794 So. 2d 801 (La. 2001); *North Pacific Ins. Co.* v. *Stucky*, 377 Mont. 25, 40, 338 P.3d 56 (2014); *Hern* v. *Safeco Ins. Co. of Illinois*, 329 Mont. 347, 361–63, 125 P.3d 597 (2005); *Rolf* v. *Tri State Motor Transit Co.*, 91 Ohio St. 3d 380, 381, 383, 745 N.E.2d 424 (2001); *Benda* v. *Roman Catholic Bishop of Salt Lake City*, 384 P.3d 207, 209, 212–13 (Utah 2016). If the experience of other states is not persuasive, then the majority need look no further than *Campos* to determine that this court has already identified a logical end point to loss of consortium claims: the parent-child relationship.[4]

As to the second factor, recognizing a cause of action for loss of filial consortium would not impose undue

[4] In the present case, Haier unpersuasively contends that a filial consortium claim would also exclude non-biological parental relationships. But nothing in this court's holding in *Campos* would compel this court to arbitrarily limit recovery to birth parents in a filial consortium cause of action. Rather, a filial consortium cause of action would make recovery available to *legal* parents, which encompasses biological and non-biological adoptive parents.

societal costs, such as unreasonable increases in insurance premiums or litigation costs. See *Campos* v. *Coleman*, supra, 319 Conn. 47. To the extent recognizing a loss of filial consortium cause of action would impose undue societal costs, the same costs would certainly have arisen after we adopted loss of parental and spousal consortium causes of action. See id., 47–49, 57; *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 496. In the present case, the defendants have not identified any data to show that this court's prior recognition of consortium causes of action has created undue societal costs in Connecticut. Moreover, other states have recognized a statutory or common-law cause of action for loss of filial consortium for more than three decades, and at least twenty-five states presently recognize such an action.[5] The majority has not identified any undue

[5] The following statutes from fifteen jurisdictions allow for a loss of filial consortium cause of action arising out of the wrongful death of, and/or injury to, a child: Alaska Stat. § 09.15.010 (2022) (wrongful death or injury); Idaho Code Ann. § 5-311 (West 2023) (wrongful death only); Iowa Code Ann. § 613.15A (West 2018) (wrongful death or injury); Kan. Stat. Ann. § 60-1904 (1994) (wrongful death only); Ky. Rev. Stat. Ann. § 411.135 (LexisNexis 2005) (wrongful death only); Mass. Ann. Laws c. 231, § 85X (LexisNexis 2009) (serious injury); Neb. Rev. Stat. § 30-810 (2016) (wrongful death only); Okla. Stat. Ann. tit. 12, § 1055 (West 2015) (wrongful death only); Or. Rev. Stat. §§ 30.010 and 30.020 (2023) (wrongful death or injury); R.I. Gen. Laws § 9-1-41 (c) (2012) (injury); S.D. Codified Laws § 21-5-1 (2004) (wrongful death only); Tenn. Code. Ann. § 20-5-113 (2009) (wrongful death only); Vt. Stat. Ann. tit. 14, § 1492 (b) (Cum. Supp. 2024) (wrongful death only); Va. Code Ann. §§ 8.01-50 and 8.01-52 (2024) (wrongful death only); Wn. Rev. Code Ann. § 4.24.010 (West Cum. Supp. 2025) (wrongful death or injury).

In addition, ten jurisdictions recognize a common-law loss of filial consortium cause of action. See, e.g., *Reben* v. *Ely*, 146 Ariz. 309, 309, 705 P.2d 1360 (App. 1985); *United States* v. *Dempsey*, supra, 635 So. 2d 962–65; *Masaki* v. *General Motors Corp.*, 71 Haw. 1, 19, 22, 780 P.2d 566 (1989); *Snearl* v. *Mercer*, supra, 780 So. 2d 591–92; *Hern* v. *Safeco Ins. Co. of Illinois*, supra, 329 Mont. 361–63; *Fernandez* v. *Walgreen Hastings Co.*, supra, 126 N.M. 271–73; *Hopkins* v. *McBane*, 427 N.W.2d 85, 92 (N.D. 1988); *Gallimore* v. *Children's Hospital Medical Center*, supra, 67 Ohio St. 3d 246, 251–52; *Benda* v. *Roman Catholic Bishop of Salt Lake City*, supra, 384 P.3d 209, 212–13; *Shockley ex rel. Habush* v. *Prier*, 66 Wis. 2d 394, 401–404, 225 N.W.2d 495 (1975).

increased societal costs in any of these twenty-five states that would warrant concern by this court.

Although there is no evidence to suggest that recognizing a filial consortium cause of action would impose undue societal costs, as to the third *Mendillo* factor, we do know that such recognition would yield important societal benefits. Allowing compensation for the loss of filial consortium would enable a parent "to secure the therapy that will" help the parent "heal the wounds caused by his or her loss." *Mendillo* v. *Board of Education*, supra, 246 Conn. 479. It would enable a consortium parent to continue to provide care for their injured child. *Campos* v. *Coleman*, supra, 319 Conn. 43 (recognizing parents' care for their children as "critically important [service]"). Furthermore, because the parent-child relationship itself provides "value to society"; id., 46; providing greater protection to this relationship benefits all of society.

Recognizing a filial consortium cause of action would also further the purposes of the tort compensation system. See *Mendillo* v. *Board of Education*, supra, 246 Conn. 482 (identifying purposes of tort system to include "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct"). The cause of action would provide compensation to innocent parents who suffer the loss of their child's consortium. And it would allocate the financial burden of that loss to responsible parties. To the extent the majority is concerned that recognizing a filial consortium cause of action would not further the purposes of the tort compensation system because it would provide no deterrence for wrongful conduct, I would disagree. Even if a filial consortium cause of action would not further deter wrongful conduct—which is doubtful, as there can be no greater incentive for profit-driven companies to create safer products and to avoid expo-

sure to financial lability—it would still further the other purposes of the tort compensation system.

As to the fourth factor, recognizing a cause of action for the loss of filial consortium would also not "create a significant risk of double recovery." Id., 489. "This precise argument was addressed and rejected in *Hopson*." Id., 509 (*Berdon*, *J.*, concurring in part and dissenting in part). It was again addressed and rejected in *Campos*. See *Campos* v. *Coleman*, supra, 319 Conn. 50–51. In *Campos* and *Hopson*, this court acknowledged that some risk of double recovery may exist. See id.; *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 492–94. The concern was that an injured party might recover for their own injuries and the inability to provide services to their spouse or child. See, e.g., *Campos* v. *Coleman*, supra, 50–51; see also, e.g., *Mendillo* v. *Board of Education*, supra, 246 Conn. 489. In both *Campos* and *Hopson*, however, this court concluded that the risk of double recovery was not an insurmountable barrier to recognizing a loss of spousal or parental consortium cause of action. *Campos* v. *Coleman*, supra, 50–51; *Hopson* v. *St. Mary's Hospital*, supra, 492–94. Instead, this court addressed the risk of double recovery by requiring the injured party and the consortium spouse or child to join their claims in the same proceeding. *Campos* v. *Coleman*, supra, 50–51; *Hopson* v. *St. Mary's Hospital*, supra, 494. We also required trial courts to instruct juries that an injured party's services are recoverable only by the spouse or the minor child. *Campos* v. *Coleman*, supra, 50–51; *Hopson* v. *St. Mary's Hospital*, supra, 494. This court can and should impose these same requirements in a filial consortium cause of action.

In the present case, Haier argues that recognizing a loss of filial consortium cause of action would create a risk of double recovery distinct from the risk of double recovery that we described in *Campos*. Previously, this

court was concerned that an injured parent might recover for their own injuries and the inability to provide services to their child. See, e.g., *Campos* v. *Coleman*, supra, 319 Conn. 50–51; see also, e.g., *Mendillo* v. *Board of Education*, supra, 246 Conn. 489. Haier claims that this court should now be concerned that, in some situations, a risk exists that a party might doubly recover for a loss of *intangible aspects of a relationship* because juries will not be able to distinguish between the different parties' intangible losses. That is, in a situation in which a child and their parent are seriously injured, they might both recover for a loss of consortium. This concern is misplaced.

A loss of filial consortium claim would compensate only for the parent's loss of consortium when their child is injured. See, e.g., *Gallimore* v. *Children's Hospital Medical Center*, supra, 67 Ohio St. 3d 253. A child cannot also recover for their parent's loss of consortium. See, e.g., id. To be clear, both the parent and the child have an interest in their relationship with the other. Accordingly, both the parent and the child could theoretically suffer a compensable injury for a loss of that relationship if both parties are seriously injured. But, in many situations, either the parent or the child, but not both, will be seriously injured. Moreover, a theoretical risk that might exist in *some* situations should not bar recovery in *all*. There is no reason to think that proper jury instructions and a requirement that parents and children join their claims are inadequate to mitigate any risk that might exist.

To the extent the majority shares the defendants' concern that, even with clear jury instructions, a jury will still make an award that arbitrarily increases a tortfeasor's liability, I am not persuaded. As this court has recognized, "[t]he difficulty [in] assessing damages for loss of consortium is not a proper reason for denying the existence of such a cause of action inasmuch as

the logic of [that reasoning] would also hold a jury incompetent to award damages for pain and suffering." (Internal quotation marks omitted.) *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 493. Further, the concern that juries are not able to follow clear instructions runs counter to this court's presumption that, in the absence of evidence to the contrary, juries do follow instructions. See, e.g., *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). The fear that recognition of another loss of consortium cause of action would increase sympathy awards by juries amounts to a "fear that some cases will be decided badly." (Internal quotation marks omitted.) *Reben* v. *Ely*, 146 Ariz. 309, 313, 705 P.2d 1360 (App. 1985). I believe that it is "better to adopt a rule [that] will enable courts to strive for justice in all cases rather than to rely [on] one [that] will ensure injustice to many." (Internal quotation marks omitted.) Id.

Finally, as to the fifth *Mendillo* factor, recognizing a cause of action for the loss of filial consortium would not run counter to the weight of judicial authority. Twenty-five jurisdictions have recognized a cause of action that allows recovery for the loss of filial consortium.[6] See footnote 5 of this opinion. The reporters'

[6] This number includes the fifteen jurisdictions that allow for a statutory loss of filial consortium cause of action arising out of the wrongful death of, and/or injury to, a child and the ten jurisdictions that allow for a common-law loss of filial consortium claim. See footnote 5 of this opinion. The number also includes jurisdictions that recognize only a wrongful death of a child cause of action but no cause of action for nonfatal injuries to a child. See id. However, there is some conceptual "intersection" between wrongful death claims and the loss of consortium claims. Restatement (Third), Torts, Concluding Provisions § 48 A, comment (g), p. 274 (Tentative Draft No. 1, 2022). Notably, of the states that recognize a common-law loss of filial consortium cause of action, most also recognize a common-law loss of parental consortium cause of action. See, e.g., *Villareal* v. *State, Dept. of Transportation*, 160 Ariz. 474, 477, 774 P.2d 213 (1989); *HELG Administrative Services, LLC* v. *Dept. of Health*, supra, 154 Haw. 229, 234–35, 237; *North Pacific Ins. Co.* v. *Stucky*, supra, 377 Mont. 31–37, 40; *State Farm Mutual Automobile Ins. Co.* v. *Luebbers*, 138 N.M. 289, 299–300, 119 P.3d 169 (App. 2005), writ quashed, 140 N.M. 675, 146 P.3d 810 (2006); *Gallimore*

note to comment (b) to § 48 B in the first tentative draft of the Restatement (Third) of Torts explains that "[t]he trend is toward recognition of such claims, with the vast majority occurring after 1987." Restatement (Third), Torts, Concluding Provisions § 48 B, reporters' note to comment (b), p. 303 (Tentative Draft No. 1, 2022). The majority emphasizes that fourteen jurisdictions have declined to recognize a common-law filial consortium cause of action; see footnote 9 of the majority opinion and accompanying text; and that eighteen jurisdictions recognize only a common-law loss of services cause of action. See footnote 10 of the majority opinion and accompanying text. I agree that some of these jurisdictions allow recovery for loss of services but not for loss of relationship. See, e.g., *Smith* v. *Richardson*, 277 Ala. 389, 394, 171 So. 2d 96 (1965); *Earl* v. *Mosler Safe Co.*, 291 Ark. 276, 279, 724 S.W.2d 174 (1987); *Forte* v. *Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 801 n.8, 802–803 (Ind. 2001); *Michaels* v. *Nemethvargo*, 82 Md. App. 294, 296, 298, 300, 571 A.2d 850 (1990); *Father A* v. *Moran*, 469 N.W.2d 503, 506 (Minn. App. 1991); *Connelly* v. *Omaha*, 284 Neb. 131, 155, 157, 816 N.W.2d 742 (2012); *Gilbert ex rel. Gilbert* v. *Stanton Brewery, Inc.*, 295 N.Y. 270, 272–73, 67 N.E.2d 155 (1946); *Bolkhir* v. *North Carolina State University*, 321 N.C. 706, 713, 365 S.E.2d 898 (1988); *Moses* v. *Akers*, 203 Va. 130, 132, 122 S.E.2d 864 (1961); see also, e.g., *J.V. ex rel. Valdez* v. *Macy's, Inc.*, Docket No. Civ. No. 13-5957 (KSH) (CLW), 2014 WL 4896423, *4 (D.N.J. September 30, 2014) (applying New Jersey law). But this court has recognized a loss of services as one component of a loss of consortium claim. See, e.g., *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 492. Other of these jurisdictions protect a similar interest by recognizing a parent's wrongful death

v. *Children's Hospital Medical Center*, supra, 67 Ohio St. 3d 246, 251–52, 254–55; *Theama ex rel. Bichler* v. *Kenosha*, 117 Wis. 2d 508, 522, 527–28, 344 N.W.2d 513 (1984).

cause of action when their child dies, even though the parent cannot recover when the child is nonfatally injured. See, e.g., Kan. Stat. Ann. § 60-1904 (1994); Ky. Rev. Stat. Ann. § 411.135 (LexisNexis 2005); Neb. Rev. Stat. § 30-810 (2016); S.D. Codified Laws § 21-5-1 (2004).

Regardless of how I might differently categorize or analyze these cases from the majority, this court does "not decide the public policy of this state based [on] the numbers game." *Mendillo* v. *Board of Education*, supra, 246 Conn. 506 (*Berdon*, *J.*, concurring in part and dissenting in part). Rather, this court must decide whether to recognize a loss of filial consortium cause of action "based [on] what we deem to be in the best interests of justice and of the citizens of [Connecticut] . . . at the time the question is presented to us." (Internal quotation marks omitted.) Id., 506–507 (*Berdon*, *J.*, concurring in part and dissenting in part), quoting *Hay* v. *Medical Center Hospital of Vermont*, 145 Vt. 533, 545, 496 A.2d 939 (1985). Because the overall balance of the public policy factors weighs in favor of recognition, I would recognize a loss of filial consortium cause of action.

III

The majority's decision not to engage in a thorough policy analysis also represents a departure from a quintessential function of this court: to determine whether to recognize a common-law cause of action. This court routinely "weigh[s] . . . public policies" to determine if a common-law cause of action exists. *Campos* v. *Coleman*, supra, 319 Conn. 40 n.5; see id. ("[s]ee, e.g., [*Mueller* v. *Tepler*, supra, 312 Conn.] 649–58 (recognizing as matter of public policy that member of same-sex couple who would have been married but for legal bar on such marriages can bring loss of consortium claim); *Craig* v. *Driscoll*, [supra, 262 Conn. 338–40] (recognizing that purveyor who negligently serves liquor to adult

patron who, as result of his intoxication, injures another, can be proximate cause of such injuries); *Jaworski* v. *Kiernan*, 241 Conn. 399, 412, 696 A.2d 332 (1997) ('[A]s a matter of policy, it is appropriate to adopt a standard of care imposing on the defendant, a participant in a team contact sport, a legal duty to refrain from reckless or intentional conduct. Proof of mere negligence is insufficient to create liability.'); *Clohessy* v. *Bachelor*, 237 Conn. 31, 49, 675 A.2d 852 (1996) ('[w]e . . . conclude, on the basis of sound public policy and principles of reasonable foreseeability, that a plaintiff should be allowed to recover, within certain limitations, for emotional distress as a result of harm done to a third party')").

To abandon this role is the functional equivalent of ceding this court's inherent authority to the legislature; this court has never deferred to the legislature when determining whether to recognize a common-law loss of consortium cause of action. See, e.g., *Campos* v. *Coleman*, supra, 319 Conn. 37–38, 57 (recognizing parental consortium cause of action); *Mueller* v. *Tepler*, supra, 312 Conn. 633–35, 646, 661 (extending spousal consortium cause of action to nonmarried partners who would have been married or in civil union when underlying tortious conduct occurred if not for fact that they were barred from doing so); *Hopson* v. *St. Mary's Hospital*, supra, 176 Conn. 494–96 (recognizing loss of spousal consortium cause of action). Even in *Mendillo* v. *Board of Education*, supra, 246 Conn. 456, in which this court declined to recognize a loss of parental consortium cause of action; see id., 461, 495–96; neither the majority opinion nor the concurring and dissenting opinion questioned that this court, not the legislature, should make that determination. See id., 480, 485–87; id., 507 and n.13 (*Berdon*, *J.*, concurring in part and dissenting in part). Instead, in *Mendillo*, the majority of this court reasoned that it can and should engage in a "special policy inquiry" pursuant to its common-law authority.

Id., 480. This court "acknowledge[d] that as in any case that involves the question of whether our public policy, as a matter of common law, should recognize a new cause of action, the ultimate decision comes down to a matter of [judicial] judgment in balancing the competing interests involved." Id., 495. There are many circumstances in which this court has appropriately left to the legislature questions better suited to its judgment and expertise. See, e.g., *Commissioner of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 347 Conn. 675, 707, 299 A.3d 197 (2023). This is not one of those circumstances. To defer to the legislature here would abdicate this court's common-law authority because "[t]he issue of whether to recognize a common-law cause of action in negligence is a matter of policy *for* [*this*] *court* to determine based on the changing attitudes and needs of society." (Emphasis added.) *Craig* v. *Driscoll*, supra, 262 Conn. 339.

Indeed, I have not found a single case in which this court has deferred to the legislature when considering whether to recognize a common-law cause of action. See generally D. Krisch & M. Taylor, Encyclopedia of Connecticut Causes of Action (2023) pp. 1–139 (listing and describing more than 100 recognized common-law causes of action). Of course, this court has *declined* to recognize many common-law causes of action or to expand existing common-law causes of action. See, e.g., *Cenatiempo* v. *Bank of America, N.A.*, 333 Conn. 769, 806, 219 A.3d 767 (2019); *Sepega* v. *DeLaura*, 326 Conn. 788, 789, 167 A.3d 916 (2017); *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 227–28, 235, 116 A.3d 297 (2015); *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 212–13, 216, 837 A.2d 759 (2004); *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 693–94, 697, 802 A.2d 731 (2002); *Kelley Property Development, Inc.* v. *Lebanon*, 226 Conn. 314, 330–31, 627 A.2d 909 (1993). But it does not change the fact that the decision-making authority

rests with this court and not the legislature. We regularly weigh policy considerations and, on that basis, determine whether to recognize a common-law cause of action. That is a quintessential function of this court. The majority's failure to engage in a policy analysis represents a dramatic departure from this court's exercise of its long established common-law authority.

For the foregoing reasons, I respectfully dissent.

Cumulative Table of Cases
Connecticut Reports
Volume 351

(Replaces Prior Cumulative Table)

CONNECTICUT APPELLATE REPORTS

Vol. 230

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE JULIANY T.*
(AC 47376)

Alvord, Cradle and Harper, Js.

Syllabus

The respondent father appealed from the judgment of the trial court terminating his parental rights as to his minor child. He claimed, inter alia, that his counsel provided ineffective assistance that constituted reversible error, as the deficient performance was of such a magnitude that it created structural error pursuant to *United States* v. *Cronic* (466 U.S. 648). *Held*:

This court declined to presume that the respondent father was prejudiced by his counsel's performance, as the presumption of prejudice standard set forth in *Cronic* does not extend to child protection matters.

The respondent father could not prevail on his claim of ineffective assistance of counsel, as he inadequately briefed the issue of prejudice.

This court rejected the respondent father's claim that he had a constitutional right to a hybrid habeas fact-finding proceeding in the trial court to more fully develop the record in support of his claim that he was denied the effective assistance of counsel, citing the precedent of the Supreme Court in *In re Jonathan M.* (255 Conn. 208) that there were other means of vindicating the right to the effective assistance of counsel through which an indigent parent may challenge a termination judgment, and this court declined to exercise its supervisory authority over the administration of justice to afford the father a right to such a fact-finding proceeding.

Argued September 10, 2024—officially released February 3, 2025**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Nguyen-O'Dowd*, *J.*; judgment terminating the respondents' parental rights, from

* 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.

** February 3, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

which the respondent father appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent father).

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

HARPER, J. The respondent father, Julio T., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Juliany.[1] The respondent raises three claims on appeal, each of which emanates from his contention that he was denied the effective assistance of counsel at trial, in violation of his due process rights under the fourteenth amendment to the federal constitution[2] and article first, § 10, of the Connecticut constitution.[3] First, he claims that his counsel's allegedly deficient performance "was of such magnitude that it created structural error as set forth in *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)," and is therefore per se reversible error. Second, he claims that he has a due process right to a hybrid

[1] The court also terminated the parental rights of Juliany's mother, Melanie R. Because she has not appealed from that judgment, we refer to Julio T. as the respondent and to Melanie R. by name throughout this opinion. Unless necessary to our analysis of the claims raised by the respondent, in this opinion we need not and do not address the court's findings and conclusions with respect to Melanie R.

[2] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., amend. XIV.

[3] Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

habeas fact-finding proceeding in the trial court to further develop the record as to his ineffective assistance of counsel claim because "the procedures available to him to vindicate his right to effective assistance of counsel are inadequate." He further claims that, if he does not have a due process right to a hybrid habeas fact-finding proceeding, this court should exercise its supervisory authority to create one.[4] We affirm the judgment of the trial court and decline the respondent's request that we exercise our supervisory authority.

The following facts, which the court found by clear and convincing evidence or which are otherwise undisputed, and procedural history are relevant to our resolution of this appeal. Juliany was born in December, 2010. Shortly thereafter, in January, 2011, the respondent was arrested and charged with murder. In October, 2013, the respondent was found guilty of murder and, in December, 2013, he was sentenced to fifty years of incarceration. The respondent's maximum release date is January, 2061.

Because he was incarcerated, the respondent was not able to provide care for Juliany, who remained in the care of her mother, Melanie R. See footnote 1 of this opinion. Melanie R. suffered from mental health and substance abuse issues and had "a child protection history dating back to 2011, for medical neglect, educational neglect, physical neglect, physical abuse, and lack of supervision."[5] Juliany "is a special education student

[4] The attorney for the minor child has filed a statement adopting the "factual statements set forth in the [petitioner's] brief" but takes no position as to whether the respondent has a constitutional right to the effective assistance of counsel or a hybrid habeas fact-finding proceeding. She maintains, nonetheless, that, if such rights exist, any violations thereof are "not so prejudicial as to require a reversal of the termination petition as set forth in the [petitioner's] brief" and argues that any further delay in the process of securing a permanent home and legal status would not be in Juliany's best interest.

[5] Melanie R. has two other minor children, Precious R. and Joshua R. The court terminated her parental rights as to them, as well. The respondent is

with her primary disability as emotional disturbance due to changes in her mood and low frustration levels." Juliany has "specialized mental health needs," "has had between eight to nine foster care placements," and has been "qualified for placement in a therapeutic foster home."[6]

"On November 1, 2019, [the Department of Children and Families (department)] received a referral from Juliany's school due to her emotional and behavioral challenges." Melanie R. did not cooperate with the department by engaging in services following this referral, and, on January 21, 2020, the petitioner filed a neglect petition as to Juliany. On March 30, 2020, the petitioner sought and was granted an ex parte order of temporary custody as to Juliany and the court, *Lobo, J.*, issued preliminary specific steps for the respondent. On September 30, 2020, the court, *Dannehy, J.*, adjudicated Juliany neglected, committed her to the care and custody of the petitioner and issued final specific steps for the respondent.[7] The respondent "stood silent as to the neglect adjudication."

After Juliany was removed from Melanie R.'s care in 2020, the department offered the respondent reunification services by encouraging his participation in programs or services available through the Department of

not the father of Precious and Joshua, and his claims in this appeal do not pertain to them.

[6] At the time of trial, Juliany had been residing in a therapeutic foster home since April, 2023.

[7] "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights." (Internal quotation marks omitted.) *In re Amias I.*, 343 Conn. 816, 822 n.6, 276 A.3d 955 (2022). The final specific steps the court issued for the respondent included, among other things, participating in services provided by the Department of Correction (DOC) regarding parenting, substance abuse and mental health and signing "releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress toward identified goals, and for use in future proceedings with this court."

Correction (DOC),[8] and it facilitated phone calls and offered him virtual and in person visits with Juliany.[9] The department's "social workers regularly contacted [the respondent] and his counselor to discuss his participation in services while incarcerated. He completed the VOICES program in June, 2020, which is a victim impact program." The department did not know whether the respondent completed any other programs, however, because he failed to sign a release of information in accordance with the court-ordered specific steps. See footnote 7 of this opinion.

On December 22, 2022, the petitioner filed a petition to terminate the respondent's parental rights on the grounds that (1) Juliany had been abandoned by the respondent "in the sense that the [respondent] failed to maintain a reasonable degree of interest, concern, or responsibility as to the welfare of the child," (2) Juliany previously had been adjudicated neglected and the respondent had failed to achieve a sufficient degree of rehabilitation, and (3) the respondent had no ongoing parent-child relationship with Juliany. A trial on the petition for the termination of parental rights was held on June 6, 2023, before the court, *Nguyen-O'Dowd*, *J.* The petitioner presented the testimony of two witnesses, department social workers Mary Daries and Paola Tierinni, and entered eighteen exhibits. After consulting with his counsel, the respondent testified. He did not call any other witnesses or enter any exhibits.

[8] Because the respondent was incarcerated, the department was unable to directly provide him with services.

[9] Since 2020, the respondent had some contact with Juliany, predominantly by telephone. The record reflects one in person visit in June, 2021. Between August, 2021, and February, 2023, however, Juliany refused to have any contact with the respondent, and the department kept him updated about her. Juliany agreed to resume contact with the respondent in 2023, provided the contact was facilitated by relatives, and this contact had occurred approximately monthly as of the time the court issued its decision. The record does not specify whether this resumed contact has been telephonic, in person, or both.

After the respondent rested his case, the petitioner's counsel advised that the petitioner was withdrawing two of the three alleged grounds for termination of parental rights and was proceeding solely on the ground set forth in General Statutes § 17a-112 (j) (3) (B) (i), which provides in relevant part that Juliany "has been found in a prior proceeding to have been neglected, abused or uncared for and the . . . [respondent] has . . . failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of [Juliany] . . . he . . . could assume a responsible position in the life of [Juliany] . . . ." The petitioner's counsel then argued, in closing argument, that the petitioner had satisfied her burden to prove this ground with evidence that established that the respondent failed to comply with the court-ordered specific steps by providing releases to confirm his engagement in, or successful completion of, DOC services regarding parenting, substance abuse and mental health. The petitioner's counsel also argued that the petitioner made reasonable efforts to reunify the respondent with Juliany and had proven the respondent's inability or unwillingness to benefit from those efforts. Finally, the petitioner's counsel argued that the evidence established that termination of the respondent's parental rights was in Juliany's best interest.

The respondent's counsel then made the following closing argument: "On behalf of [the respondent], I do believe the [petitioner] has appropriately adopted the grounds, ground B, failure to rehabilitate. I think the others are not appropriate.

"As to failure to rehabilitate, [the respondent is] in an unfortunate situation where he's not able to rehabilitate because he is incarcerated. So, his actions or inactions are not wilful, they're consequential, and I don't want to belabor that.

"There is enough today to hear that the child may seek to have a relationship with the [respondent] through the [respondent's] family. It's very difficult to predict the future, but as she matures perhaps she can work out some relationship regardless of the decision of this court. Whether the court decides to terminate the rights of [the respondent] to his child, it doesn't mean the court can terminate any affection or any desire to be a part of the [respondent's life] at some point in time. So, there's enough there to say that Juliany may seek some relationship with [the respondent] at some point in time regardless of the outcome. So, I just wanted to emphasize that [the respondent's] behavior is not wilful.

"His testimony today echoes the reality when you're sentenced for a long time, for practical reasons the [DOC] tends to favor those inmates who have lesser time to serve. And where the time to serve is greater, for efficacy it's distributed inequitably. So, I just want to emphasize what [the respondent] made clear: It's not that he doesn't want to. It's not wilful. He did the best that he could on what was provided, and he's not in complete control of the [DOC]."

On August 21, 2023, the court issued a memorandum of decision in which it terminated the respondent's parental rights. The court found by clear and convincing evidence that the department had made reasonable efforts to reunify Juliany with the respondent and that the respondent was unable or unwilling to benefit from reunification efforts.

The court also found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of Juliany, he could assume a responsible position in her life. In reaching this conclusion, the court observed that the

respondent "has been incarcerated throughout the pendency of this case" and that he had been on notice since early 2020 "as to the expectations of him in the specific steps ordered by the court." To this end, the court acknowledged that the respondent "took advantage of the programs that were available to him" but determined that "this is not enough given Juliany's age[10] and needs and the length of time she has been in [the department's] care. There is still more work to do to ensure that the respondent . . . understands Juliany's emotional and mental health needs." (Footnote added.) Noting that the respondent's maximum release date "is well beyond when Juliany will reach the age of majority," the court concluded that the respondent "would be unable to rehabilitate in time for Juliany." It specified that "the only reasonable conclusion *to be made from the credible testimony and evidence* is that the respondent . . . has failed to attain a level of rehabilitation given Juliany's age and needs" and determined "that the petitioner has shown by clear and convincing evidence that the respondent . . . has failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i)." (Emphasis added.)

In the dispositional phase of the proceedings, the court made findings as to each of the seven statutory factors set forth in § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in Juliany's best interest. Accordingly, the court rendered judgment terminating the respondent's parental rights and appointing the petitioner as Juliany's statutory parent. This appeal followed.

Each of the respondent's claims on appeal derives from his contention that he was denied the effective assistance of counsel at trial. See *In re Jonathan M.*, 255 Conn. 208, 235, 764 A.2d 739 (2001) (confirming

[10] Juliany was twelve years old at the time of trial.

that parent may challenge adequacy of trial counsel in parental rights termination proceedings by way of direct appeal). The respondent argues that his counsel's performance was deficient because he conceded that the petitioner had proven the case for termination when he stated during his closing argument that "the [petitioner] has appropriately adopted the grounds, ground B, failure to rehabilitate." The following principles, therefore, guide our review.

"In Connecticut, a parent who faces the termination of his or her parental rights is entitled, by statute, to the assistance of counsel. . . . Because of the substantial interests involved, a parent in a termination of parental rights hearing has the [statutory] right not only to counsel but to the effective assistance of counsel. . . . Moreover, a parent whose rights have been terminated may assert, on direct appeal, that he or she was deprived of the right to the effective assistance of counsel at trial. . . . In determining whether counsel has been ineffective in a termination proceeding, [this court has] enunciated the following standard: The range of competence . . . requires not errorless counsel, and not counsel judged ineffective by hindsight, but counsel whose performance is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in [that particular area of the] law. . . . The respondent must prove that [counsel's performance] fell below this standard of competency and also that the lack of competency contributed to the termination of parental rights. . . . *A showing of incompetency without a showing of resulting prejudice . . . does not amount to ineffective assistance of counsel.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Peter L.*, 158 Conn. App. 556, 563, 119 A.3d 23 (2015). "Even where a parent in a termination proceeding has a constitutional, rather than merely statutory, right to counsel, the parent must

show resulting prejudice to prevail on a claimed violation of that right." *In re Jaelynn K.-M.*, 229 Conn. App. 371, 382, 327 A.3d 1013 (2024).

"In making such a claim, it is the responsibility of the respondent to create an adequate record pointing to the alleged ineffectiveness and any prejudice the respondent claims resulted from that ineffectiveness. . . . In the absence of findings by the trial court in this regard, we directly review the trial court record." (Citation omitted; internal quotation marks omitted.) *In re Wendy G.-R.*, 225 Conn. App. 194, 205, 314 A.3d 1029, cert. denied, 349 Conn. 916, 316 A.3d 357 (2024).

I

The respondent's first claim on appeal is that he had a federal and state constitutional right to the effective assistance of counsel during the termination proceedings and that his "[t]rial counsel's deficient performance represented structural error" requiring an automatic reversal of the judgment and an order for a new trial. He acknowledges that, "[i]n most cases, a respondent alleging ineffective assistance of counsel in a termination hearing must prove both that the trial counsel's performance was deficient and that the lack of competency contributed to the termination of parental rights" but argues that, "[i]n this case . . . trial counsel's concession that the [petitioner] had proven that the respondent had failed to rehabilitate represents a breakdown in the adversarial process such that the process itself should be deemed unreliable." As such, he maintains that we should presume that he was prejudiced by his counsel's alleged incompetency and reverse the judgment in accordance with the standard set forth in *United States* v. *Cronic*, supra, 466 U.S. 658.

The petitioner claims, in response, that the respondent's right to the effective assistance of counsel is not constitutional in nature and that, even it if was, this

court should not "import *Cronic* . . . into the child protection context," given that "our Supreme Court has declined to adopt an automatic reversal rule that would forgo a harmlessness analysis in child protection cases." The petitioner maintains, therefore, that the respondent must demonstrate both his counsel's incompetence and prejudice resulting therefrom to prevail on his claim of ineffective assistance of counsel and that he has failed to do so. We agree with the petitioner and conclude that, assuming that the respondent had a constitutional right to the effective assistance of counsel at the termination hearing; see *In re Jonathan M.*, supra, 255 Conn. 225 (noting that parent "is constitutionally entitled to the effective assistance of counsel only if he had a constitutional right to appointed counsel in the termination proceeding");[11] *Cronic*'s presumption

[11] The parties agree that whether the respondent had a constitutional right to the effective assistance of counsel under the fourteenth amendment to the federal constitution depends on the outcome of the balancing test set forth in *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27–32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), and its progeny. "[I]n *Lassiter* . . . the United States Supreme Court considered and rejected a claim that the due process clause of the fourteenth amendment requires the appointment of counsel for indigent parents in every parental status termination proceeding. . . . The court read its prior cases as establishing a presumption that an indigent litigant has a right to appointed counsel only when his or her physical liberty is at stake. . . . The court then applied the due process balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—weighing the competing private and governmental interests at stake and the risk of an erroneous decision in the absence of appointed counsel—to determine whether an indigent parent's interest in obtaining the assistance of counsel is sufficiently compelling to overcome that presumption. . . .

"Despite [marshaling] a number of potentially convincing arguments in favor of recognizing a right to counsel . . . the court ultimately declined to hold that due process requires the appointment of counsel whenever a state seeks to terminate the parental rights of an indigent parent. . . . Instead, the court held that whether the federal constitution requires the appointment of counsel is a fact specific determination that must be made by balancing the *Mathews* factors on a case-by-case basis. . . . The court further cautioned that, in light of the presumption against the right to appointed counsel in the absence of a potential deprivation of physical liberty, such a right would exist only [i]f, in a given case, the parent's interests

of prejudice standard does not extend to "this case and other child protection cases where there is a complete breakdown in the adversarial system," as the respondent urges.[12]

Because the respondent's claim is strictly predicated on the applicability of the "standard used by our reviewing courts in *Cronic*," we begin there. In *Cronic*, the United States Supreme Court considered a defendant's appeal from his conviction of mail fraud based on his claim that his sixth amendment right to the effective assistance of counsel[13] had been violated during his criminal trial. *United States* v. *Cronic*, supra, 466 U.S. 651, 658. The court recognized in *Cronic* that "[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system"; id., 653; and that that right "is the right to the effective assistance of counsel." (Internal quotation marks omitted.) Id.,654. The court expressed concern that, "[u]nless the accused receives the effective assistance

[are] at their strongest, the [s]tate's interests [are] at their weakest, and the risks of error [are] at their peak . . . ." (Citations omitted; internal quotation marks omitted.) *In re Amias I.*,343 Conn. 816, 833 n.18, 276 A.3d 955 (2022). With these principles in mind, we assume without deciding that the respondent had a federal constitutional right to the effective assistance counsel. We need not further assume, therefore, that article first, § 10, of the Connecticut constitution independently confers such a right. See *In re Taijha H.-B.*, 333 Conn. 297, 327, 216 A.3d 601 (2019).

[12] The petitioner also argues that, even if the presumption of prejudice standard set forth in *Cronic* is extended to child protection matters, that standard is not implicated by the circumstances of this case. Because we conclude that this standard is not applicable in the context of this child dependency proceeding, we do not address this argument.

[13] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. We note that our Supreme Court "has held that, in termination of parental rights proceedings, parents have no right to counsel under the sixth amendment . . . which [applies] only to criminal defendants," and the respondent does not argue otherwise in this appeal. *In re Amias I.*, 343 Conn. 816, 832 n.17, 276 A.3d 955 (2022), citing *State* v. *Anonymous*, 179 Conn. 155, 159–60, 425 A.2d 939 (1979).

of counsel, a serious risk of injustice infects the trial itself"; (internal quotation marks omitted) id., 656; and explained that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." Id., 658. As such, although the court acknowledged the presumption that an accused's "lawyer is competent to provide the guiding hand that the defendant needs" and maintained that "the burden rests on the accused to demonstrate a constitutional violation," it nonetheless identified three situations involving circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id., 658. Specifically, where there is a "complete denial of counsel" during a critical stage of the proceedings, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; id., 659; and where surrounding circumstances make it unlikely that any lawyer could provide effective assistance, prejudice resulting from ineffective assistance may be presumed. Id., 659–60; see also *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 532, 208 A.3d 296 (explaining that, in *Cronic*, court "established a narrow exception to the general two part . . . test for determining whether a petitioner's [sixth amendment] right to the effective assistance of counsel has been violated"), [14] cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

The respondent argues that, by conceding that the petitioner had proven his failure to rehabilitate, his

[14] That two part test, set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is the same as the two part test the respondent must satisfy, in the absence of an exception, to establish ineffective assistance of counsel in the termination proceeding that gives rise to this appeal. See *In re Peter L.*, supra, 158 Conn. App. 563. Under *Strickland*, a petitioner cannot establish a violation of his sixth amendment right to counsel without first demonstrating that (1) counsel's performance was deficient and (2) this deficiency prejudiced the petitioner's defense. *Strickland* v. *Washington*, supra, 687.

"counsel failed entirely to subject the [petitioner's] case to meaningful adversarial testing" as contemplated by *Cronic*, and that this error "was of a magnitude significant enough that [this court] could conclude that [he] was, in effect, unrepresented during a critical phase of the termination trial." He maintains, therefore, that this court should treat his counsel's concession as structural error by deeming "the process itself . . . presumptively unreliable" and reversing the judgment. See *In re Amias I.*, 343 Conn. 816, 840, 276 A.3d 955 (2022) ("[s]tructural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected" (internal quotation marks omitted)). Our Supreme Court's decision in *In re Amias I.*, however, forecloses the respondent's claim.

In *In re Amias I.*, the respondent mother appealed from the judgments of the trial court terminating her parental rights to her three children. Id., 818–19. The respondent claimed that the trial court violated her children's constitutional right to conflict free representation by failing to inquire into whether the attorney appointed to represent them had a conflict of interest and that the court should treat that failure as structural error subject to automatic reversal. Id., 819–20, 830. Our Supreme Court explained, however, that, on previous occasions when it had applied the structural error doctrine, it had "done so sparingly" and, more to the point, that it never had applied structural error in the child dependency context. Id., 839; see also *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 29, 259 A.3d 1082 (2021) ("[o]nly a small share of constitutional errors are structural, that is, so presumptively harmful that they require automatic reversal"). The court "concluded that the significant differences between child dependency proceedings and other judicial proceedings militate decisively against applying a per se reversible error

rule in dependency cases," and it declined to do so. *In re Amias I.*, supra, 343 Conn. 840.

In reaching this conclusion, our Supreme Court "agree[d] fully with the California Supreme Court's reasoning in *In re James F.*, 42 Cal. 4th 901, 915–16, 174 P.3d 180, 70 Cal. Rptr. 3d 358 (2008), in which that court concluded that the significant differences between child dependency proceedings and other judicial proceedings militate decisively against applying a per se reversible error rule in dependency cases. See id., 917 ('[w]e cannot agree . . . that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child'). '[T]he price that would be paid for [applying such a rule], in the form of needless reversals of dependency judgments, is unacceptably high in light of the strong public interest in prompt resolution of these cases so that the children may receive loving and secure home environments as soon as reasonably possible.' Id., 918." *In re Amias I.*, supra, 343 Conn. 840–41. The same policy considerations are implicated in this child dependency proceeding and thus, we will not presume prejudice here. See id.; see also *In re Jaelynn K.-M.*, supra, 229 Conn. App. 383 (concluding that *Cronic*'s presumption of prejudice was not applicable to constructive deprivation of counsel claim in child dependency proceeding).

It is therefore incumbent on the respondent to prove prejudice to prevail on his claim of ineffective assistance of counsel. See *In re Peter L.*, supra, 158 Conn. App. 563. Apart from arguing that prejudice should be presumed, however, the respondent has not addressed the issue of prejudice in his briefs to this court, let alone proven that his counsel's alleged incompetency contributed to the loss of his parental rights. See, e.g., *In re S. F.*, 229 Conn. App. 1, 10 n.7, 326 A.3d 609 ("[a]nalysis, rather than mere abstract assertion, is

required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)), cert. denied, 350 Conn. 932, 326 A.3d 1108 (2024). We conclude that the respondent cannot prevail on his ineffective assistance of counsel claim because, as the petitioner argues and we agree, he did not brief the issue of prejudice and, thus, his claim is inadequately briefed. See id.

On the basis of the foregoing, we reject the respondent's claim that his trial counsel rendered ineffective assistance at the termination of parental rights trial.

II

The respondent next claims that he has a due process right to a hybrid habeas fact-finding proceeding in the trial court in order to more fully develop the record in support of his claim that he was denied the effective assistance of counsel at trial. He claims that "procedures available to him to vindicate his right to effective assistance of counsel are inadequate." He further claims that, if due process does not afford him such a right, this court should exercise its supervisory authority to afford him that right. These claims warrant little discussion.

As the respondent acknowledges, our Supreme Court concluded in *In re Jonathan M.*, supra, 255 Conn. 227–28, that "due process does not dictate that the petitioner must be permitted to utilize the writ of habeas corpus as a procedural means of attacking collaterally the termination judgment." He further acknowledges that the court saw "no need to utilize [its] supervisory authority to supplement the evidentiary record in direct appeals from such judgments in an effort to create an alternative to the habeas relief sought in this case." Id., 236. In reaching these conclusions, the court explained that there were "other means of vindicating the right to effective assistance of counsel . . . through which an

indigent parent may challenge a termination judgment . . . .'' Id. Specifically, in addition to the right to bring a direct appeal from the termination judgment, a parent may seek to ''open the final judgment of termination and assert a claim of ineffective assistance of counsel''; id., 237; and/or file a petition for a new trial. Id.,239.

Although the respondent argues that the latter two options are inadequate, he did not attempt to avail himself of those options. Moreover, he also correctly acknowledges that, ''to the extent the claims overlap, this court is bound by our Supreme Court's prior ruling'' in *In re Jonathan M.*[15] We are not at liberty to assess the propriety of the ''other means'' that were available to the respondent to vindicate his right to effective assistance of counsel under these circumstances. This court is bound by the precedent of our Supreme Court; see, e.g., *In re Wendy G.-R.*, supra, 225 Conn. App. 201 n.12 (rejecting request to reconsider propriety of other means parent has to vindicate right to effective assistance of counsel set forth in *In re Jonathan M.*); and we therefore reject the respondent's claim that he has a constitutional right to a hybrid habeas fact-finding proceeding, and we decline to exercise our supervisory authority to create one in light of our Supreme Court's recognition of other available remedies in *In re Jonathan M.*

The judgment is affirmed.

In this opinion the other judges concurred.

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[15] We note that the respondent explains in his brief that ''[t]his claim is fully briefed to allow this court an ability to fully examine whether *In re Jonathan M.* forecloses action by this court and to preserve the argument in further proceedings.''

JOSHUA MARCINISZYN ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF SOUTHINGTON ET AL.

(AC 46736)

Suarez, Clark and Lavine, Js.

Syllabus

The plaintiffs, a self-represented nonattorney father and his minor son by and through the father as next friend, appealed from the trial court's denial of their petition for a bill of discovery. They claimed, inter alia, that the court erred when it determined that they had failed to establish probable cause for their claims that the defendants had discriminated against the son in denying him admission to a public high school program in violation of several federal civil rights laws. *Held*:

This court properly considered, sua sponte, the issue of the plaintiff father's standing to bring this appeal in his individual capacity and of his authority to proceed in a representative capacity as a self-represented nonattorney on behalf of his minor son, as exceptional circumstances warranted this court's review, the parties have been afforded an opportunity to be heard, the plaintiffs have failed to raise a colorable claim of prejudice, and the record was adequate for review, even though the parties did not raise the issue in their principal briefs.

The plaintiff father had standing in his individual capacity to appeal from the trial court's decision denying the petition for a bill of discovery, as he was classically aggrieved by the court's decision in that, as one of two plaintiffs in the proceedings before the court, he suffered an injury when the court denied his request to act pursuant to its common-law authority to issue the bill.

The plaintiff father, notwithstanding his aggrievement by the trial court's decision, did not have standing to bring the action in his individual capacity in the first instance because he was not classically aggrieved, as a review of the petition revealed that the injuries alleged therein were exclusively injuries to his minor son and not to him, and the court should have dismissed the petition as to the father for lack of subject matter jurisdiction rather than denying it.

This court dismissed the appeal as to the minor son as the plaintiff father did not have the authority as a self-represented nonattorney to proceed in a representative capacity on behalf of his son, and the father failed to cure that defect by retaining counsel to appear on behalf of the son when this court afforded the father the opportunity to do so.

Argued September 4, 2024—officially released February 11, 2025

Procedural History

Petition for a bill of discovery seeking certain information related to the application process for a high school educational program, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Pierson, J.*; judgment denying the petition, from which the plaintiffs appealed to this court. *Appeal dismissed in part; reversed in part; judgment directed.*

Joshua Marciniszyn, self-represented, the appellant, and for the appellant D (plaintiffs).

Peter J. Murphy, with whom were *Bradley M. Harper* and, on the brief, *Chelsea C. McCallum*, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiffs, Joshua Marciniszyn, who is self-represented, and his minor child D, by and through Marciniszyn as next friend, appeal from the trial court's denial of their petition for a bill of discovery (petition). On appeal, the plaintiffs argue that the court erred when it determined that they failed to establish probable cause for their claims that the defendants, the Board of Education of the Town of Southington and the town of Southington, had discriminated against D in violation of several federal civil rights laws. They also argue that the court improperly granted the defendants a continuance to file an objection to their petition and improperly limited the presentation of testimony at the hearing on the petition. We conclude that Marciniszyn lacked standing to bring this action in his individual capacity. We therefore reverse in part the court's judgment and remand the case with direction to dismiss the petition as to Marciniszyn in his individual capacity. We dismiss the appeal as to D because Marciniszyn lacks authority, as a self-represented nonattorney, to proceed in a representative capacity on D's behalf before this court.

The following undisputed facts and procedural history are relevant to this appeal. Southington High School operates an educational program called the Southington Regional Agriculture program (AG program). Students from the towns of Southington, Berlin, Farmington, Bristol, New Britain, Cheshire, Plainville, Terryville, Waterbury, and Wolcott are eligible to apply to the AG program, but not all students who apply are accepted. D applied to the AG program for the 2023–2024 school year and was placed on a waiting list.

The plaintiffs commenced this action on March 7, 2023. They filed their petition, captioned as "Joshua Marciniszyn [and] Joshua Marciniszyn P/P/A[1] (Minor Child) [D], Plaintiff v. [Defendants]." They sought an order directing the defendants to disclose, inter alia, "the [t]raining [m]anual used, referenced, and implemented, to evaluate all the applications" to the AG program; "every and all, applications, separated into those initially accepted, those put on wait lists, and those rejected," including information about applicants' grades, test scores, and recommendations; internal and external communications to and from "decision makers, including but not limited to, the principal, vice principal, superintendent, teachers, [and] school board"; and "social media research conducted on each student." They also sought to compel the defendants to answer certain interrogatories, including: "Please state in detail why [D] was not selected at the initial selection process?" "What additional steps could [D] have completed to secure placement?" And "[p]lease describe the complete and entire methodology . . . used to reach the determination of students accepted, rejected, and placed on the wait list . . . ."

[1] "Per proxima amici, or [PPA], means by or through the next friend, and is employed when an adult brings suit on behalf of a minor, who was unable to maintain an action on his own behalf at common law." (Internal quotation marks omitted.) *Marciniszyn* v. *Taylor*, Superior Court, judicial district of Waterbury, Docket No. CV-20-5026268-S (March 19, 2021).

The plaintiffs alleged that they were entitled to this information because the defendants had discriminated against D in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; Title VI[2] of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; and "Title 42 of the C.F.R., et al."[3] The plaintiffs further alleged that the defendants "wilfully and maliciously acted in bad faith and with extreme prejudice" when they put D on a waiting list for the AG program and that this decision constituted discrimination against D "based on race, (biracial birth), sex, gender, sexual orientation, sexual orientation of parent, [individualized education program] status, disease or diagnosis, place of current residence, place of current educational district, place of current educational school and/or other factors that this discovery will reveal." In support of these claims of discrimination, the plaintiffs alleged that D had been placed on a waiting list despite being a uniquely strong candidate for admission to the AG program, as evidenced by his grades, standardized test scores, and extracurricular activities.

The plaintiffs further alleged that the defendants' decision to place D on a waiting list impeded D's future college and career plans. In particular, they claimed

[2] Although the plaintiffs did not, in their petition, expressly list Title VI among the civil rights statutes that they accused the defendants of violating, they cited elsewhere in their petition to the language of Title VI as setting forth a "standard" that, they claimed, the defendants had breached. Mindful that self-represented parties' pleadings should be construed "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569, 877 A.2d 761 (2005); we construe the plaintiffs' petition to allege probable cause for a Title VI violation.

[3] In a later filing, the plaintiffs also claimed that the defendants had violated "all other federal and state laws, to which publicly funded schools are subject to."

that D was "entitled to remedy" for: "[l]oss of education that would prepare him for the career path he has chosen"; "[l]oss of education that would appear on his resume that college acceptance boards review"; [l]oss of education that would position him to receive scholarships and grants to further his education beyond high school"; "[l]ifetime loss of income in his chosen career, as a result of lost education . . . [and] [l]oss of educational information and resources that would be unknown to him, giving students that attend, the advantage over him in the same career field."

Following briefing and oral argument,[4] the trial court, *Pierson*, *J.*, denied the petition on July 7, 2023. The court concluded that "[t]he . . . claims of discrimination are premised on the assumption that, as [D], an excellent student, was denied admission to the [AG] program, such denial must have been based on impermissible discrimination of some kind. Such an assumption is insufficient to give rise to an inference of intentional or otherwise prohibited discrimination. The application is devoid of detailed facts demonstrating that [D's] characteristics affected, in any way, the defendants' decision to place him on the 'wait list.' " (Emphasis omitted.) The court concluded that the plaintiffs

[4] Prior to oral argument on the plaintiffs' petition in the trial court, the court, over the plaintiffs' objection, continued the matter from April 10 to May 1, 2023, in order to allow the defendants time to file an objection to the petition and the plaintiffs time to file a reply thereto. On the date scheduled for oral argument on the petition, before he began his argument, Marciniszyn asked if the trial court would be allowing testimony, stating that D was available to authenticate certain exhibits that the plaintiffs had filed. The court replied that testimony would be unnecessary because the defendants had not objected to the exhibits. Although the plaintiffs, in this appeal, challenge both the continuance order and the exclusion of D's proffered testimony, along with the court's determination that they had failed to establish probable cause for a bill of discovery, we do not reach the merits of their claims in light of our conclusions herein that Marciniszyn lacked standing in his individual capacity to bring this action and lacks authority as a self-represented nonattorney to proceed on D's behalf before this court.

were using their petition as a means of conducting a " 'fishing expedition.' " This appeal followed.

On September 30, 2024, following oral argument before this court, we sua sponte ordered the parties to submit supplemental memoranda addressing (1) whether Marciniszyn has standing to bring this appeal in his individual capacity, and (2) whether, in light of this court's decision in *Lowe* v. *Shelton*, 83 Conn. App. 750, 755–59, 851 A.2d 1183, cert. denied, 271 Conn. 915, 859 A.2d 568 (2004), Marciniszyn—who is neither an attorney licensed to practice law in Connecticut, nor admitted pro hac vice—is authorized, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D, and, if not, whether and how that defect may be cured. The parties filed supplemental memoranda in accordance with this order.

Thereafter, on October 23, 2024, we ordered that the adjudication of this appeal be stayed for sixty days in order to afford Marciniszyn an opportunity to retain an attorney licensed to practice and in good standing in Connecticut to represent D in this appeal.[5] We further specified that this attorney, if retained, must file an appearance with this court within sixty days, along with a statement specifying (1) whether they intended to adopt the plaintiffs' brief or submit a substitute brief in lieu thereof, and (2) whether they sought reargument of the appeal. We cautioned that, should Marciniszyn fail to comply with this order, the appeal as to D may be dismissed.

Marciniszyn did not retain counsel to represent D within sixty days of our October 23, 2024 order. On

[5] As a minor, D may not represent himself. See, e.g., *V. V.* v. *V. V.*, 218 Conn. App. 157, 168, 291 A.3d 109 (2023) ("a child may bring a civil action only by a guardian or next friend, whose responsibility it is to ensure that the interests of the ward are well represented" (internal quotation marks omitted)).

December 19, 2024, the plaintiffs filed a motion requesting an extension of time of ninety days to secure counsel for D. The defendants did not file a response. We denied the motion on January 2, 2025, and lifted the stay. The appeal is now ready for adjudication.

I

As a preliminary matter, in their supplemental memorandum to this court, the plaintiffs claim that it is improper for us to raise and decide, sua sponte, the issues of Marciniszyn's standing to bring this appeal in his individual capacity and of his authority to proceed in a representative capacity on behalf of D. In particular, the plaintiffs argue that no exceptional circumstances justify our consideration of these issues and that our consideration of these issues would prejudice them. We disagree.

"Our appellate courts generally do not consider issues that were not raised by the parties. . . . This is because our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues . . . . There are, however, well established exceptions to this rule." (Citations omitted; internal quotation marks omitted.) *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016). "[W]ith respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised . . . the reviewing court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 128, 84 A.3d 840 (2014) (*Blumberg*). The record must also be

adequate for review of the unpreserved issue. See, e.g., *Matos* v. *Ortiz*, 166 Conn. App. 775, 792, 144 A.3d 425 (2016).

"Exceptional circumstances [justifying sua sponte review of an unpreserved issue in the court's discretion] exist when the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims. . . . To satisfy concerns of fundamental fairness, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a meaningful opportunity . . . . The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response. . . . Additionally, [p]rejudice may be found, for example, when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 59, 225 A.3d 953 (2020). "[B]ecause it may be difficult for a party to prove definitively that it would have proceeded in a different manner and, as a result, would suffer unfair prejudice if the reviewing court were to consider the unpreserved issue, once that party makes a colorable claim of such prejudice, the burden shifts to the other party to establish that the first party will not be prejudiced by the reviewing court's consideration of the issue." (Internal quotation marks omitted.) *State* v. *Connor*, supra, 321 Conn. 373–74.

The issue of Marciniszyn's standing in his individual capacity implicates subject matter jurisdiction as to him; see, e.g., *Portfolio Recovery Associates, LLC* v. *Healy*, 158 Conn. App. 113, 115, 118 A.3d 637 (2015); and this court is therefore required to raise and decide

the issue sua sponte. By contrast, the issue of Marciniszyn's authority, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D does not implicate subject matter jurisdiction. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 759 ("the filing of an appeal on behalf of a minor by a nonattorney parent does not implicate subject matter jurisdiction"). We are convinced, however, that sua sponte consideration of this latter issue is proper because exceptional circumstances warrant our review, the parties have been afforded an opportunity to be heard, the plaintiffs have failed to raise a colorable claim of prejudice, and the record is adequate for review.

In *Lowe* v. *Shelton*, supra, 83 Conn. App. 756–59, this court held that, in general, nonattorney parents may not represent their minor children on appeal without the assistance of an attorney. The court in *Lowe* reasoned that " 'it is not in the interests of minors or incompetents that they be represented by [nonattorneys]. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.' " Id., 757, quoting *Cheung* v. *Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). Because "[t]he choice to appear [in a self-represented capacity] is not a true choice for minors who under state law . . . cannot determine their own legal actions . . . [t]here is . . . no individual choice to proceed [in a self-represented capacity] for courts to respect, and the sole policy at stake concerns the exclusion of [nonlicensed] persons to appear as attorneys on behalf of others." (Internal quotation marks omitted.) *Lowe* v. *Shelton*, supra, 757. As the court in *Lowe* explained, "[t]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings

that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, e.g., to avoid litigating unfounded or vexatious claims." (Internal quotation marks omitted.) Id., 758.[6]

We begin with the question of whether exceptional circumstances justify our sua sponte review of Marciniszyn's authority, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D. We note at the outset that this court in *Lowe* reached its holding only after ordering supplemental briefs at oral argument on the questions of (1) whether the court had subject matter jurisdiction over the appeal because it was filed by the plaintiff's parents without the aid of an attorney, and (2) whether any defect resulting from the parents' filing of the appeal was curable. See id., 753 (describing supplemental brief order without analysis of why order was proper). Moreover, although we are unaware of any case in which this court or our Supreme Court has squarely discussed the propriety of a court's consideration, sua sponte, of nonattorney self-represented parents' authority to "represent" their children, our research reveals that at least six of the federal circuit courts of appeals—including the United States Court of Appeals for the Second Circuit, whose case law influenced this court's holding in *Lowe*—have considered this issue sua sponte. See, e.g., *Dunlop* v. *Commissioner of Social Security*, 518 Fed. Appx. 691, 692 n.1 (11th Cir. 2013), cert. denied sub nom. *Dunlop* v.

[6] Contrary to the plaintiffs' assertion, this language does not require the court, before concluding that a *Lowe* defect exists, to conduct an individualized evaluation of whether a nonattorney, self-represented parent acting in a representative capacity on behalf of his child would create "unusual burdens" for his adversaries and the court. Rather, the court in *Lowe* discussed the burdens imposed by self-represented parties' litigation simply as one rationale for its ultimate holding. See *Lowe* v. *Shelton*, 83 Conn. App. 758–59.

Colvin, 572 U.S. 1005, 134 S. Ct. 1521, 188 L. Ed. 2d 455 (2014); *Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1299 (10th Cir. 2011); *Myers* v. *Loudoun County Public Schools*, 418 F.3d 395, 399 (4th Cir. 2005); *McPherson* v. *School District No. 186*, 32 Fed. Appx. 769, 770 (7th Cir. 2002); *Wenger* v. *Canastota Central School District*, 146 F.3d 123, 125 (2d Cir. 1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1267, 143 L. Ed. 2d 363 (1999); *Osei-Afriyie* v. *Medical College of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991); see also *Harris* v. *Apfel*, 209 F.3d 413, 414 (5th Cir. 2000) (addressing nonattorney, self-represented parent's authority to represent child in Social Security appeal when issue was raised for first time by appellee on appeal).[7]

[7] We are aware of one circuit that has taken a different approach. In *W. J.* v. *Secretary of Health & Human Services*, 93 F.4th 1228, 1235–37 (Fed. Cir.), cert. denied sub nom. *W. J.* v. *Becerra*, U.S. , S. Ct. , L. Ed. 2d (2024), the United States Court of Appeals for the Federal Circuit sua sponte ordered supplemental briefing on the question of whether a minor's self-represented parents were authorized to act in a representative capacity on behalf of their child in prosecuting, and appealing the denial of, a claim for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300a-1 et seq. (Vaccine Act). After reviewing the parties' supplemental briefing, the court concluded that "this case does not require us to answer our own question." Id., 1236. The court explained that dismissal of the case would be inefficient and unfair in light of the fact that the government, even after the order for supplemental briefing, had not asked that the appeal be dismissed; that the Rules of the Court of Federal Claims, where the claim had been filed, and procedural rules for Vaccine Act cases expressly permitted such representation; that the Federal Circuit had adjudicated the merits of claims brought by self-represented parents on behalf of their children in several prior nonprecedential decisions; and that the case, which had been fully briefed and argued, had been working its way through the courts for three years and was predicated on alleged injuries that were more than seventeen years old. Id.

W. J., like all the federal cases we cite herein, is not binding on this court and constitutes, at most, persuasive authority only. In any event, the circumstances that motivated the Federal Circuit to refuse to decide the representation question in *W. J.* are either absent from or carry significantly less force in this case. Here, the defendants, following our order for supplemental memoranda, have requested that we conclude that Marciniszyn lacks authority to proceed on behalf of D. Moreover, this court's holding in *Lowe*, which predates the inception of this case by almost two decades and with

We find the reasoning of the United States Court of Appeals for the Second Circuit in *Wenger* to be persuasive. In that case, the court stated that, because "[t]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him," courts have a duty, sua sponte, to inquire as to the propriety of—and to restrain—self-represented nonattorney parents' representation of their children. (Internal quotation marks omitted.) *Wenger* v. *Canastota Central School District*, supra, 146 F.3d 125. This court's holding in *Lowe* was informed by, and expressed, that same solicitude for minors' entitlement to trained legal representation so that they may effectively litigate their claims. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 757 ("[t]he purpose for requiring an attorney is to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents" (internal quotation marks omitted)). This concern likewise informs our conclusion that it is appropriate for this court to raise and decide the question of Marciniszyn's authority, as a self-represented

which the plaintiffs are well acquainted; see footnote 8 of this opinion; expressly forbids self-represented nonattorney parents without a personal interest at stake from proceeding on their child's behalf, and the plaintiffs have cited no statute or rule of practice to the contrary. In the one case of which we are aware in which this court decided the merits of an appeal that suffered from a *Lowe* defect, it did so without any discussion of or attempt to distinguish the decision in *Lowe*. See *Shockley* v. *Okeke*, 92 Conn. App. 76, 882 A.2d 1244 (2005), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007) (certification improvidently granted). Moreover, in a dissenting opinion in *Shockley*, Judge Schaller—the author of *Lowe*—considered the defect a threshold issue that implicated this court's authority to decide the appeal and would have given the parties an opportunity to brief the issue and cure the defect. See id., 86–92 (*Schaller*, *J.*, dissenting). Finally, notwithstanding the plaintiffs' assertion that "a substantial period has [e]lapsed" since D's alleged injury—his placement on a waiting list—this event occurred, by the plaintiffs' own representations, in February, 2023; the case was filed in March, 2023; and oral argument before this court occurred in September, 2024. This is a far cry from the more than *seventeen years* between injury and adjudication that the court confronted in *W. J.*

nonattorney, to proceed in a representative capacity on behalf of D, even though the parties did not raise the issue in their principal briefs.

Sua sponte consideration of this issue is also warranted in light of Connecticut's prohibition against the unauthorized practice of law. It is well established that "[a self-represented] party may not appear on behalf of another [self-represented] party . . . [and] [t]o do so would be to engage in the unauthorized practice of law." (Citation omitted.) *Collard & Roe, P.C.* v. *Klein*, 87 Conn. App. 337, 343–44 n.3, 865 A.2d 500, cert. denied, 274 Conn. 904, 876 A.2d 13 (2005); see also General Statutes § 51-88. As our Supreme Court has explained, the various functions inherent in the practice of law "require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations . . . [and] [i]t is of importance to the welfare of the public that these manifold customary functions [of practicing law] be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Patton*, 239 Conn. 251, 255, 683 A.2d 1359 (1996); accord *Collinsgru* v. *Palmyra Board of Education*, 161 F.3d 225, 231 (3d Cir. 1998) ("Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims. . . . Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice." (Citation omitted.)). In keeping with these strong public policy considerations, this court has not hesitated in

other contexts to consider, sua sponte, whether a self-represented party attempting to proceed before this court in a representative capacity was engaged in the unauthorized practice of law. See, e.g., *Cazenovia Creek Funding I, LLC* v. *Roman*, 223 Conn. App. 739, 743, 309 A.3d 419 (2024); *Ellis* v. *Cohen*, 118 Conn. App. 211, 214 n.8, 982 A.2d 1130 (2009). The plaintiffs have set forth no compelling justification for why we should take a different course here. We therefore conclude that the interests of justice, fairness, integrity of the courts and consistency of the law militate in favor of our considering, sua sponte, Marciniszyn's authority as a self-represented nonattorney to proceed before this court in a representative capacity on behalf of D, and significantly outweigh the interest in enforcing procedural rules governing the preservation of claims.

The plaintiffs do not argue that we have deprived them of a meaningful opportunity to be heard on this issue and, indeed, our September 30, 2024 order for supplemental memoranda has afforded them such an opportunity. See, e.g., *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 126 n.9, 172 A.3d 1228 (2017) (explaining that *Blumberg* "calls for supplemental briefing when a reviewing court raises an unpreserved issue sua sponte" (emphasis omitted)); *Shockley* v. *Okeke*, 92 Conn. App. 76, 91–92, 882 A.2d 1244 (2005) (*Schaller, J.*, dissenting) ("[b]ecause the lack of authority to proceed without counsel . . . implicates our authority to decide the appeal, I would give the parties an opportunity to address the *Lowe* problem by ordering supplemental briefs" (citation omitted)), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007) (certification improvidently granted).

With respect to prejudice, the plaintiffs assert that our consideration of this issue will cause them "extreme prejudice" because a substantial amount of time has already elapsed since D was notified that he had been

placed on a waiting list for the AG program. The plaintiffs do not, however, attempt to explain how, had the issue of Marciniszyn's authority as a self-represented nonattorney to proceed on D's behalf arisen in the trial court, they would have presented any additional evidence or otherwise proceeded differently—which is the relevant inquiry when determining whether review of an unpreserved issue would prejudice a party. See, e.g., *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 813–14, 277 A.3d 200 (2022).[8] The plaintiffs have thus failed to raise a colorable claim of prejudice.

Finally, the record is adequate for review of this issue. As we discuss in greater detail in parts II and III of this opinion, the question requires no fact-finding on our part—it is undisputed that Marciniszyn is a self-represented nonattorney who is attempting to act as D's next friend—and instead requires us simply to assess the propriety of this representative relationship on the basis of the plaintiffs' pleading and established legal principles. See, e.g., *Matos* v. *Ortiz*, supra, 166 Conn. App. 794 (record is adequate for review of unpreserved issue when issue presents "a pure question of law and the relevant facts are undisputed"). Therefore, we conclude that sua sponte consideration of Marciniszyn's standing in his individual capacity, and of his authority as a self-represented nonattorney to proceed in a representative capacity on behalf of D, is proper.

II

We next consider the question of Marciniszyn's standing, in his individual capacity. In their supplemental

[8] We note that, before they commenced the present action, the plaintiffs previously confronted motions to dismiss and for default, predicated on *Lowe*, in a separate action in which Marciniszyn sought to proceed on D's behalf without the assistance of an attorney. See *Marciniszyn* v. *Taylor*, Superior Court, judicial district of Waterbury, Docket No. CV-20-5026268-S; see also, e.g., *Jackson* v. *Drury*, 191 Conn. App. 587, 590 n.4, 216 A.3d 768 ("[a]n appellate court may take judicial notice of files in the same or other cases"), cert. denied, 333 Conn. 938, 218 A.3d 1050 (2019).

memorandum, the plaintiffs argue that Marciniszyn has standing to bring this appeal because he was a named party in the proceedings before the trial court and "has legally cognizable economic, social, and emotional intertwined interests" in D's admission to the AG program, in connection with D's future college admissions prospects, financial aid and scholarship opportunities, and employment and earning potential. We agree that Marciniszyn is aggrieved by the trial court's decision denying the petition and, thus, has standing, in his individual capacity, to bring this appeal. We further conclude, however, that Marciniszyn lacked standing in his individual capacity to bring this action in the first instance because he has not established that he has suffered a direct injury, traceable to the defendants' conduct, to a legally protected interest belonging to him. As such, the trial court should have dismissed, rather than denied, the petition as to Marciniszyn in his individual capacity.

We begin with a brief discussion of the difference between appellate standing and a party's standing to bring an action in the first instance. In order to establish standing in, and thereby invoke the jurisdiction of, either this court or the trial court, a plaintiff bears the burden of establishing that he or she is aggrieved. Cf. *Perry* v. *Perry*, 312 Conn. 600, 620, 95 A.3d 500 (2014); *Martinelli* v. *Martinelli*, 226 Conn. App. 563, 572–73, 319 A.3d 198 (2024); see also *Lewin* v. *United States Surgical Corp.*, 21 Conn. App. 629, 631, 575 A.2d 262 ("[t]he burden of proving aggrievement rests with the plaintiffs who have claimed it"), cert. denied, 216 Conn. 801, 577 A.2d 716 (1990). "There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features." (Internal quotation marks omitted.) *In re Ava W.*, 336 Conn. 545, 554, 248 A.3d 675 (2020). "The fundamental test for determining [classical] aggrievement

encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of 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]." (Internal quotation marks omitted.) *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, 330 Conn. 447, 455, 195 A.3d 1123 (2018). Statutory aggrievement, meanwhile, "exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *In re Criminal Complaint*, 350 Conn. 633, 639, 325 A.3d 921 (2024).

As our Supreme Court has emphasized, however, "[s]tanding for purposes of bringing an action differs from the aggrievement requirement for appellate review under [General Statutes] § 52-263." *In re Ava W.*, supra, 336 Conn. 555. When analyzing whether a plaintiff is classically aggrieved for purposes of bringing an action, the court must assess whether the plaintiff has made a colorable allegation of direct injury, in an individual or representative capacity, to a protected interest, that is traceable to the conduct of the defendant. See, e.g., *Frillici* v. *Westport*, 264 Conn. 266, 280–81, 823 A.2d 1172 (2003). A party can be classically "aggrieved" for purposes of appellate standing, by contrast, when he affirmatively requests that a court act, and his request is denied—even if he lacked standing to bring the action in the trial court. See, e.g., *In re Ava W.*, supra, 555–57. In the context of the appellate standing inquiry, it is the request for judicial relief itself—and not the underlying

factual allegations marshaled in support of that request—that establishes the requisite "specific personal and legal interest," and it is the court's denial of that request that constitutes the requisite injury. Id., 555. The reviewing court retains, however, the obligation to consider—even sua sponte—whether a plaintiff in a case over which it has appellate jurisdiction had standing to bring the action in the first place. See, e.g., *Smith* v. *Snyder*, 267 Conn. 456, 460 n.5, 839 A.2d 589 (2004); see also *State* v. *Bryan*, 229 Conn. App. 364, 366 n.3, 327 A.3d 467 (2024) ("[i]t is well established . . . that [t]he trial court's lack of subject matter jurisdiction does not . . . deprive this court of appellate jurisdiction to determine whether the trial court had jurisdiction" (internal quotation marks omitted)).

Although our order for supplemental memoranda asked the parties to address Marciniszyn's standing, in his individual capacity, to bring this appeal, the parties' submissions largely focus on whether the underlying claims asserted in the action were personal to Marciniszyn or instead were predicated solely on injuries to D. Properly understood, this analysis addresses, not Marciniszyn's *appellate* standing but, rather, his standing to bring this action in his individual capacity in the first instance. We therefore address Marciniszyn's standing, in his individual capacity, both to appeal and to bring this action. We afford these issues plenary review. See, e.g., *C. M.* v. *R. M.*, 219 Conn. App. 57, 65, 293 A.3d 968 (2023); *Johnson* v. *Rell*, 119 Conn. App. 730, 736, 990 A.2d 354 (2010).

A

We begin with Marciniszyn's standing to appeal. Because Marciniszyn does not allege that he is statutorily aggrieved, he must establish that he has been classically aggrieved by the trial court's decision. See, e.g., *In re Probate Appeal of Kusmit*, 188 Conn. App. 196,

201, 204 A.3d 776 (2019). Upon our review of the record and the parties' supplemental memoranda, we conclude that he has done so. As one of two plaintiffs in the proceedings before the trial court, Marciniszyn affirmatively requested that the court act, pursuant to its common-law authority, to issue a bill of discovery. The trial court then denied this request, thereby causing Marciniszyn to suffer an injury. He is therefore classically aggrieved by the trial court's decision. See, e.g., *In re Ava W.*, supra, 336 Conn. 555–57 (mother was classically aggrieved by trial court's denial of motion for posttermination visitation "because she was a party to the underlying litigation who requested that the trial court act pursuant to its common-law authority" and trial court denied her request). He thus has standing to maintain this appeal in his individual capacity.

B

We next consider whether Marciniszyn, notwithstanding his aggrievement by the trial court's decision, had standing to bring the action in his individual capacity in the first instance. The legal principles underlying our inquiry are well established. "The requirement that a party have standing is fundamental. [A] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . 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. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Freedom of Information Commission*, 161 Conn. App. 654, 658–59, 129 A.3d 721 (2015), cert. denied, 321 Conn. 901, 136 A.3d 642 (2016).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather, it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue." (Citation omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 486, 815 A.2d 1188 (2003).

As we have discussed, "[s]tanding is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected. . . . [O]nly those individuals who have suffered a direct injury would have standing." (Citation omitted; internal quotation marks omitted.) *Martinelli* v. *Martinelli*, supra, 226 Conn. App. 572–73. Conclusory statements devoid of adequate supporting factual allegations, however, do not establish the requisite protected interest. See, e.g., *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 405, 234 A.3d 111 (2020).

The plaintiffs do not claim that Marciniszyn is authorized by statute to bring this action. Thus, in order for

Marciniszyn to have standing to bring this action in his individual capacity, the plaintiffs must establish that he is classically aggrieved, i.e., that he has set forth a colorable claim of direct injury, traceable to the defendants' conduct, to a personal, legally protected interest. See, e.g., *Andross* v. *West Hartford*, 285 Conn. 309, 323, 939 A.2d 1146 (2008). A review of the petition,[9] however—reading its allegations in the light most favorable to the plaintiffs—reveals that the injuries alleged therein are exclusively injuries to D, not to Marciniszyn. It is D's right to be free from discrimination, D's college and career prospects, and D's future earning potential that the plaintiffs allege have been harmed by the defendants' decision to place D on a waiting list. As such, the plaintiffs' allegations do not demonstrate that Marciniszyn—as opposed to D—was classically aggrieved in his individual capacity. See, e.g., *Shockley* v. *Okeke*, supra, 92 Conn. App. 84–85 (Superior Court properly dismissed mother's probate appeal from denial of minor child's name change application for lack of subject matter jurisdiction where "the only matter properly before either the Probate Court or the Superior Court was the child's right to a change of name" and, "[a]s the plaintiff had no legal interest at issue, she was not aggrieved by the decision of the Probate Court denying the application for a change of name").

The fact that the plaintiffs now claim, in their supplemental memorandum, that Marciniszyn has "legally cognizable economic, social, and emotional intertwined interests" of his own in D's ability to attend the AG program—interests that the plaintiffs value at "hundreds of thousands . . . if not millions" of dollars—does not change our conclusion. This is so for two reasons. First, the plaintiffs never made any such asser-

[9] The plaintiffs' reply to the defendants' objection to the petition largely mirrored the allegations in the petition and did not set forth any additional claims of direct harm to Marciniszyn.

tion in their petition, and "a memorandum of law is not a proper vehicle for supplementing the factual allegations in a complaint . . . ." (Internal quotation marks omitted.) *Ross* v. *Commissioner of Correction*, 217 Conn. App. 286, 324, 288 A.3d 1055, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023). Second, even if it were proper for us to consider the plaintiffs' new allegations as part of our standing analysis, these allegations are wholly conclusory. The plaintiffs do not state with any specificity what Marciniszyn's "economic, social, and emotional intertwined interests" actually are, describe how those interests have been injured by D's placement on a waiting list, or explain how they calculated the monetary value of those interests. In the absence of adequate supporting factual allegations, these threadbare claims do not sufficiently allege classical aggrievement. See, e.g., *Hendel's Investors Co.* v. *Zoning Board of Appeals*, 62 Conn. App. 263, 274, 771 A.2d 182 (2001) (conclusory statements that " '[p]laintiff is aggrieved by the decision of the [d]efendant' " and " '[t]he [p]laintiff has a specific personal and legal property interest which was specifically and injuriously affected by the action of the [d]efendant' " are insufficient to establish aggrievement). We therefore reverse in part the trial court's denial of the petition on the merits and remand with instructions to dismiss the petition with respect to Marciniszyn in his individual capacity.[10]

[10] We emphasize that Marciniszyn—independent of the question of his authority to represent D's interests as a self-represented nonattorney, which we discuss in part III of this opinion—had standing in a *representative* capacity to assert claims on D's behalf in the trial court. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 755; accord *In re Tayquon H.*, 76 Conn. App. 693, 698–99, 821 A.2d 796 (2003) ("[a]lthough, generally speaking, a person has no standing to assert the rights of another, when the parties include a guardian and a minor ward . . . the guardian is indeed entitled to assert the legal rights of her ward" (footnote omitted)). Throughout proceedings in the trial court, however, Marciniszyn purported to proceed *both* as D's next friend *and* in his individual capacity. As he failed to establish any direct injury to himself, Marciniszyn did not have standing to proceed in his individual capacity; he only had standing to proceed as D's next friend.

III

We now consider whether, in light of this court's decision in *Lowe*, Marciniszyn has the authority as a self-represented nonattorney to proceed in a representative capacity on behalf of D, or whether the appeal as to D should be dismissed. The plaintiffs argue that *Lowe* is distinguishable from the present case. We disagree.

As we have explained, in *Lowe*, this court held that, as a general matter, a nonattorney, self-represented parent lacks the authority to maintain an appeal on behalf of his minor child. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 755–59. The court left open, however, the possibility that a nonattorney, self-represented parent may be authorized to proceed on his minor child's behalf when the parent also has a personal interest at stake in the action. Id., 758–59. In particular, the court in *Lowe* distinguished the matter before it from the scenario that the United States Court of Appeals for the Second Circuit confronted in *Machadio* v. *Apfel*, 276 F.3d 103 (2d Cir. 2002).

In *Machadio*, the court held that a nonattorney, self-represented parent may represent her minor child in an appeal from a denial of supplemental security income (SSI) benefits, when that parent "has a sufficient interest in the case and meets basic standards of competence . . . ." Id., 107. The court in *Machadio* further concluded that the district court had not erred in permitting the self-represented plaintiff parent to proceed on her child's behalf, because—in addition to meeting the basic standard of competency to proceed—she had a personal financial stake in the government's decision as to whether to pay SSI benefits. Id., 106–108. This was so, the court explained, because the plaintiff parent was responsible for the cost of her child's alleged disability, and, "[i]f [the child] qualifie[d] for disability

benefits, then the federal government [would] assume some of the costs associated with [her] condition, freeing the plaintiff's limited resources for other living expenses." Id., 107. In *Lowe*, by contrast, this court determined that the parents seeking to maintain the appeal—who had accused a school official of libeling their son but had raised no claims of their own—had not been directly harmed by the lower court's judgment in the defendants' favor and thus had no interest at stake. *Lowe* v. *Shelton*, supra, 83 Conn. App. 758–59. This court therefore concluded that the parents in *Lowe* could not represent their minor son without an attorney's assistance. Id., 759.

The plaintiffs claim that this case is analogous to *Machadio* because Marciniszyn and D both have interests in the outcome of the matter. For the reasons we set forth in part II of this opinion, however, Marciniszyn has failed to establish that he, as opposed to D, has any direct interest at stake in the trial court's resolution of the matter. Accordingly, as with the parents in *Lowe*, "[t]he [plaintiffs'] reliance on [*Machadio*] . . . is misplaced." Id., 758. We therefore conclude that Marciniszyn, as a self-represented nonattorney, lacks the authority to maintain this appeal on D's behalf.

In *Lowe*, this court held that when a nonattorney, self-represented parent without an interest at stake in the case files an appeal on behalf of his minor child, the appeal suffers from a curable defect. Id., 760. This court in *Lowe* identified two ways in which that defect may be cured: either by having counsel appear on behalf of the minor child; or by the child filing his own self-represented appearance, if he has reached the age of majority during the pendency of the appeal. Id., 761. As we have explained, we provided the plaintiffs with an opportunity to cure the defect by affording Marciniszyn sixty days in which to retain counsel to appear on D's behalf. See, e.g., *Munoz* v. *Stableford*, Superior Court,

judicial district of New Haven, Docket No. CV-13-5034701-S (January 10, 2014) (57 Conn. L. Rptr. 454, 455) (affording parent sixty days to cure *Lowe* defect by retaining counsel). He has not done so. Nor has D reached the age of majority, such that he would be eligible to file a self-represented appearance.[11] Accordingly, we dismiss the appeal as to D.

The appeal is dismissed as to D; the judgment denying the petition as to Marciniszyn in his individual capacity is reversed and the case is remanded with direction to render judgment dismissing the petition as to Marciniszyn for lack of subject matter jurisdiction; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MYRON CAMOZZI *v.* ERIC PIERCE
(AC 46938)

Suarez, Westbrook and Keller, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant on the complaint and on the count of the defendant's counterclaim seeking to quiet title to a certain parcel of real property. A 1951 deed conveyed the entirety of a five acre tract of property, which included the parcel in dispute in the present action, to G. In 1975, G signed a deed as grantor that used the same boundary description as the 1951 deed but included a different

[11] In their supplemental memorandum, the plaintiffs suggest that this court should allow them to cure the *Lowe* defect by staying adjudication of the appeal until D reaches the age of majority and then permitting D to file a self-represented appearance. The record reflects that D is currently sixteen years old. The age of majority in this state is eighteen years. See General Statutes § 1-1d. The plaintiffs' proposed "cure" would thus delay the resolution of this appeal by more than one year, in contravention of our responsibility to "[process] cases in an orderly and expeditious manner." *Srager* v. *Koenig*, 42 Conn. App. 617, 622, 681 A.2d 323, cert. denied, 239 Conn. 935, 684 A.2d 709 (1996), and cert. denied, 239 Conn. 936, 684 A.2d 709 (1996). The plaintiffs cite no authority or other extenuating circumstances to justify such an extraordinary delay in the proceedings, and we decline to adopt this course of action.

acreage call. On appeal, the plaintiff claimed, inter alia, that the court improperly found that the 1975 deed conveyed the entirety of the property that had been conveyed by the 1951 deed, including the disputed parcel. *Held*:

The trial court's finding that the 1975 deed did not sever the disputed parcel from the property was not clearly erroneous, as the court, noting that an established rule of deed construction provides that boundary descriptions prevail over acreage calls and that the 1975 deed and the 1951 deed used the same adjoining owner descriptions as the boundaries of the property, properly relied on the adjoining owner descriptions instead of the acreage calls in determining that the disputed parcel was not severed from the property.

The trial court's finding that no evidence other than the acreage call in the 1975 deed indicated that the disputed parcel was severed from the property was not clearly erroneous.

Argued November 13, 2024—officially released February 11, 2025

Procedural History

Action, inter alia, seeking a declaratory judgment as to the title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim; thereafter, the case was tried to the court, *Shah*, *J.*; subsequently, the plaintiff withdrew his claim for statutory theft, and the court, *Shah*, *J.*, rendered judgment for the defendant on the remaining counts of the complaint and on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Robert J. Piscitelli, for the appellant (plaintiff).

Andrew P. Barsom, for the appellee (defendant).

Opinion

WESTBROOK, J. In this action regarding title to a 1.46 acre parcel of land (disputed parcel), the plaintiff, Myron Camozzi, appeals from the judgment of the trial court rendered in favor of the defendant, Eric Pierce, on the plaintiff's complaint seeking declaratory and injunctive relief and alleging trespass and theft and on the defendant's counterclaim alleging that he is the

owner of the disputed parcel. On appeal, the plaintiff claims that the court improperly found (1) that the chain of title to 105 Westbrook Road in Deep River (property) included the disputed parcel, and (2) that no evidence other than the acreage call[1] indicates that the disputed parcel was severed from the property.[2] We disagree and, accordingly, affirm the judgment of the court.

The following facts and procedural history were found by the trial court or are undisputed in the record. In 1951, Marie Cook conveyed the property subject to this appeal, a five acre parcel of land, to George J. Ressler (George I) by warranty deed.[3] In 1975, George

[1] "An 'acreage call' is the designated quantity of land as specified in a deed." *U.S. Bank National Assn.* v. *Palmer*, 88 Conn. App. 330, 331 n.1, 869 A.2d 666 (2005).

[2] In his principal appellate brief, the plaintiff asserts four separate claims of error. For ease of discussion, we address certain claims together. Specifically, the plaintiff's first claim, that the court erred in finding that the 1975 deed conveyed the entire property, his second claim, that the court erred in determining that the deeds' descriptions of which lands border the property (adjoining owner description) are more reliable than the acreage call for determining the property's boundary, and his third claim, that the court erred in affording more weight to the boundary description than the acreage call in determining whether the property includes the disputed parcel, each posit that the court improperly favored the adjoining owner description instead of the acreage call in construing the chain of title to the property. We therefore address the plaintiff's first, second, and third claims together.

[3] In 1951, Cook conveyed two parcels of land to George I. The 1951 deed applicable to both parcels specifies that the other parcel conveyed by Cook contained "about one (1) acre, more or less." Cook's conveyance of this other parcel is not relevant to this appeal.

The 1951 deed describes the parcel that is the subject of this appeal as "containing twenty-six (26) acres, more or less." Below the term "twenty-six (26) acres" is a notation of "5 acres." During the trial in this matter, the following exchange occurred between the plaintiff's counsel and Richard Gates, the plaintiff's expert witness, regarding this discrepancy:

"Q. Now I'm going to show you . . . a deed from [Cook] back to George [I]. Do you recognize that deed?

"A. Yes, sir. I do.

"Q. And is there a difference in the description between the two prior deeds? I'm sorry, the acreage call.

"A. Yes. It's the twenty-six acres . . . . [T]his document was bracketed and underneath it, someone wrote five acres . . . . [T]his was done in 1951.

I conveyed the property to his grandson, George M. Ressler (George II), by quitclaim deed. Although the 1975 deed purported to convey a parcel containing only four acres, more or less, it provided the same boundary description as the 1951 deed.[4]

In 1996, George II conveyed the property to himself and Anna Ressler (Resslers) using the same boundary and acreage descriptions as set forth in the 1975 deed. In 1997, the Resslers granted a mortgage on the property to Long Beach Mortgage Company, which subsequently assigned the mortgage to Norwest Bank Minnesota, N.A. Norwest Bank Minnesota, N.A., foreclosed on the property in 2000 and conveyed it to the plaintiff by limited warranty deed on October 5, 2001. The 2001 deed contained the same boundary and acreage descriptions as set forth in the 1975 deed.

On December 4, 2001, Russell Waldo completed a survey of the property (Waldo survey). The Waldo survey showed that the plaintiff owned a 5.12 acre parcel bound northerly by land now or formerly of George I and land now or formerly of Agnes Ressler. In 2002, in a separate lawsuit, the Resslers sought a temporary injunction against the plaintiff with respect to the property. See *Ressler* v. *Camozzi*, Superior Court, judicial

"Q. And . . . was it your opinion that the five acres was a more accurate depiction of this parcel?

"A. Yes, sir."

Because neither party disputes on appeal that the 1951 deed from Cook to George I conveyed a parcel containing five acres, more or less, all references to the 1951 deed are to Cook's conveyance of the second parcel containing five acres, more or less.

[4] The 1951 and 1975 deeds both describe the parcel being conveyed using substantially the same language. The 1975 deed describes the parcel as follows: "Bounded northerly by land now or formerly of George [I], and land now or formerly of Charles Heidtman, Sr., partly by each; easterly by land now or formerly of Natalie Isaacs; southerly by land now or formerly of said Natalie Isaacs, and land now or formerly of Charles Heidtman, Jr., partly by each; and westerly by land now or formerly of said Charles Heidtman, Jr. and by highway, partly by each . . . ."

district of Middlesex, Docket No. CV-02-0097742-S (February 10, 2004). In 2003, Richard Gates completed an additional survey of the property (Gates survey). The Gates survey showed that the plaintiff owned a 3.66 acre portion of the property that was bound northerly by the disputed parcel, a 1.46 acre parcel belonging to the estate of George I. The Gates survey additionally showed that the disputed parcel was bound northerly by land now or formerly of the estate of George I and land now or formerly of Agnes Ressler. On February 10, 2004, in the matter between the plaintiff and the Resslers, the court, *Hon. Daniel F. Spallone*, judge trial referee, rendered judgment by stipulation in which the Resslers forfeited any rights that they may have had to the property, including to the disputed parcel. This stipulation was not recorded in the land records.

On June 8, 2004, the administrator of the estate of Agnes Ressler conveyed the entire property, including the disputed parcel, to the plaintiff by quitclaim deed (2004 deed), describing the property as the 5.12 acre parcel depicted in the Waldo survey. The 2004 deed states: "The purpose and intent of this deed is to confirm the boundary line between the herein described property, which is currently owned by the [plaintiff], and adjoining property currently owned by the Grantor, confirming that the Grantor makes no claim of ownership in any of said herein described property, as such has never been owned by [the] Grantor."

In 2005, the plaintiff mortgaged the property to Webster Bank (bank) using the same boundary and acreage description as set forth in the 1975 deed. The bank subsequently foreclosed on the property, and, on February 25, 2019, the Superior Court rendered a judgment of foreclosure by sale. On March 28, 2019, after the judgment of foreclosure was rendered but before the foreclosure sale took place, the plaintiff conveyed the disputed parcel, "containing 1.46 acres," to Elizabeth

Morgan by quitclaim deed.[5] The bank obtained title to the property on May 24, 2019, following the foreclosure sale, and subsequently sold it to the Federal National Mortgage Association (Fannie Mae) by quitclaim deed on July 12, 2019. The bank's deed to Fannie Mae used the same boundary and acreage description as set forth in the 1975 deed. On March 13, 2020, Fannie Mae conveyed the property to the defendant by special warranty deed. The defendant recorded his deed in the land records on March 26, 2020. On June 17, 2020, Morgan conveyed the disputed parcel back to the plaintiff by quitclaim deed. Despite the foreclosure and conveyances, the plaintiff has continued to occupy the disputed parcel since 2004.[6]

On August 19, 2022, the plaintiff commenced this action against the defendant regarding the disputed parcel. In his complaint, the plaintiff sought a declaratory judgment that he holds title to the disputed parcel[7] and

[5] We note that the plaintiff does not argue that he severed the disputed parcel from the property by way of the March 28, 2019 quitclaim deed to Morgan and that he is entitled to the disputed parcel as a result of such severance. Rather, the plaintiff's argument on appeal is that the disputed parcel has been excluded from the property's chain of title since George I severed the disputed parcel in 1975, and, therefore, the bank's 2005 mortgage on the property excluded the disputed parcel. We conclude in part II of this opinion, however, that the court properly found that George I did not sever the disputed parcel in 1975 and that the plaintiff granted the bank a mortgage on the entire property. Furthermore, Elton Harvey, the defendant's expert, testified that the plaintiff conveyed the disputed parcel to Morgan *subject to the bank's mortgage* and, when Morgan conveyed the disputed parcel back to the plaintiff on June 17, 2020, she no longer held title to convey because of the bank's foreclosure. Because the plaintiff does not raise any further claims regarding the significance of his conveyance to Morgan and her subsequent conveyance back to him, we do not discuss any additional legal implications of the plaintiff's conveyance to Morgan.

[6] There is a garage located on the disputed parcel, which the plaintiff inhabited.

[7] In particular, the plaintiff sought "an order pursuant to [General Statutes §] 52-29 declaring that the plaintiff is the owner of the [disputed parcel] free and clear of any claim by the defendant." Section 52-29 provides in relevant part: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration . . . ."

a permanent injunction against the defendant's use of the disputed parcel. He also stated claims against the defendant for trespass and statutory theft. On December 22, 2022, the defendant filed an amended answer, which included a statement, pursuant to General Statutes § 47-31 (d),[8] and a special defense alleging that he is the owner of the disputed parcel by virtue of the March 13, 2020 deed from Fannie Mae. The defendant also asserted a counterclaim against the plaintiff in which he sought a judgment, pursuant to § 47-31, that he is the owner of the disputed parcel free and clear of any interest of the plaintiff. The plaintiff thereafter filed a reply containing a statement, pursuant to § 47-31 (d), that he claims an interest in the disputed parcel.

The matter was tried before the court, *Shah*, *J.*, on June 13, 2023. Both parties presented the testimony of expert land surveyors in support of their claims. Gates, the plaintiff's expert, and Elton Harvey, the defendant's expert, both agreed that George I acquired the property in 1951 and conveyed a parcel to George II in 1975. The experts disagreed, however, as to whether the 1975 deed severed the disputed parcel from the property.

Ordinarily, actions to determine title in real property are governed by General Statutes § 47-31; see *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 9, 682 A.2d 1046 (1996); which provides in relevant part: "An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it . . . for the purpose of determining . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. . . ." Nevertheless, "the distinction [between a declaratory judgment action and a quiet title action] is without a difference. Although actions for declaratory judgments most often involve contract disputes, declaratory judgments also involve property rights." *Gemmell* v. *Lee*, 42 Conn. App. 682, 686 n.5, 680 A.2d 346 (1996).

[8] General Statutes § 47-31 (d) provides: "Each defendant shall, in his answer, state whether or not he claims any estate or interest in, or encumbrance on, the property, or any part of it, and, if so, the nature and extent of the estate, interest or encumbrance which he claims, and he shall set out the manner in which the estate, interest or encumbrance is claimed to be derived."

Gates testified that the plaintiff holds title to the disputed parcel because the acreage calls in the chain of title indicate that the disputed parcel was severed from the property. Harvey, on the other hand, explained that "every property description in the eighty-two year chain of title to the . . . property uses the same description, which calls for [the] property to be bounded on the north by the properties that are shown on [the Gates survey] as being the adjoining properties to the north of the disputed parcel. . . . If the disputed parcel was not part of the defendant's property, then his property would be bounded on the north by the disputed parcel, which is contrary to what the land records reflect." (Citations omitted.)

On September 7, 2023, the court issued a memorandum of decision in which it made the following findings: "As [a deed's description of which lands border the property (adjoining owner description)] is the most reliable call for determining a property's boundary, that call established that the disputed parcel is part of the property that was conveyed to the plaintiff in [2001], was mortgaged by the plaintiff in [2005], was the subject of the lis pendens in [2018], was the subject of the committee deed in [2019], was the subject of the deed [to Fannie Mae] in [2019], and was conveyed to the defendant in [2020]. Additionally, there is no record of the prior lawsuit or the terms of any stipulated judgment evidencing any ownership of the plaintiff in the land records, and the plaintiff did not offer the stipulation into evidence." The court further found the following: "[T]he defendant has shown that he has legal title to the disputed parcel through the special warranty deed he was granted on March [13], 2020. Although there is a discrepancy in the description of the total acreages between some of the deeds in the chain of title, the court is satisfied that the boundary descriptions identical in

all the deeds provide for the same transfer of land, which includes the disputed parcel."

On the basis of these findings, the court rendered judgment for the defendant on the plaintiff's complaint because (1) the defendant held title to the disputed parcel by virtue of the 2020 deed from Fannie Mae and (2) the plaintiff was the record owner of the disputed parcel until 2019 and thus could not demonstrate that he acquired title to the disputed parcel by adverse possession.[9] The court additionally found that the plaintiff could not prove his trespass claim because he is not the owner of the disputed parcel, and he had abandoned his statutory theft claim in his posttrial brief. The court also rendered judgment for the defendant on his quiet title counterclaim. This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth our standard of review. "[A] court's interpretation of the language of a deed presents a question of law. Therefore, insofar as our assessment of the judgment involves the court's interpretation of [a] deed of conveyance, our review is plenary." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Palmer*, 88 Conn. App. 330, 334, 869 A.2d 666 (2005). "In conducting a plenary review we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Mazzeo*, 195 Conn. App. 357, 369, 225 A.3d 290 (2020). "To the extent that

[9] "[T]he essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner." (Internal quotation marks omitted.) *Roberson* v. *Aubin*, 120 Conn. App. 72, 74, 990 A.2d 1239 (2010). The court found that "the plaintiff owned the disputed parcel until 2019, so he cannot show that he held the disputed parcel by ousting another rightful owner without the consent of the owner."

the court has made findings of fact, our review is limited to a determination of whether the court's conclusions were clearly erroneous." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Palmer*, supra, 334. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 630, 289 A.3d 609 (2023). With these principles in mind, we turn to the plaintiff's claims on appeal.

I

The plaintiff first claims that the court improperly found that the 1975 deed conveyed the entire property, including the disputed parcel, to George II because (1) the 1975 deed is clear and unambiguous, (2) the language of the 1975 deed conveyed only four acres of the property, and (3) both experts agree that George I retained the disputed parcel. He further argues that the court improperly relied on the adjoining owner description instead of the acreage call in determining whether the 1975 deed conveyed the disputed parcel to George II. We are not persuaded.

"In determining the location of a boundary line expressed in a deed, if the description is clear and unambiguous, it governs and the actual intent of the parties is irrelevant. . . . When the description of a boundary line in a deed is ambiguous, however, the question of what the parties intended that line to be is

one of fact for the trial court. . . . In the construction of an ambiguous instrument of conveyance, the decisive question of fact is the intent of the parties to the instrument." (Citation omitted; internal quotation marks omitted.) *Gleason* v. *Atkins*, 225 Conn. App. 745, 765, 317 A.3d 1168, cert. denied, 350 Conn. 901, 322 A.3d 1059 (2024).

We begin with the language of the 1975 deed, which describes the parcel being conveyed as follows: "Bounded northerly by land now or formerly of George [I], and land now or formerly of Charles Heidtman, Sr., partly by each; easterly by land now or formerly of Natalie Isaacs; southerly by land now or formerly of said Natalie Isaacs, and land now or formerly of Charles Heidtman, Jr., partly by each; and westerly by land now or formerly of said Charles Heidtman, Jr. and by highway, partly by each, containing four (4) acres, more or less. Being a portion of the [five acre] parcel described in a deed from Marie Cook to George [I] dated November 8, 1951 . . . ."

In the present matter, the parties disagree as to whether we should employ a plenary or a clearly erroneous standard of review. The plaintiff argues that the 1975 deed is clear and unambiguous as to its acreage call and, therefore, plenary review applies. The defendant, on the other hand, argues that this appeal does not require us to construe a deed and, therefore, we review the trial court's findings of fact for clear error. Alternatively, the defendant argues that the 1975 deed is clear and unambiguous as to its boundary description and, therefore, plenary review applies. Insofar as this appeal requires us to review the court's finding of the grantor's intent as expressed in the 1975 deed, it involves the construction of a deed. See *Gleason* v. *Atkins*, supra, 225 Conn. App. 782 (appellate court construed deed to determine boundary line of property).

Therefore, we must first determine whether the 1975 deed is ambiguous.

Although both parties argue that the 1975 deed is clear and unambiguous, they assert different interpretations of the grantor's intent. We are mindful that "[t]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 783, 290 A.3d 801 (2023). However, "[a] latent ambiguity arises from extraneous or collateral facts that make the meaning of a deed uncertain although its language is clear and unambiguous on its face. . . . Latent ambiguity exists where, although language in a deed appears to be certain on its face, it is rendered uncertain when compared to the land that it is purported to describe." (Internal quotation marks omitted.) *Williams* v. *Green Power Ventures, LLC*, 221 Conn. App. 657, 679–80 n.12, 303 A.3d 13 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024). Such is the case here.

Even if the boundary description and acreage call appear clear and unambiguous on the face of the 1975 deed, the two descriptions conflict when compared with the property. Although the boundary description, in light of the 1951 deed's boundary description and the Waldo survey, reasonably implies that the parcel contains five acres, more or less, the acreage call describes a parcel containing four acres, more or less, and the parties disagree as to which description prevails. Thus, a latent ambiguity exists in the 1975 deed because the grantor's intent is unclear as to whether he intended to convey four or 5.12 acres. We therefore review the court's finding of the grantor's intent for clear error. See *Stefanoni* v. *Duncan*, 282 Conn. 686, 704, 923 A.2d 737 (2007) ("[w]hen there is a latent ambiguity, the meaning of the ambiguous . . . deed is an

issue of fact for the trial court and we cannot disturb its finding, based as it is upon evidence of the surrounding circumstances and the situation of the property, which legally supports it" (internal quotation marks omitted)).

"Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed . . . and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . In the construction of a deed or grant, the language is to be construed in connection with, and in reference to, the nature and condition of the subject matter of the grant at the time the instrument is executed, and the obvious purpose the parties had in view. . . . [I]f the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Internal quotation marks omitted.) *Gleason* v. *Atkins*, supra, 225 Conn. App. 765–66.

The plaintiff argues that the language of the 1975 deed shows that George I conveyed a portion of the property to George II and retained the remaining portion. In support of his argument, the plaintiff points to the provisions of the 1975 deed that describe the parcel as "containing four (4) acres, more or less," and as "[b]eing a portion of the [five acre] parcel described in [the 1951] deed from Marie Cook to George [I] . . . ." The defendant, on the other hand, argues that the 1975 deed contained the same boundary descriptions as the 1951 deed and, therefore, the 1975 deed conveyed the entire property, including the disputed parcel, to George

II. The trial court agreed with the defendant, and we conclude that its finding is not clearly erroneous.

"[W]hen a deed sets forth two different descriptions of the property to be conveyed, the one containing the less certainty must yield to that possessing the greater, if apparent conflict between the two cannot be reconciled." (Internal quotation marks omitted.) *Rocamora* v. *Heaney*, 144 Conn. App. 658, 667, 74 A.3d 457 (2013). "It is well settled as a rule of the construction of deeds that [w]here the boundaries of land are described by known and fixed monuments which are definite and certain, the monuments will prevail over courses and distances." (Internal quotation marks omitted.) *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 10, 682 A.2d 1046 (1996). "Adjacent land may be a monument if the boundary of it is fixed." *Marshall* v. *Soffer*, 58 Conn. App. 737, 744, 756 A.2d 284 (2000); see also *Koennicke* v. *Maiorano*, supra, 11 ("[t]he land of an adjoining owner whose boundaries can be fixed by known monuments is also considered to be a monument to establish a boundary"). "On the other end of the spectrum, [t]he general rule is that the designated quantity of land called for, here acreage, is the least reliable aspect of the description determining the intent by the parties." (Internal quotation marks omitted.) *Thurlow* v. *Hulten*, 173 Conn. App. 694, 726, 164 A.3d 858 (2017); see also *U.S. Bank National Assn.* v. *Palmer*, supra, 88 Conn. App. 335 ("[i]t is widely recognized that acreage calls are the least reliable interpretation of a description"). Accordingly, "[t]he court attaches little weight to the call for [the number of] acres," especially when "[the] deed uses the words 'more or less,' indicating that the parties to that deed did not intend the acreage call to be precise." *Thurlow* v. *Hulten*, supra, 714.

Here, the 1951 deed conveyed five acres, more or less, to George I, and the 1975 deed purportedly conveyed four acres, more or less, to George II. The acreage

calls, therefore, could be read to suggest that George I conveyed a portion of the property that he acquired in 1951 and retained the remaining portion. Both deeds, however, describe the same adjoining owners as the boundaries of the property; see footnote 4 of this opinion; suggesting that the intent of the 1951 and 1975 deeds was to convey the same property. Harvey testified that, since 1941, the description of abutting owners in the chain of title to the property has remained the same with calls for the property to be bound northerly by the properties that are north of the disputed parcel. He further testified that, had George I retained the disputed parcel, the 1975 deed would have referred to the disputed parcel as the property's northern boundary. Moreover, although the 1975 deed states that the parcel being conveyed is a *portion* of the parcel conveyed in the 1951 deed, there is no evidence in the record to show that George I retained the disputed parcel as neither he nor his estate ever conveyed the disputed parcel separate from the property.

The plaintiff contends that both experts agreed on the basis of the 1975 deed that George I retained the disputed parcel, but his assertion is belied by the record. Although Harvey's report initially stated that the reduction in the acreage call from five acres to four acres "would lead to the logical conclusion that there was a remaining portion of the property in George [I] after this conveyance," the report ultimately concluded that the 1975 deed did not sever the disputed parcel. Harvey also testified at trial that the 1975 deed conveyed the entire property, including the disputed parcel, to George II on the basis of the bounding owner descriptions in each deed in the chain of title. He further testified that it is not unusual for acreage calls in a deed to be different from the actual acreage of a property. Thus, the court reasonably could have found that Harvey did not

agree with Gates that George I retained the disputed parcel.

Moreover, the court, as the trier of fact, was entitled to determine what portion, if any, of the expert opinions to credit or reject. "It is well settled that the credibility of an expert witness is a matter to be determined by the trier of fact. . . . The credibility of expert witnesses and the weight to be given to their testimony . . . is determined by the trier of fact. . . . [T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The [trial] judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Citations omitted; internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 455, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017); see also *Menard* v. *State*, 346 Conn. 506, 521–22, 291 A.3d 1025 (2023) ("a trier of fact may accept or reject, in whole or in part, the testimony of an expert"). Thus, the court was entitled to credit Harvey's expert opinion that George I did not retain the disputed parcel in the 1975 deed.

The adjoining owner description in the 1975 deed indicates that George I conveyed the same property to George II that Cook had conveyed to George I in 1951. Because boundary descriptions prevail over acreage calls, the trial court's finding that the 1975 deed did not sever the disputed parcel from the property is not clearly erroneous.

The plaintiff nevertheless argues that the court improperly relied on the adjoining owner description instead of the acreage call in determining whether the 1975 deed conveyed the disputed parcel to George II

because (1) the court disregarded George I's clear intent as expressed in the 1975 deed, (2) the acreage call is more reliable than the boundary description, (3) George I did not need to change the adjoining owner description in the 1975 deed, and (4) there is no significance to the fact that the names of the abutters remained the same in all of the deeds in the multiple chains of title. We disagree.

Here, the plaintiff asked the court to quiet title on the basis of the acreage calls in the property's chain of title, which describe a parcel containing four acres, more or less. The defendant, on the other hand, asked the court to quiet title on the basis of the boundary descriptions in the property's chain of title, which indicate that the chain of title conveys the same property that Cook conveyed to George I in 1951. The court noted that, although the acreage call in the 1975 deed arguably would support a finding that George I retained the disputed parcel, the boundary description indicates that he conveyed the entire property. The court thereafter determined that "[the adjoining owner description] is the most reliable call for determining a property's boundary [and] that call established that the disputed parcel is part of the property . . . ." (Internal quotation marks omitted.)

The plaintiff argues that the court's reliance on the adjoining owner description in the 1975 deed disregards George I's clearly expressed intent to retain the disputed parcel and, therefore, "is contrary to the rules of construction." As we have already discussed, however, the established rules of construction provide that "[w]here the boundaries of land are described by known and fixed monuments," including adjacent land with fixed boundaries, such descriptions prevail over acreage calls, which are the least reliable land description. (Internal quotation marks omitted.) *Thurlow* v. *Hulten*, supra, 173 Conn. App. 726. Thus, the court's finding as

to George I's intent as expressed by the language of the boundary description in the 1975 deed is not clearly erroneous.

Although the plaintiff acknowledges that our case law provides that boundary descriptions are more reliable than acreage calls, he contends that the rule should not apply in this case because the acreage call in the 1975 deed is reliable. We are not persuaded.

The 1975 deed expressly describes the parcel as containing four acres, *more or less*, indicating that the acreage call is, at best, an estimate rather than a precise measurement of the parcel. See id., 714. There was also a discrepancy in the property's acreage when Cook conveyed it to George I in the 1951 deed. See footnote 3 of this opinion. Moreover, Harvey testified that acreage calls are the last factor to consider, after natural or artificial monument calls and metes and bounds descriptions, when determining a property's boundaries. This opinion is supported by our case law, which consistently states that acreage calls are an unreliable method for identifying property. See *Feuer* v. *Henderson*, 181 Conn. 454, 461, 435 A.2d 1011 (1980) ("any discrepancy between acreage designated in deeds and that determined by a surveyor, as found by the court, can be accounted for by the fact that many old deeds contain imprecise measurements"); *Steinman* v. *Maier*, 179 Conn. 574, 575, 427 A.2d 828 (1980) ("the designation of unsurveyed acreage contained in old deeds is quite unreliable"); *Thurlow* v. *Hulten*, supra, 173 Conn. App. 714 ("the words 'more or less,' indicat[e] that the parties to that deed did not intend the acreage call to be precise"). Accordingly, the court reasonably could have inferred that George I did not know the precise acreage of the property and intended the 1975 deed's acreage call to be an estimate rather than a precise and reliable description of the property. Thus, the court's finding

that the adjoining owner description is more reliable than the acreage call is not clearly erroneous.

The plaintiff additionally argues that the boundary description does not show that George I conveyed the entire property to George II because George I was the northern abutter before and after the 1975 conveyance and, therefore, the adjoining owner description did not need to be changed. Specifically, he argues that the 1951 deed referred to George I as the northern abutter because he owned the land to the north of the property, and he remained the northern abutter in the 1975 deed because he retained the disputed parcel. Again, we disagree.

The plaintiff's argument disregards the express language of the 1951 and 1975 deeds, which describe the property as "[b]ounded northerly by land [now or formerly] of George [I], *and land* [*now or formerly*] *of Charles Heidtman, Sr., partly by each* . . . ." (Emphasis added.) Although Heidtman, Sr., appears in the chain of title to land north of the disputed parcel, there is no evidence in the record that he ever held title to the property or the disputed parcel. Accordingly, if George I intended the disputed parcel to be the property's northern boundary, then the 1975 deed would describe the northern boundary as the land of George I *only*, rather than the lands of both George I *and* Heidtman, Sr. Because the 1951 and 1975 deeds refer to the lands of George I and Heidtman, Sr., as the northern boundary, the court's findings that the 1951 and 1975 deeds conveyed the same property is not clearly erroneous.

Finally, the plaintiff argues that the adjoining owner descriptions in the chain of title have no bearing on the determination of the property's boundaries because it is not unusual for a deed to leave the names of abutters unchanged. In support of this argument, the plaintiff points to the chains of title to the property and its

abutters to "demonstrate that the names of abutters were not updated each time there was a conveyance of property, even if those individuals no longer owned the abutting property." We are not persuaded.

Even if the adjoining owner descriptions in the property's chain of title reflect names of people who no longer own the adjoining lands, the parties can identify those lands by tracing the chains of title. Therefore, the adjoining owner descriptions in the chain of title to the property are reliable because they allow the parties to identify the adjoining properties. See *Marshall* v. *Soffer*, supra, 58 Conn. App. 744 (parties could identify property's boundary where deed described adjoining property as "now or formerly of Katherine Link Knapp" (internal quotation marks omitted)).

Thus, because the chain of title expressly refers to adjoining lands as the property's boundaries, the court properly relied on the adjoining owner descriptions instead of the acreage calls in determining that the disputed parcel was not severed from the property.

II

The plaintiff next claims that the court improperly found that "there is no other support that the disputed parcel was and remained a separate property, as Harvey testified to after searching title to the adjoining properties to determine if there was a remaining parcel that George [I] had not conveyed." The plaintiff argues that this finding is clearly erroneous because (1) George I retained title to the disputed parcel until the plaintiff purchased it in 2004, (2) the Gates survey identified the disputed parcel as separate from the property, (3) the plaintiff has improved, occupied, maintained, insured, and paid the taxes on the disputed parcel since 2004, (4) the plaintiff did not mortgage the disputed parcel to the bank and, therefore, the bank could not foreclose

on it, and (5) the defendant did not acquire the disputed parcel. We disagree.

The plaintiff first argues that the court's finding is clearly erroneous because George I retained the disputed parcel in the 1975 deed and held title to it until his heirs, the Resslers, filed the quiet title action against the plaintiff, which was settled when the Resslers sold the disputed parcel to the plaintiff in 2004. As previously discussed in this opinion, however, George I did not retain title to the disputed parcel when he conveyed it to George II in 1975. Furthermore, each conveyance between 1975, when George II acquired title, and 2001, when the plaintiff first acquired title, used the same boundary description and acreage call as the 1975 deed. Accordingly, the court reasonably could have inferred that each conveyance between 1975 and 2001 conveyed the entire property, including the disputed parcel.

Moreover, the plaintiff argues that he acquired the disputed parcel as a distinct parcel in 2004, but the 2004 deed expressly conveyed the 5.12 acre parcel depicted in the Waldo survey, which shows the disputed parcel as part of the property. "[A] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein. . . . [T]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as though they were expressly recited therein." (Internal quotation marks omitted.) *Walters* v. *Servidio*, 227 Conn. App. 1, 11, 320 A.3d 1008 (2024). Because the deed specifies the Waldo survey, that depiction governs our interpretation of the description in the deed. See *Gleason* v. *Atkins*, supra, 225 Conn. App. 769 ("[b]ecause the [deed] specifies that [a] map describes the parcel of land intended, that map is controlling as to our interpretation of the description provided in the deed"). Additionally, the 2004 deed states

that the parties intended to *confirm* the property's boundary line, that the estate of Agnes Ressler never owned the property, and that the property consists of 5.12 acres. If the plaintiff had purchased the disputed parcel from the estate of Agnes Ressler, then the deed would state that it conveyed a parcel containing 1.46 acres previously owned by the estate of Agnes Ressler. Accordingly, the court reasonably could have inferred that the plaintiff did not purchase the disputed parcel in 2004.

The plaintiff nevertheless argues that the court's finding is clearly erroneous because the Gates survey, prepared by the plaintiff's expert in 2003, after the plaintiff acquired the property, shows the disputed parcel and the property as two separate parcels. The Gates survey, however, was not referenced in any deed in the chain of title to the property. The Gates survey, therefore, does not alter the boundary descriptions in the chain of title. See *Marshall* v. *Soffer*, supra, 58 Conn. App. 742 ("map was not referenced in any deed, and no deed description after that date in the chain of title of either the plaintiffs or the defendant was amended to reflect any change in the boundaries of land conveyed," so map did not "alter the plaintiffs' deeded description"). Moreover, the record reveals that the Gates survey existed at the time of the 2004 deed to the plaintiff. The court, therefore, reasonably could have inferred that if the disputed parcel was separated from the property, the deed would have specified the Gates survey instead of the Waldo survey. Thus, the Gates survey does not render the court's finding clearly erroneous.

The plaintiff next argues that the court's finding is clearly erroneous because he has improved, occupied, maintained, insured, and paid the taxes on the disputed parcel since 2004. He specifically argues that he fixed the building located on the disputed parcel, that he cleaned up the land, that he paid taxes and insurance

on the land, and that the disputed parcel has its own driveway. The defendant, on the other hand, argues that the plaintiff produced no evidence to show that he maintained the disputed parcel separately from the property. We agree with the defendant.

Although the plaintiff argues that he maintained the disputed parcel separately, he did not introduce any evidence, such as bills or checks, showing that he paid property taxes and insurance on the disputed parcel *separate* from those he paid on the property. Even if the disputed parcel has its own driveway, the plaintiff admits that it does not have its own address. Moreover, the record reveals that the plaintiff applied for a zoning permit in 2003 using the Waldo survey's depiction of the property as a 5.12 acre parcel. The only evidence that the plaintiff offered to support his argument that he maintained the disputed parcel separately was his own testimony, which the court was free to credit or reject. See *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" (internal quotation marks omitted)); *Rocamora* v. *Heaney*, supra, 144 Conn. App. 668 ("[an appellate] court does not try issues of fact or pass upon the credibility of witnesses" (internal quotation marks omitted)). Thus, the court reasonably could have inferred that the plaintiff had once owned and maintained the *entire* property, including the disputed parcel. The court's finding that no evidence supports the plaintiff's contrary contention, therefore, is not clearly erroneous.

Finally, the plaintiff argues that he did not mortgage the disputed parcel to the bank, that the bank did not foreclose on the disputed parcel, and, therefore, the bank did not sell the disputed parcel to the defendant. Specifically, he argues that each conveyance of the

property between 1975 and 2020 excluded the disputed parcel. As we have already discussed at length, however, each relevant conveyance of the property since 1951 conveyed the entire property, including the disputed parcel. Thus, when the plaintiff mortgaged the property in 2005, using the same boundary description as the 1975 deed, he mortgaged the entire property, including the disputed parcel. Consequently, when the bank subsequently foreclosed on the property, obtained title, and sold it to the defendant, it obtained title to and sold the disputed parcel. Although each conveyance described the parcel as four acres, more or less, the adjoining owner descriptions consistently describe the same parcel that Cook conveyed to George I in 1951. Therefore, the record supports the court's findings that the plaintiff mortgaged the disputed parcel and that the bank foreclosed on and sold the disputed parcel to the defendant. Therefore, the court's finding that "there is no . . . support that the disputed parcel was and remained a separate property" other than the acreage call is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER PETROCELLI *v.* CITY OF SHELTON ET AL.
(AC 46773)

Moll, Westbrook and Eveleigh, Js.

Syllabus

The defendant state of Connecticut appealed from the trial court's judgment denying its motion to dismiss the count of the plaintiff's complaint asserted against it. The defendant claimed that the plaintiff's cause of action for personal injuries pursuant to statute (§ 13a-144) was barred by the doctrine of sovereign immunity because the defendant had abandoned that portion of the defective sidewalk where the plaintiff fell and, thus, the court lacked subject matter jurisdiction over her claim. *Held*:

The trial court properly denied the motion to dismiss because the question of abandonment involved a disputed issue of fact, which was critical to the determination of whether the court had subject matter jurisdiction, and the court had discretion to postpone resolution of that question until after a trial on the merits.

Argued November 14, 2024—officially released February 11, 2025

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective state highway, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where United Illuminating Company was cited in as a defendant; thereafter, the court, *Frechette, J.*, granted the motions for summary judgment filed by the defendant Center Motorsports, LLC, et al.; subsequently, the court denied the motion to dismiss filed by the defendant state of Connecticut, and the defendant state of Connecticut appealed to this court. *Affirmed.*

Kevin S. Coyne, for the appellant (defendant state of Connecticut).

Jeremy C. Virgil, with whom was *Kyle D. Souza*, for the appellee (plaintiff).

Matthew L. Studer, with whom, on the brief, was *Jonathan D. Berchem*, for the appellee (named defendant).

Opinion

EVELEIGH, J. In this action brought, in part, pursuant to the state highway defect statute, General Statutes § 13a-144,[1] the defendant, the state of Connecticut,[2]

[1] General Statutes § 13a-144, which serves as a waiver of the state's sovereign immunity for monetary claims seeking recovery for injuries caused by highway defects, provides in relevant part: "Any person injured in person or property through the neglect or default of the state . . . by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . ."

[2] The city of Shelton (city), United Illuminating Company, Barone Properties, LLC, and Center Motorsports, LLC, also were named as defendants in

appeals from the judgment of the trial court denying its motion to dismiss the claims asserted against it by the plaintiff, Jennifer Petrocelli, on the ground that they are barred by sovereign immunity.[3] On appeal, the state claims that the court improperly denied the motion to dismiss because it did not have a duty to maintain and repair the area where the alleged injury occurred and, thus, is entitled to sovereign immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The plaintiff alleges the following facts. On January 11, 2020, at approximately 9:15 p.m., the plaintiff was walking on the sidewalk adjacent to Center Street in Shelton. Center Street is a public highway that is heavily traveled, and its adjacent sidewalks are open to and used by pedestrians on a regular basis. The plaintiff stepped into an open utility handhole[4] on the sidewalk in front of 61 Center Street, which caused her to fall. Consequently, the plaintiff sustained personal injuries and has a diminished capacity to earn a living. The plaintiff provided the state with written notice on March 23, 2020, advising the state of the injuries she sustained from the allegedly defective handhole.

The plaintiff commenced the present action in February, 2021. The operative complaint, filed on August 9,

the plaintiff's complaint. The city is participating as an appellee in the present appeal. The court rendered summary judgment in favor of the remaining defendants, and they are not participating in this appeal.

[3] "Although the denial of a motion to dismiss generally is an interlocutory ruling that does not constitute an appealable final judgment, the denial of a motion to dismiss filed on the basis of a colorable claim of sovereign immunity is an immediately appealable final judgment." *Filippi* v. *Sullivan*, 273 Conn. 1, 6 n.5, 866 A.2d 599 (2005).

[4] Merriam-Webster's Online Dictionary defines a "handhole" in relevant part as "a shallow form of manhole giving access to a top row of ducts in an underground electrical system." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/handhole (last visited February 3, 2025).

The plaintiff described the open handhole as a "hole/depression in the sidewalk with two large screws/bolts sticking up near its edges."

2021, asserts five counts. The first count is a municipal highway defect claim against the city of Shelton (city) pursuant to General Statutes § 13a-149. The second count alleges that the plaintiff is entitled to relief against the state pursuant to § 13a-144. The third, fourth, and fifth counts sound in negligence and are directed, respectively, against two businesses that own property abutting the sidewalk where the plaintiff was injured and United Illuminating Company.[5]

On July 21, 2021, the state filed a motion to dismiss the second count of the operative complaint pursuant to Practice Book § 10-30 et seq., arguing that the plaintiff's claim did not fall within the waiver of sovereign immunity contained in § 13a-144. In its memorandum of law in support of its motion to dismiss, the state argued that it did not have a duty pursuant to § 13a-144 to maintain the sidewalk where the alleged incident occurred and, therefore, the court lacked subject matter jurisdiction over the plaintiff's claim.

On November 4, 2022, the plaintiff filed an objection to the state's motion to dismiss. On June 1, 2023, the plaintiff filed a supplemental objection to the state's motion to dismiss along with several exhibits. In the plaintiff's supplemental objection, she referenced the state's revised responses to the city's first request for admissions, which had been filed with the court on January 5 and March 23, 2023. In those responses, the state admitted that it owned the handhole located on the sidewalk directly in front of 61 Center Street.[6] Specifically, the state first admitted that the handhole was owned by the state "at some time prior to [January 11, 2020]," and then subsequently admitted that the handhole was owned by the state "from 1992 until [it]

[5] The court rendered summary judgment in favor of the defendants named in these counts. See footnote 2 of this opinion.

[6] In its previous response to the plaintiff's request for admissions, the state had denied owning the handhole.

was taken out of service and abandoned in 1997." The state further admitted that the handhole contains an abandoned loop detection system, which was serviced by the state and controlled the traffic light at an intersection on Center Street.

In her supplemental objection, the plaintiff argued that, even if the state intended to abandon the handhole, it did not do so in a proper manner because it failed to remove the handhole. In support of her argument, the plaintiff cited deposition testimony from Arnold Ozols, an employee with the Department of Transportation (department) who supervises traffic signal maintenance and highway illumination. Ozols averred that if a handhole is abandoned, it should be removed and the ground should be "put . . . back to grade or patched."[7] The plaintiff also cited § 11.18.03 of the Standard Specifications for Roads, Bridges and Incidental Construction, Form 814A (1995),[8] as promulgated by the department, which relates to the removal and/or relocation of traffic signal equipment and states, among other things, that "[e]quipment shall be removed in such a manner as to cause no hazard to pedestrians," and, "[w]hen poles, foundations, etc. are removed, the hole shall be backfilled with clean fill material, which shall be compacted and the ground restored to a grade and condition compatible with the surrounding area."

On June 6, 2023, the city filed a memorandum in opposition to the state's motion to dismiss, along with several exhibits. The exhibits included an affidavit from Rimas Balsys, the city engineer, in which he averred that certain intersections on Center Street, "including all supporting equipment and wiring, are owned, controlled, and maintained by the [state]"; that, to the best

[7] Ozols' deposition testimony was included in the exhibits attached to the plaintiff's supplemental objection.

[8] The standard specifications also were included in the plaintiff's exhibits.

of his knowledge, "the handhole contains an abandoned loop detection system"; and that "[t]he [c]ity never owned, maintained or controlled the subject handhol[e] utility box, its cover or the electrical wiring and utility components encapsulated therein."

The state subsequently filed its responses to the city's fourth request for admissions in which it admitted that, on January 14, 2020, the state received a notification from the Shelton Police Department about the handhole identified in the notice attached to the plaintiff's complaint. On that same date, the state put a cover on the handhole, but it advised the city at that time that it did not believe that the handhole was one maintained by the state. The state again admitted that it installed the handhole as part of an intersection redesign in 1992 but stated that the handhole was abandoned and taken out of service in 1997 and that the handhole remained within the confines of a sidewalk maintained by the city. The state further admitted that it did not have a copy of any written notice to the city advising it that the state intended to and/or planned to abandon the handhole.

On July 21, 2023, following a hearing held on July 19, 2023, the court, *Frechette*, *J.*, issued a written order denying the state's motion to dismiss. The court concluded that the issue of abandonment is a question of fact for the jury to decide and, therefore, rejected the state's argument that it is not liable as a matter of law. The court explained: "As pointed out in the plaintiff's supplemental objection . . . the [state] admits that it owned the handhole some time prior to [January 11, 2020] . . . until it was taken out of service and abandoned in 1997. It is also not disputed that, on January 14, 2020, three days after the plaintiff's fall, the [state] exercised control over the handhole by replacing the broken cover with a new cover that very well fit the handhole. Having admitted ownership of the handhole,

the question of abandonment is clearly a question of fact which the jury will have to decide at trial. Moreover, the state's subsequent repair of the handhole belies its claim of abandonment. Accordingly, the [state's] motion to dismiss is denied." (Internal quotation marks omitted.) This appeal followed.

We begin by setting forth the relevant principles of law and the applicable standard of review. "It is the established law of our state that the state is immune from suit unless the state, by appropriate legislation, consents to be sued. . . . The legislature waived the state's sovereign immunity from suit in certain prescribed instances by the enactment of § 13a-144. . . . The statute imposes the duty to keep the state highways in repair upon . . . the [C]ommissioner [of Transportation] . . . and authorizes civil actions against the state for injuries caused by the neglect or default of the state . . . by means of any defective highway . . . . There being no right of action against the sovereign state at common law, the [plaintiff] must first prevail, if at all, under § 13a-144. . . .

"[T]he doctrine of sovereign immunity implicates [a court's] subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations . . . ." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 348–49, 141 A.3d 784 (2016).

"[I]f the complaint is supplemented by undisputed facts established by [1] affidavits submitted in support

of the motion to dismiss . . . [2] other types of undisputed evidence . . . and/or [3] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] . . . .[9]

"Conversely, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. . . . The trial court may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." (Citation omitted; footnote in original; internal quotation marks omitted.) *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 635–36, 216 A.3d 753, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

"We review a trial court's denial of a motion to dismiss on the ground of sovereign immunity, based on an application of § 13a-144, de novo. . . . [W]hether a highway is defective may involve issues of fact, but

[9] "Other types of undisputed evidence that a trial court may consider in deciding a motion to dismiss includes deposition testimony submitted in support or opposition thereto." *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 635 n.6, 216 A.3d 753, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law over which we exercise plenary review. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 350.

In the present case, we conclude that the court properly denied the state's motion to dismiss on the ground that the question of whether the state abandoned the handhole involves a disputed issue of fact that is critical to the determination of whether the court has subject matter jurisdiction pursuant to § 13a-144.

Section 13a-144 provides in relevant part that "[t]he commissioner and the state shall not be liable in damages for injury to person or property when such injury occurred on any highway or part thereof abandoned by the state or on any portion of a highway not a state highway but connecting with or crossing a state highway, which portion is not within the traveled portion of such state highway. . . ."

The parties have cited no case law, and we have found none, in which this court or our Supreme Court has examined the issue of abandonment in the context of § 13a-144. Nevertheless, in other circumstances, this court has repeatedly concluded that the issue of abandonment is a question of fact. See, e.g., *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 21, 48 A.3d 107 (abandonment of highway in context of claim for easement), cert. denied, 307 Conn. 932, 56 A.3d 715 (2012); see also *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 396, 183 A.3d 1176 (2018) (abandonment of easement).

Because the question of whether the state abandoned the handhole involves a critical factual dispute, the court had the discretion to postpone the resolution of that issue until a trial on the merits occurred. "[W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits." (Citations omitted; footnote omitted.) *Conboy* v. *State*, 292 Conn. 642, 652–53, 974 A.2d 669 (2009). The trial court "may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." Id., 653 n.16; see also *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 369 n.27 (" 'critical factual dispute[s]' " existed regarding whether culvert was highway defect and whether child was traveler on highway for purposes of § 13a-144, which prevented court from resolving jurisdictional question).

On appeal, the state claims that the court improperly denied its motion to dismiss because the "uncontroverted" evidence that it had not used or maintained the handhole since 1997 established that it had abandoned the handhole.[10] The state argues that the court improperly relied on the evidence of its remedial repair of the handhole, subsequent to the plaintiff's alleged fall, as an indication that it did not abandon the handhole. The state argues that such evidence is relevant to a common-

[10] To the extent that the state also argues that it did not have a duty to maintain the handhole, regardless of whether it was abandoned, because it was located on a sidewalk that is not within the state highway system, we are not persuaded.

This court addressed a similar issue in *Dudley* v. *Commissioner of Transportation*, supra, 191 Conn. App. 641–46, which involved an allegedly defective manhole cover. In *Dudley*, the trial court rejected the state's argument

law negligence claim, not a statutory claim pursuant to § 13a-144. The state also contends that the plaintiff's claim that the state's method of abandonment was improper or negligent similarly is not relevant to a cause of action under § 13a-144.[11] We are not persuaded.

Section 13a-144 is silent as to the manner in which the state may establish that it abandoned a highway, or part thereof, pursuant to that provision. Accordingly, we look to common-law principles governing abandonment for guidance. See, e.g., *Escobar-Santana* v. *State*, 347 Conn. 601, 618, 298 A.3d 1222 (2023) (because legislature did not directly address question in statutory

that it did not have a duty pursuant to § 13a-144 to maintain or repair the sidewalk on which the plaintiff allegedly was injured, determining that the plaintiff's claim was not that the state had a duty to maintain the sidewalk but, instead, that the state had a duty to maintain the allegedly defective manhole cover. Id., 634. On appeal, this court agreed with the trial court that the case "is not a sidewalk maintenance case [but, instead] is a state highway storm drain system maintenance case." (Internal quotation marks omitted.) Id., 644. This court ultimately concluded that the allegedly defective manhole cover was within the definition of "highway defect" pursuant to § 13a-144, as the record reflected that the allegedly defective manhole cover was located near the traveled portion of the state highway, arguably within the state's right-of-way line, served state owned and operated highways, and existed solely to service the state highway. Id., 646.

In the present case, similar to *Dudley*, the plaintiff's claim is not that the sidewalk was defective but, rather, that the handhole was defective. At oral argument before this court, the state seemed to acknowledge that *Dudley* controls this issue. Specifically, the state acknowledged that, faced with *Dudley*, it could not argue that it did not have a duty to maintain the handhole if it had not abandoned the handhole. Similarly, the state conceded that, if the handhole was still in use, it would have had a duty to maintain the handhole, even though it is located on a sidewalk. The state also admitted that the sidewalk where the plaintiff fell was located within the state's right-of-way line. See *Ferreira* v. *Pringle*, 255 Conn. 330, 350–51, 766 A.2d 400 (2001) (state liability applied to defect embedded within shoulder of road seven feet from paved area within state's right-of-way line).

[11] The state argues that the plaintiff's claim that the state did not properly abandon the handhole would, instead, arguably be a basis for a claim to the Claims Commissioner. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 443 n.6, 195 A.3d 664 (2018) (Claims Commissioner may grant party permission to sue state for negligence pursuant to General Statutes § 4-141 et seq.).

language, court looked to state's common law for additional guidance).

"While nonuse of [a] highway may, in some circumstances, conclusively establish the intent to abandon . . . where abandonment is found there most frequently is some affirmative act of an intention to abandon." (Citation omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 21. "[A]bandonment implies . . . a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances . . . . Most frequently, where abandonment has been held established, there has been found present some affirmative act indicative of an intention to abandon . . . but nonuser, as of an easement, or other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment. The weight and effect of such conduct depends not only upon its duration but also upon its character and the accompanying circumstances." (Internal quotation marks omitted.) *Nichols* v. *Oxford*, 182 Conn. App. 674, 680–81, 191 A.3d 219, cert. denied, 330 Conn. 912, 193 A.3d 560 (2018).

On the basis of the foregoing, the fact finder[12] may ultimately find that the state's nonuse of the handhole, from 1997 until the alleged incident in 2020, reflected its intention to abandon the handhole. The state, however, has provided no legal support for its argument that its nonuse of the handhole during that time *conclusively* established, *as a matter of law*, that it abandoned the

[12] In the event that there is a jury trial, the factual question of whether the state abandoned the handhole shall be submitted to the jury by way of a special interrogatory, and the court shall reserve for itself the ultimate question of whether, on the basis of the facts found, it has jurisdiction over the plaintiff's claim. See *Sanchez* v. *Hartford*, 227 Conn. App. 771, 775, 322 A.3d 1108 (court submitted interrogatories to jury to make factual findings and reserved for itself question of whether governmental immunity would apply to facts presented), cert. denied, 350 Conn. 922, 325 A.3d 1093 (2024).

handhole. The fact finder may find, after further factual development, that the state's nonuse of the handhole should have been accompanied by an affirmative act in order to indicate an intent to abandon, or that its failure to remove the handhole and its remedial repair of the handhole,[13] as currently reflected in the plaintiff's exhibits, demonstrate that it did not abandon the handhole. There is, again, no legal support for the state's contention that the fact finder would be prohibited from considering such evidence in its analysis.

At this stage of the proceedings, the arguments advanced by the plaintiff and the city in opposition to the state's motion to dismiss, along with the exhibits included in support thereof, sufficiently placed into dispute the issue of abandonment, such that the court had discretion to postpone resolution of the jurisdictional question until after a full trial on the merits has occurred. See *Conboy* v. *State*, supra, 292 Conn. 653 n.16. Accordingly, we conclude that the court properly denied the state's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

J. C.-S. *v.* J. G.*
(AC 47655)

Elgo, Moll and Seeley, Js.

Syllabus

The plaintiff appealed from the trial court's judgment denying his application for a civil protection order against the defendant. The plaintiff claimed, inter

[13] Section 4-7 (a) of the Connecticut Code of Evidence provides in relevant part that evidence of subsequent remedial measures "is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective

alia, that the court violated his right to self-representation by limiting the manner in which he was permitted to present evidence in support of his application. *Held*:

This court declined to address the merits of the plaintiff's claims because he failed to provide this court with an adequate record pursuant to the rule of practice (§ 61-10 (a)), as, instead of providing the complete transcript from the hearing on the application, he provided only self-selected excerpts.

Submitted on briefs January 15—officially released February 11, 2025

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. John F. Kavanewsky, Jr.*, judge trial referee, denied the application, and the plaintiff appealed to this court. *Affirmed.*

J. C.-S., self-represented, filed a brief as the appellant (plaintiff).

Opinion

PER CURIAM. The self-represented plaintiff, J. C.-S., appeals from the judgment of the trial court denying his application for a civil protection order against the defendant, J. G., pursuant to General Statutes § 46b-16a.[1] The plaintiff's claims on appeal distill into two parts, namely, whether the court (1) erred in ruling, in the absence of a motion for protective order, that the defendant and a nonparty witness were not required to testify or produce documents pursuant to subpoenas that had issued and had been served, and (2) violated the plaintiff's right to self-representation by limiting the manner in which he was permitted to present evidence

order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

[1] The defendant did not file a brief or otherwise participate in the present appeal.

in support of his application.[2] We decline to address the merits of these claims because the plaintiff has failed to provide this court with an adequate record. Thus, we affirm the judgment of the trial court.

The record reflects the following facts and procedural history. On March 8, 2024, pursuant to § 46b-16a, the plaintiff filed an application for a civil protection order. In his application and the unsworn statement filed therewith, the plaintiff alleged that the defendant was stalking him and causing him to fear for his safety. On that same day, the court, *Vizcarrondo*, *J.*, scheduled a hearing, having found that the allegations of the plaintiff's unsworn statement satisfied the requirements of § 46b-16a (a).[3] On April 29, 2024, the court, *Hon. John F. Kavanewsky*, *Jr.*, judge trial referee, conducted the hearing, at which the defendant was represented by

[2] The plaintiff also claims that the court erred in denying his motions for contempt, which were filed on April 30 and May 2, 2024, and were directed to the defendant and a nonparty witness. That claim is not properly before us. On May 20, 2024, the plaintiff filed the present appeal. The court denied the motions for contempt on June 5 and May 21, 2024, respectively.

Practice Book § 61-9 provides in relevant part: "If the trial court issues an additional decision after an appeal has been filed that the appellant wants to appeal, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1. . . ."

The plaintiff did not file an amended appeal to include a claim regarding the denial of his motions for contempt. Accordingly, we need not review that claim. See *Jewett* v. *Jewett*, 265 Conn. 669, 673 n.4, 830 A.2d 193 (2003); *Worth* v. *Commissioner of Transportation*, 135 Conn. App. 506, 508 n.2, 43 A.3d 199, cert. denied, 305 Conn. 919, 47 A.3d 389 (2012).

[3] General Statutes § 46b-16a (a) provides in relevant part: "Any person who has been the victim of . . . stalking may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such . . . stalking and does not qualify to seek relief under section 46b-15. As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety."

counsel. At the conclusion of the hearing, the court denied the application. This appeal followed.

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." "The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . This court also has explained that [a]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative." (Citation omitted; internal quotation marks omitted.) *R & P Realty Co.* v. *Peerless Indemnity Ins. Co.*, 193 Conn. App. 374, 379, 219 A.3d 429 (2019).

In this appeal, the plaintiff has presented claims that require us to have a complete and accurate picture of what occurred during the hearing. The plaintiff has not provided this court, however, with a complete transcript of the hearing, opting instead to provide only self-selected excerpts.[4] In the absence of a complete transcript, we would have to resort to speculation in order to evaluate the plaintiff's claims, which we decline to do. See id., 380 (this court declined to review appellate claim where plaintiffs provided only partial trial

[4] Notably, the plaintiff's transcript order form instructs the court reporter's office in part that "[t]he [defendant's] counsel shouldn't be on the transcript . . . ."

transcript); *Buehler* v. *Buehler*, 175 Conn. App. 375, 382, 167 A.3d 1108 (2017) (this court declined to review appellate claim because defendant failed to provide complete transcript of relevant hearing); *Calo-Turner* v. *Turner*, 83 Conn. App. 53, 56–57, 847 A.2d 1085 (2004) (this court declined to review appellate claim where defendant failed to provide complete transcript of trial proceedings). Accordingly, we decline to review the plaintiff's claims.

The judgment is affirmed.

S. S. *v.* J. S.*
(AC 47525)

Elgo, Cradle and Clark, Js.

Syllabus

The defendant appealed from the trial court's judgment granting the plaintiff's motion, filed pursuant to statute (§ 46b-15 (g)), to extend an order of civil protection issued against the defendant. The defendant claimed that the court abused its discretion in extending the order because there was insufficient evidence that the defendant posed a continuous threat of present physical pain or physical injury to the plaintiff. *Held*:

The trial court's decision to extend the order of civil protection was not an abuse of its discretion because the evidence was sufficient to show that the defendant posed a continuous threat of present physical pain or physical injury to the plaintiff, including evidence that the plaintiff resided in a home that was jointly owned by the parties, they were in the midst of a contested dissolution action, and there were criminal changes still pending against the defendant for an incident in which he assaulted the plaintiff.

Argued November 18, 2024—officially released February 11, 2025

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of New Haven, where the court, *Gould*, *J.*, issued an ex parte civil protection order; thereafter, the court, *Grossman*, *J.*, issued an order of civil protection in accordance with a stipulation entered into by the parties; subsequently, the court, *Hon. James G. Kenefick*, *Jr.*, judge trial referee, granted the plaintiff's motion to extend the order of civil protection, and the defendant appealed to this court. *Affirmed.*

Remington E. Copertino, certified legal intern, with whom were *Richard A. Rochlin* and *Elise Cousineau*, for the appellant (defendant).

Opinion

CLARK, J. The defendant, J. S., appeals from the judgment of the trial court granting the motion filed by the self-represented plaintiff, S. S., to extend a restraining order issued against him pursuant to General Statutes § 46b-15.[1] On appeal, the defendant claims that the court abused its discretion in extending the order because

[1] General Statutes § 46b-15 provides in relevant part: "(a) Any family or household member . . . who is the victim of domestic violence, as defined in section 46b-1, by another family or household member may make an application to the Superior Court for relief under this section.

* * *

"(g) No order of the court shall exceed one year, except that an order may be extended by the court upon motion of the applicant for such additional time as the court deems necessary. . . ."

General Statutes § 46b-1 provides in relevant part: "(b) As used in this title, 'domestic violence' means: (1) A continuous threat of present physical pain or physical injury against a family or household member . . . (2) stalking . . . of such family or household member; (3) a pattern of threatening . . . of such family or household member or a third party that intimidates such family or household member; or (4) coercive control of such family or household member, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. . . ."

there was insufficient evidence that, at the time the plaintiff sought the extension, the defendant posed a continuous threat of present physical pain or physical injury to her.[2] We affirm the judgment of the court.

The following facts, as found by the trial court or as otherwise undisputed in the record, and procedural history are relevant to this appeal. On February 8, 2023, the plaintiff filed an ex parte application in New Haven Superior Court for relief from abuse against the defendant pursuant to § 46b-15 (application). At the time of the application, the parties, who had been married for more than thirty years and who have three adult children, were engaged in a contested dissolution action in the Superior Court in Middletown. The parties previously had resided together in their marital home in Guilford, but, following the events alleged in the application, the defendant moved to Florida, where he has resided during the pendency of this case.

In her affidavit accompanying the application, the plaintiff averred the following under oath. The defendant put a recording device in the plaintiff's purse without her knowledge, which he used to record her while she was at work. On November 14, 2022, when the plaintiff arrived home from work, the defendant, who was drunk, confronted her with a recording he had taken of her, which he falsely believed captured audio of her having sex with a coworker in her cubicle. He ordered the plaintiff to sit down and then "back handed [the plaintiff] so hard that [she] flew off the chair [she] was sitting in." The plaintiff attempted to hide under a desk, but the defendant continued to hit her. She then went upstairs to use the bathroom, but the defendant followed her, "back handed [her] repeatedly" while she

[2] The plaintiff did not file a brief with this court. We therefore consider the appeal solely on the basis of the defendant's brief, oral argument, and the record. See, e.g., *Kathrynne S.* v. *Swetz*, 191 Conn. App. 850, 852 n.2, 216 A.3d 858 (2019).

was sitting on the toilet, and then picked her up by the neck and held her against the wall. The defendant "ripped clumps of hair out of [the plaintiff's] head" and left bruises "all over [her] body." The next day, the plaintiff called out of work because she had been badly beaten and had "lost [her] voice from screaming in fear the day before."

The plaintiff further averred that, throughout their marriage, the defendant had engaged in acts of domestic violence, such as pushing her and pulling hair out of her head. In the past, the plaintiff's children had to "get into the middle of the [defendant] and [the plaintiff] in order to protect [her] from his violence." Two weeks before the November 14, 2022 incident, the defendant drunkenly confronted the plaintiff in the bathroom and said: " '[H]ow about we just end it now. I will put a bullet in your head and a bullet in my head.' " The defendant is a retired Connecticut state trooper who had access to guns, and, following his retirement from the state police in 2014, "[h]is drinking and aggressive behavior became out of control." The defendant had previously exhibited jealous and controlling behaviors, including isolating the plaintiff from her family and demanding that the plaintiff call back any number on her phone that he did not recognize so that he could make sure that the number belonged to a woman.

On February 7, 2023, one day before the inception of this case, the defendant was arrested in connection with the events described in the application. He was charged in New Haven Superior Court with strangulation in the second degree in violation of General Statutes § 53a-64bb, assault in the third degree in violation of General Statutes § 53a-61, threatening in the second degree in violation of General Statutes § 53a-62, and disorderly conduct in violation of General Statutes § 53a-182. A criminal protective order was issued against him. The criminal case is still pending, and, at oral

argument before this court in November, 2024, counsel for the defendant represented that the criminal protective order remains in effect.

On February 8, 2023, the same day the plaintiff filed her application, the court, *Gould*, *J.*, granted the application and issued an ex parte restraining order against the defendant for a period of one week. On February 15, 2023, the parties stipulated to the entry of a restraining order against the defendant for one year, with the exception that the order would not apply to any of the parties' pets. That same day, following a remote hearing[3] at which all parties were present, the court, *Grossman*, *J.*, accepted the stipulation as fair and equitable under the circumstances and made it an order of the court. The restraining order required the defendant, inter alia, to "[s]urrender or transfer all firearms and ammunition"; not to "assault, threaten, abuse, harass, follow, interfere with, or stalk" the plaintiff; to "[s]tay 100 yards away from [the plaintiff]" and to stay away from her residence; and not to contact the plaintiff in any manner.[4] The defendant complied with the terms of this order as well as with the terms of the criminal protective order.

On January 30, 2024, the plaintiff moved for an extension of the restraining order. The defendant opposed this motion. The court, *Hon. James G. Kenefick, Jr.*, judge trial referee, held a remote hearing on the plaintiff's motion on February 14, 2024, at which all parties were present but only the plaintiff testified. In her testimony, the plaintiff stated that, for her "peace of mind,"

[3] Proceedings before the trial court were held remotely so that the defendant could appear without having to travel to Connecticut from Florida.

[4] The criminal protective order is not part of the record. At the February 14, 2024 hearing, however—which we discuss subsequently in this opinion—the court consulted the protection order registry, located the criminal protective order, and summarized its terms as "no assaulting, threatening, et cetera, stay away from the home, no contact, he can return once to get his belongings, stay 100 yards away . . . ."

she wanted the restraining order to continue because the parties' dissolution litigation was ongoing and she "still [was] not comfortable with just letting this go." She added that "[i]t doesn't matter [that the defendant] lives in Florida right now; he could easily get on a plane or in a car and come here." She explained that the parties continued to jointly own the marital home and stated: "I'm not comfortable with [the restraining order] ending. Absolutely not. . . . I mean, if they could extend [the restraining order] longer than a year after this, I would appreciate that." She affirmed the truth of the statements that she made in the affidavit accompanying her original application.

The court continued the matter to March 20, 2024—leaving the restraining order in effect until that date—in order to allow the defendant time to file a brief addressing the court's statutory authority to extend the order. The defendant filed his brief on March 7, 2024. On March 20, 2024, the court issued an order extending the restraining order for an additional year. The court found the plaintiff's testimony at the February 14, 2024 hearing to have been credible. The court further found that the allegations of abuse set forth in the affidavit accompanying the application were "very significant and serious"; that the defendant was arrested in connection with this abuse and was currently subject to a criminal protective order with no expiration date; that, although the defendant resided in Florida, the parties were engaged in contested dissolution litigation and continued to jointly own the marital home where the plaintiff resided; and that, notwithstanding the defendant's compliance with the restraining order and criminal protective order, the plaintiff "is still fearful of the [defendant] because of the significant abuse she suffered from him in the past." This appeal followed.[5]

[5] On March 27, 2024, one week after the restraining order was extended, the defendant notified the court overseeing the parties' dissolution action that the parties had settled the dissolution, which had been scheduled for

The defendant claims that the court abused its discretion in granting the plaintiff's motion for an extension of the restraining order because the plaintiff failed to present sufficient evidence that he posed a continuous threat of present physical pain or injury to her.[6] In

trial starting on April 2, 2024. On April 2, 2024, two days before this appeal was filed, the dissolution court, *Sanchez-Figueroa*, *J.*, rendered a judgment of uncontested dissolution. Three months later, on July 2, 2024, the plaintiff filed a motion for contempt, which the dissolution court, *Nugent*, *J.*, marked off on October 2, 2024. The most recent docket entry in the parties' dissolution action is dated October 2, 2024.

[6] In support of his claim that this court, in reviewing the extension of a restraining order under § 46b-15 (g), should assess whether there is sufficient evidence that the party subject to the order poses a continuous threat of present physical pain or physical injury to the plaintiff, the defendant relies on this court's decision in *Joni S.* v. *Ricky S.*, 124 Conn. App. 170, 3 A.3d 1061 (2010). In *Joni S.*, this court applied the "continuous threat" standard in an appeal from the trial court's extension of a restraining order and concluded that, because sufficient evidence established the existence of such a threat, the trial court had not erred in granting the extension. Id., 175. The court in *Joni S.* derived the "continuous threat" standard from the language of § 46b-15 (a), which, at the time, provided in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury by another family or household member . . . may make an application to the Superior Court for relief under this section." General Statutes (Rev. to 2009) § 46b-15 (a); see also *Joni S.* v. *Ricky S.*, supra, 171 n.1, 173.

Since this court's decision in *Joni S.*, § 46b-15 has been amended several times. See, e.g., Public Acts 2021, No. 21-78, § 2. The revision of the statute that has been in effect throughout the present case provides in relevant part: "(a) Any family or household member . . . *who is the victim of domestic violence, as defined in section 46b-1*, by another family or household member may make an application to the Superior Court for relief under this section." (Emphasis added.) General Statutes § 46b-15 (a).

General Statutes § 46b-1 (b) defines " 'domestic violence' " to include "[a] continuous threat of present physical pain or physical injury," but also to encompass other behaviors, such as "stalking," "a pattern of threatening," and "coercive control . . . ." See footnote 1 of this opinion.

Because we conclude that the plaintiff in the present case presented sufficient evidence of a continuous threat of present physical pain or physical injury, we need not and do not consider whether sufficient evidence of any of the other behaviors enumerated in § 46b-1 (b), in the absence of sufficient evidence of a continuous threat of present physical pain or physical injury, would justify the court, in its discretion, in extending a restraining order issued pursuant to § 46b-15.

particular, he claims that the plaintiff's testimony at the February 14, 2024 hearing established that she had only a "vague, unsupported and unspecified sense of discomfort" with allowing the restraining order to expire and that, because she did not bring a "singular specific allegation" of problematic behavior to the court's attention, she failed to set forth an adequate justification for an extension. We are not persuaded.

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . .

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 361–62, 190 A.3d 68 (2018). We are mindful that "trial courts have a distinct advantage over an appellate court in dealing with domestic relations, where all of the surrounding circumstances and the appearance and attitude of the parties are so significant. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . as [t]he conclusions which we might reach, were we sitting as the trial court, are irrelevant." (Internal quotation marks omitted.) *R. H.* v. *M. S.*, 220 Conn. App. 212, 224–25, 297 A.3d 592 (2023).

The court found, and the defendant does not dispute, that, at the time of the hearing on the plaintiff's motion, the parties continued to jointly own the marital home where the plaintiff resided; they were in the midst of a contested dissolution action; and there were criminal charges still pending against the defendant, who remained subject to a criminal protective order. The court reasonably could have concluded from these facts that the defendant's attitude toward the plaintiff remained volatile and vulnerable to the emotional strain that matrimonial litigation can engender and that the defendant, had he decided to travel to Connecticut, could have gained access to the plaintiff more easily than if she lived in a residence of which she was the sole owner or tenant.[7] Moreover, the court properly considered the outstanding criminal protective order that had issued as a result of the defendant's alleged conduct in assessing whether he posed a continuous threat to the plaintiff. See *Rosemarie B.-F.* v. *Curtis P.*, 133 Conn. App. 472, 477, 38 A.3d 138 (2012) (issuance of criminal protective order in connection with plaintiff's domestic violence allegations manifested judicial finding that defendant had violent tendencies and had acted aggressively toward plaintiff). Lastly, the court reasonably could have considered these facts and conclusions to be particularly salient to its risk assessment in light of the defendant's history of abuse toward the plaintiff. The allegations in the plaintiff's affidavit accompanying her original application—the truth of which the plaintiff affirmed in testimony that the court found credible—were extremely serious. They described a history of assaultive and controlling behavior by the defendant that spanned more than three decades of marriage, culminating in a brutal act of physical violence that led to felony charges being brought against the defendant.

[7] We note that, in her affidavit, the plaintiff alleged that nine days after the defendant moved to Florida, he returned to the marital home and "scream[ed] that he wanted [the plaintiff] and [her] son out of the house."

The defendant points to his compliance with the restraining order and his current residence in Florida as evidence that he no longer poses a threat of physical injury to the plaintiff.[8] These were certainly appropriate factors for the court to consider in rendering its decision, but they did not compel the court to allow the restraining order to expire. Nothing in the language of § 46b-15 expressly requires, as a precondition of extending a restraining order, that a defendant have violated the order or resided within a certain proximity of the plaintiff. See, e.g., *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 346 Conn. 391, 410, 291 A.3d 64 (2023) ("[i]t is not the role of this court to engraft additional requirements onto clear statutory language" (internal quotation marks omitted)); *Putman* v. *Kennedy*, 104 Conn. App. 26, 34, 932 A.2d 434 (2007) ("[N]either a pattern of abuse nor the [victim's] subjective fear of the defendant is a requirement for the finding of a continuous threat. Had the legislature intended these factors to be requirements, the statute would have stated so explicitly. . . . It would defy the prophylactic purpose of the statute to impose an absolute bar on relief until the person for whom protection was sought had suffered multiple physical abuses." (Citations omitted.)), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008). To the contrary, § 46b-15 (g) affords the court broad discretion in determining whether to extend a restraining order; the statute provides that the court may do so "for such additional time as [it] deems necessary." General Statutes § 46b-15 (g); see, e.g., *Stein* v. *Hillebrand*, 240 Conn. 35, 41, 688 A.2d 1317 (1997) ("the statutory language authorizing security on such terms as the court may deem desirable underlines the legislature's intent to confer broad judicial discretion on [the

[8] At oral argument before this court, the defendant narrowed his position, arguing that his compliance with the restraining order, *standing alone*, should have barred the court from extending the order as a matter of law. We reject that argument for the reasons we set forth in this opinion.

court]" (internal quotation marks omitted)). The court properly considered the facts highlighted by the defendant but nonetheless concluded, in its discretion, that they did not outweigh other evidence tending to show that he posed a continuous threat to the plaintiff. It is not the function of this court to reweigh that evidence. See, e.g., *Downing* v. *Dragone*, 216 Conn. App. 306, 331–32, 285 A.3d 59 (2022), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023).

Because the evidence was sufficient to show that the defendant posed a continuous threat of present physical pain or physical injury, we cannot conclude that the court's decision to extend the restraining order by one additional year constituted an abuse of its discretion.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] On November 8, 2024, the defendant filed a notice of supplemental authority pursuant to Practice Book § 67-10, in which he cites this court's recent decision in *S. S.* v. *D. M.*, 228 Conn. App. 559, 324 A.3d 233 (2024), to illustrate "how the court heavily weighs specific behaviors when making the necessary factual findings to determine whether grounds exist for continuing a civil protective order" and for the proposition that "specificity and seriousness in pleading" are required in order to secure an extension of a restraining order. We are not persuaded that *S. S.* is apposite to the present case.

In *S. S.*, this court reversed the judgment of the trial court granting the plaintiff's application for an order of civil protection pursuant to General Statutes § 46b-16a on the basis of stalking. *S. S.* v. *D. M.*, supra, 228 Conn. App. 567–68. This court concluded that the trial court had abused its discretion by failing to make factual findings that there were reasonable grounds to believe that the defendant had stalked and would continue to stalk the plaintiff. Id., 567. The defendant in the present case, however, does not claim that the court failed to make the necessary factual findings to support the extension of the restraining order; instead, he argues that the evidence before the court was insufficient to justify the extension. These claims are distinct. Indeed, in *S. S.*, the defendant had made a separate claim that the evidence was insufficient to establish reasonable grounds to believe that he had stalked the plaintiff, and this court expressly declined to reach that claim. Id., 565 n.5. *S. S.* thus sheds little, if any, light on the appropriate resolution of this appeal.

KIMBERLY ELDRIDGE *v.* HOSPITAL OF CENTRAL CONNECTICUT
(AC 46868)

Moll, Suarez and Prescott, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant, rendered following its grant of the defendant's motion for summary judgment on the plaintiff's complaint alleging, inter alia, employment discrimination based on disability. The plaintiff claimed, inter alia, that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether the defendant's reasons for its termination of her employment were pretextual in nature. *Held*:

The trial court properly granted the defendant's motion for summary judgment on the plaintiff's claim of disability discrimination, as it properly applied the burden shifting framework of *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792) to evaluate the discrimination claim, and, after the defendant presented unrefuted evidence that its termination of the plaintiff's employment was not based on her disability, the burden shifted to the plaintiff, and the plaintiff failed to present any evidence that the defendant's reasons for terminating her employment were pretextual.

The trial court properly granted the defendant's motion for summary judgment on the plaintiff's claim that the defendant failed to provide her with a reasonable accommodation for her disability, as the plaintiff failed to present evidence to raise a genuine issue of material fact that she initiated a request for a reasonable accommodation or that the defendant had a position available to which she could have been reassigned prior to the termination of her employment.

Argued September 9, 2024—officially released February 11, 2025

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Knox*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

David R. Jimenez, with whom were *Adam J. Lyke*, and, on the brief, *Jessica L. Draper*, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Kimberly Eldridge, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Hospital of Central Connecticut, with respect to her claims under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq., for disability discrimination, failure to accommodate, and retaliation.[1] The plaintiff raises two claims. First, with respect to her allegation of disability discrimination, the plaintiff claims that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether the defendant's reasons for the termination of her employment were pretextual in nature. Second, in connection with her claim that the defendant failed to provide her with a reasonable accommodation for her disability, the plaintiff claims that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether she made a good faith request for an accommodation. We affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following undisputed facts and procedural history. The defendant hired the plaintiff as a licensed registered nurse on or about March 6, 2017. The plaintiff suffers from several conditions including alcoholism and bipolar disorder. In May, 2018, the plaintiff began a medical leave of absence pursuant to both the federal Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2018), and the Connecticut Family and Medical Leave Act (CFMLA), General Statutes § 31-51kk

[1] The plaintiff has not challenged the court's summary judgment with respect to her retaliation claim set forth in the third count of her complaint.

et seq., to undergo treatment for alcoholism and bipolar disorder, as well as depression. By the time the plaintiff went on leave, the defendant was aware of her medical conditions. The plaintiff was entitled to up to twelve weeks of leave under the FMLA and up to sixteen weeks of leave under the CFMLA.

During the plaintiff's leave of absence, the Department of Public Health (department) began investigating the plaintiff's history of alcohol abuse. At the conclusion of the investigation, the department expressed concerns as to the impact the plaintiff's alcoholism had on her ability to work as a nurse and recommended disciplinary action. In response to the department's findings and recommendation, the Board of Examiners for Nursing suspended the plaintiff's Connecticut nursing license as of August 22, 2018. The plaintiff's license remained suspended until she voluntarily surrendered it on May 28, 2019.

On October 17, 2018, Prudential Insurance Company of America, the third-party administrator through which the defendant managed its employees' leaves of absences, informed the plaintiff that, although she had exhausted her FMLA leave as of August 6, 2018, and her CFMLA leave as of September 3, 2018, her leave benefits would be further extended through November 11, 2018. On November 12, 2018, the defendant terminated the plaintiff's employment. As of the date of termination, the plaintiff's nursing license remained suspended, she had not provided the defendant with a return to work date, and she had not informed the defendant as to whether she would ever be able to return to work.

On February 19, 2021, the plaintiff commenced this action against the defendant.[2] In her complaint, the

[2] A person alleging discriminatory work practices in violation of CFEPA must exhaust his or her administrative remedies by filing a complaint with the Commission on Human Rights and Opportunities (CHRO) in accordance with General Statutes § 46a-82. Only after obtaining a release of jurisdiction

plaintiff alleged, inter alia, that the defendant discriminated against her on the basis of disability in violation of General Statutes § 46a-60 (b) (1) when it unlawfully terminated her employment due to her disability and failed to engage in the required good faith interactive process to provide her with a reasonable accommodation. On February 28, 2023, the defendant filed a motion for summary judgment accompanied by a memorandum of law. Attached to its memorandum were affidavits, excerpts from the plaintiff's deposition, and other documentary evidence. On May 30, 2023, the plaintiff filed a memorandum in opposition to the defendant's motion which included additional documentary evidence. The court heard oral argument on June 20, 2023.

On August 11, 2023, the court issued a memorandum of decision in which it concluded that there were no genuine issues of material fact with respect to the plaintiff's claims and that the defendant was entitled to judgment as a matter of law. With respect to the disability discrimination claim set forth in count one of the plaintiff's complaint, the court determined that, although the plaintiff had established a prima facie case of disability discrimination under the *McDonnell Douglas*[3] framework, the defendant had articulated legitimate, nondiscriminatory reasons for the termination. The court determined that the plaintiff subsequently failed to present evidence that created a genuine issue of material

from the CHRO may that person pursue a civil action in the Superior Court. See General Statutes § 46a-100. Any such action must be brought within ninety days of receipt of the CHRO release. General Statutes § 46a-101 (e). Moreover, any such action must be brought within two years from the date of the filing of the CHRO complaint. General Statutes § 46a-102. In the present case, the plaintiff obtained a release of jurisdiction from the CHRO on November 30, 2020.

[3] Adapted from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny, the *McDonnell Douglas* framework is the test generally employed in assessing discrimination claims under Connecticut law. See *Cooling* v. *Torrington*, 221 Conn. App. 567, 583 n.11, 302 A.3d 319 (2023).

fact that the defendant's proffered reasons for the termination were pretextual. Furthermore, the court determined that the defendant was entitled to judgment as a matter of law on the plaintiff's claim for failure to accommodate, as the plaintiff failed to identify any request for accommodation made prior to termination. This appeal followed.

We begin by setting forth the applicable standard of review. "The standards governing our review of a court's decision to grant a defendant's motion for summary judgment are well settled. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and [only on such a showing] the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Cooling* v. *Torrington*, 221 Conn. App. 567, 582–83, 302 A.3d 319 (2023).

I

The plaintiff first claims that the court erred in granting the defendant's motion for summary judgment with respect to her disability discrimination claim set forth in count one of her complaint. Specifically, the plaintiff argues that the court erred in applying the *McDonnell Douglas* framework. Alternatively, she argues that, even if the *McDonnell Douglas* framework applied, the court erred in first determining that the defendant satisfied its burden to identify legitimate, nondiscriminatory reasons for termination and then determining that she failed to raise a genuine issue of material fact as to whether those reasons were pretextual. The defendant counters that the court correctly applied the *McDonnell Douglas* framework and concluded that the defendant was entitled to judgment as a matter of law on count one. We agree with the defendant.

We begin by setting forth the following relevant legal principles. Under CFEPA, "employers may not discriminate against certain protected classes of individuals . . . ." *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 775, 105 A.3d 103 (2014). Section 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice . . . (1) [f]or an employer . . . to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of mental disability . . . [or] physical disability. . . ."

In order to establish a prima facie case of employment discrimination "based on adverse employment action under the burden shifting analysis enumerated by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and adopted by [our Supreme Court] in *Ford* v. *Blue Cross & Blue Shield of Connecticut*,

Inc., 216 Conn. 40, 53–54, 578 A.2d 1054 (1990) . . . the complainant must prove that: (1) [s]he [was] in the protected class; (2) [s]he was qualified for the position; (3) [s]he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 705–706, 900 A.2d 498 (2006). "The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) Id., 705.

"To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] . . . . Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Citation omitted; internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28–29, 206 A.3d 194 (2019). "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation marks omitted.) *Bombero* v. *Warner-Lambert*

Co., 142 F. Supp. 2d 196, 203 n.7 (D. Conn. 2000), aff'd, 9 Fed. Appx. 38 (2d Cir. 2001).

As a threshold issue, we address the plaintiff's claim that, by applying *McDonnell Douglas*, the court applied an improper legal standard in evaluating her disability discrimination claim. She argues that, "[w]hen the reason given by the employer for the adverse employment action is unrelated to the employee's disability, the *McDonnell Douglas* approach can be used to weed out nonviable claims of discrimination based on circumstantial evidence." She contends, however, that, "[w]hen the parties agree that the employer complains of conduct that is the direct result of the employee's disability . . . there is no need to evaluate whether the employer's adverse employment action made in response to that conduct is pretextual." She further asserts that "[a] plaintiff cannot come forward with evidence of pretext where the very reason for the adverse employment action is the disability related extended medical leave of absence." It is fundamentally at odds with CFEPA, she argues, to require a plaintiff claiming disability discrimination to establish pretext when the employer has terminated the individual's employment because of her disability.

The plaintiff's argument assumes that the defendant's adverse employment action is in direct response to the plaintiff's disability. The defendant, however, presented unrefuted evidence that its termination of the plaintiff's employment was not based on her disability. The defendant articulated two nondiscriminatory bases for its termination of the plaintiff's employment: her failure to return to work and her inability to work as a registered nurse due to the loss of her Connecticut nursing license. Under these circumstances, the *McDonnell Douglas* framework of analysis is an appropriate method to employ. Consequently, the burden shifted to the plaintiff to present evidence demonstrating, either

directly or by inference, the existence of a genuine issue of material fact with respect to whether these bases were pretextual.

We next consider whether the court properly applied the *McDonnell Douglas* pretext model of analysis. In the present case, the court determined, and we agree, that the plaintiff satisfied her burden to make out a prima facie case and that the defendant satisfied its burden to identify legitimate, nondiscriminatory reasons for termination. After the defendant set forth its two legitimate and nondiscriminatory justifications for termination, under the *McDonnell Douglas* framework, the burden shifted back to the plaintiff to present sufficient evidence to create a genuine issue of material fact as to whether those stated reasons were pretexts for discrimination. She, however, has failed to offer any evidence that the defendant's legitimate reasons are pretextual. Instead, she maintains that this is not a pretext case. For the reasons stated earlier in this opinion, we disagree. After a thorough review of the record, we agree with the court that the plaintiff did not satisfy her burden under the *McDonnell Douglas* framework because she failed to offer any evidence of pretext. Accordingly, we conclude that the court properly applied the *McDonnell Douglas* framework and rendered summary judgment in favor of the defendant on the plaintiff's claim of disability discrimination.

II

The plaintiff next claims that the court erred in granting summary judgment in favor of the defendant on her failure to accommodate claim because it improperly concluded that a genuine issue of material fact did not exist with respect to whether she made a good faith request for an accommodation. We disagree.

We turn to relevant state law regarding employment discrimination premised on a failure to reasonably

accommodate a disability. "Section 46a-60 (b) (1) requires employers to reasonably accommodate an employee's disability. . . . In order to survive a motion for summary judgment on a reasonable accommodation claim, the plaintiff must produce enough evidence for a reasonable jury to find that (1) [she] is disabled within the meaning of the [statute], (2) [she] was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it. . . . If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business." (Citation omitted; internal quotation marks omitted.) *Bartolotta* v. *Human Resources Agency of New Britain, Inc.*, 224 Conn. App. 248, 272–73, 312 A.3d 59, cert. denied, 349 Conn. 908, 313 A.3d 513 (2024). At issue in the present case is the court's conclusion that the plaintiff failed to satisfy her burden, under both the second and third prongs, by failing to produce evidence that she initiated the interactive process with a request for accommodations while still employed by the defendant.

"Our Supreme Court has interpreted CFEPA, consistent with analogous federal law; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 403–404, 415–16, 944 A.2d 925 (2008); to require an employer and an employee to engage in an informal, interactive process . . . [to] identify the precise limitations resulting from [an employee's] disability and potential reasonable accommodations that could overcome those limitations. . . . The need for bilateral discussion arises because each party holds information the other does not have or cannot easily obtain. . . . The employee bears the burden of initiating the interactive process

and must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion. . . . A plaintiff who fails to initiate or to participate in the interactive process in good faith cannot prevail on an employment discrimination claim under CFEPA. . . . Once the employee has initiated the informal interactive process, the employer has a duty of good faith compliance." (Internal quotation marks omitted.) *Cooling* v. *Torrington*, supra, 221 Conn. App. 584.

"The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment . . . . To satisfy this burden, [the] [p]laintiff must establish both that [her] requested accommodation would enable [her] to perform the essential functions of [her] job and that it would allow [her] to do so at or around the time at which it is sought." (Citation omitted; internal quotation marks omitted.) *Thomson* v. *Dept. of Social Services*, 176 Conn. App. 122, 129, 169 A.3d 256, cert. denied, 327 Conn. 962, 172 A.3d 800 (2017).

In the present case, the plaintiff argues that there are two types of accommodations at issue: (1) a medical leave of absence, and (2) job reassignment. A medical leave of absence is a recognized accommodation; however, "[t]he duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover, nor does it force an employer to investigate every aspect of an employee's condition before terminating [her] . . . based on [an] inability to work." (Internal quotation marks omitted.) Id., 130. Reassignment to an alternative position is also a recognized accommodation; however, a "plaintiff requesting reassignment as [an] accommodation [is] required to demonstrate the existence, at or around the

time when accommodation was sought, of an existing vacant position to which she could have been reassigned." (Internal quotation marks omitted.) Id., 129.

In addition to arguing that the record contains no evidence that the plaintiff initiated the good faith interactive process, as is required for the defendant to be obligated to engage in that process, the defendant asserts that the plaintiff's arguments premised on those alleged accommodations fail because "(1) it is not required to hold open the plaintiff's position for an indefinite period of time and (2) the plaintiff has produced no evidence of a vacant role that the defendant could have placed her in before the end of her employment." The defendant argues that the record is simply devoid of any evidence that the plaintiff initiated the good faith interactive process with a request for a reasonable accommodation prior to termination. As the court noted in its memorandum of decision, "[even] the plaintiff's [own] opposition memorandum does not point the court to evidence that she actually requested an accommodation while still employed with the defendant."

With respect to the leave of absence claim, the plaintiff admits that, as of the date of termination, she had not provided the defendant with a return to work date or even notified the defendant that she would ever be able to return to work. With respect to the claim of job reassignment, the plaintiff maintains that she may have been qualified for a position in the dietary field or as a registered medical assistant. The plaintiff, however, did not submit any evidence that the defendant had a vacant position in either of these areas during the period between the commencement of her leave and the termination of her employment. The plaintiff admits that she never applied for an alternative position with the defendant until after termination. Therefore, the plaintiff has not produced any evidence to raise a genuine

issue of material fact that there was a position to which she could have been reassigned as an accommodation prior to termination.

Accordingly, the trial court properly rendered summary judgment in favor of the defendant on the plaintiff's claim for failure to accommodate.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 230

DEBRA SHERWOOD *v.* ROWAN SNYDER
(AC 46955)

Alvord, Cradle and Suarez, Js.

Argued January 14—officially released February 11, 2025

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Truglia*, *J.*

Per Curiam. The judgments are affirmed.

MICHELLE BENIVEGNA *v.* DONNA RICHO ET AL.
(AC 47423)

Suarez, Westbrook and Prescott, Js.

Argued February 4—officially released February 11, 2025

Appeal by the defendant Richard Miller from the Superior Court in the judicial district of New Haven, *Frechette*, *J.*

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* ANTWAN J. RUFUS
(AC 46996)

Suarez, Westbrook and Prescott, Js.

Argued February 4—officially released February 11, 2025

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

Per Curiam. The judgment is affirmed.

JOHN A. MCLEAN *v.* DAVID C. MCLEAN
(AC 46986)

Suarez, Westbrook and Prescott, Js.

Argued February 4—officially released February 11, 2025

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

Per Curiam. The judgment is affirmed.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 230

(Replaces Prior Cumulative Table)

NOTICE OF CONNECTICUT STATE AGENCIES

CONNECTICUT PORT AUTHORITY

Notice of Intent to Adopt a Revision of Marine Pilots Procedures

In accordance with Conn. Gen. Stat. §1-121, the Connecticut Port Authority ("Port Authority") hereby gives notice that it intends to adopt a revision of Marine Pilots Procedures Regarding Qualifications, Selection and Training for New Applicants for a License as a Connecticut State Marine Pilot.

Statement of the substance and purpose of the proposed amendments: The Port Authority intends to adopt a revision to its Marine Pilots Procedures ("Procedures") as recommended by the Connecticut Pilot Commission ("Pilot Commission") to eliminate the current requirement (found in Section III (c) of the Port Authority's Procedures) that newly-licensed pilots work under the auspices of Interport Pilots Agency, Inc., substituting instead a requirement that newly-licensed pilots work under the auspices of the Association of Connecticut State Pilots.

Pursuant to Conn. Gen. Stat. 15-15a, the regulations of the Connecticut Department of Transportation ("CDOT") pertaining to pilotage were adopted by the Port Authority as its Procedures, effective July 1, 2016. Section III (c) of the Procedures came from section 15-15a-7(c) of the former regulations of CDOT. The statute also authorizes the Port Authority to adopt and implement new written procedures "as the authority deems necessary[.]"

A description of the proposed revision is included below.

PROPOSED REVISION TO MARINE PILOTS PROCEDURES

III. QUALIFICATIONS, SELECTION AND TRAINING FOR NEW APPLICANTS FOR A LICENSE AS A CONNECTICUT STATE MARINE PILOT

(c) Upon completion of the Program as determined by the commissioner at the recommendation of the [Pilot Commission], an Apprentice found to possess the requisite physical and mental standards . . . and to possess the required knowledge, aptitude and skills . . . shall be issued a License[.] Once the license is issued, the newly licensed marine pilot shall work on the Connecticut side of the rotation under the auspices of ~~Interport Pilots Agency, Inc. d.b.a. Connecticut State Pilots~~ the Association of Connecticut State Pilots.

A copy of the above proposed policy will also be made available on the Port Authority's website (https://ctportauthority.com/rfqs-rfps-3/) under "Public Notices."

Manner of presenting views: All interested people are invited to present their views in writing no later than ***March 14, 2025***. Comments are to be submitted to the Connecticut Port Authority, Jill Dowling-Moreno either by e-mail to jill@ctportauthority.com (please put "Public Comment re: Revision of Marine Pilots Procedures" in the subject line) or by postal mail addressed to her at:

Connecticut Port Authority
ATTN: Jill Dowling-Moreno
455 Boston Post Road, Suite 204
Old Saybrook, CT, 06475

NOTICES

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimands

November 15, 2024: Michael R. Hasse – 405645
Sebastian DeSantis – 415635

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in January 2025. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Alicea, Christina Marie of Hartford, CT
Baker, Kim of Fort Mill, SC
Bierman, Sarah Elizabeth of Braintree, MA
Bisesto, Elliot of Valhalla, NY
Buchoff, Kyle of Edgewater, NJ
Carlson, Danielle Marie of Keene, NH
Chambers, Kirsten of Keene, NH
DeRose, Andrew Michael of Pleasantville, NY
DiaPaul, AnnaMarie Eisabella of Quincy, MA
Fainsod, Austin of Manalapan, NJ
Federation, Sarah C. of Broad Brook, CT
Galeazzi, Diego Melo of Pflugerville, TX
Glaser, Justin Ross of Morristown, NJ
Goodwin, Hannah Dianne of Brooklyn, NY
Greco, Alise Catherine of Higganum, CT
Gribbin-Burket, Ryan of Pflugerville, TX
Isaev, Edith Lucy of Stamford, CT
Klaneski, Rosa Lee of Farmington, CT
Land, Desiree of Willoughby, OH
Leheny, Matthew Colin of Brooklyn, NY
Lyons, Genevieve of Keene, NH
Morrison, Mikala of Westerly, RI
Newman, Kristina Marie of Norwalk, CT
Nissanoff, David of New York, NY
Perrotto, David Christopher of Jericho, NY
Podgorski, Marcin of Brooklyn, NY
Princi, Miranda Cavas of New Rochelle, NY
Rampy, Alexandra Lee of Somerville, MA
Robinson, Garrett John of Boston, MA
Russell, John Benton of Stamford, CT
Ryan, Hunter of Keene, NH
Snyder, Ashley Liberta of Troy, NY
Svenning, Leonidas Gustav of New York, NY
Woods, Rachel of Springfield, MA
Zarkower, Samuel Alexander of Rye Brook, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in January 2025. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Arnault, Bryan Thomas of Syracuse, NY
Calamia, Jennifer of New York, NY
Cheung, Wingman of Guilford, CT
Cohen, Zachary of Stamford, CT
Cores, Amy Sara of Howell, NJ
Cortinas, Aniosca of West Hartford, CT
Devaney, Emma of Boston, MA
Flamm, Rebekah of Riverside, CT
Gavaletz, Jennifer of Whitinsville, MA
LaRose, Daniel J. of New York, NY
Medford, Dena Harriet of West Hartford, CT
Moriarty-Ambrozaitis, Elisabeth Jane of Bethlehem, CT
Namerow, Derek of West Hartford, CT
Risalvato, Anthony Joseph of River Vale, NJ
Schohl, Joseph Thomas of Westlake Village, CA
Trump, Aaron C. of Hamden, CT
Wells, Andrew John of New York, NY